

IN THE IOWA DISTRICT COURT  
FOR POLK COUNTY

FILED  
POLK COUNTY IA  
08 MAR 12 PM 4:02  
ALEXIS DISTRICT COURT

LISA KRAGNES, et al.	)	
	)	
Plaintiff,	)	Law No. 49273
	)	
vs.	)	
	)	MOTION FOR GAG ORDER
CITY OF DES MOINES, IOWA,	)	AND MOTION FOR SANCTIONS
	)	
Defendant.	)	

**MOTION FOR GAG ORDER**

COMES NOW the Defendant, the City of Des Moines, and for its motion for a gag order states:

1. It has come to the attention of the City that the attorneys for the Plaintiff have hired a public relations firm, a publicist or some similar person or entity.
2. That person or entity has authored something called a "media update", subtitled "questions of fairness and secrecy surround City of Des Moines justification of gas, electric franchise tax." (Attached as Exhibit A). The so-called media update is nothing more than a compilation of lies, half-truths and unethical comments upon ongoing litigation and its dissemination and the dissemination of anything like it in the future should and must be halted.
3. For example, the first paragraph on the first page of the "media update" relates that the Plaintiff's attorneys "convinced a judge" to order the City to turn over supporting documents. As the Court will recall, the City was agreeable at all times to turning over the documents, subject only to a protective order, which the court granted upon hearing.
4. Paragraph 3 on the first page of the "media update" discusses the "questions of fairness" surrounding the fees. As the court knows, questions of fairness of the fees are the integral issue in this lawsuit and the comment upon the same in the media update represents an

unethical comment upon ongoing litigation. See: Rule of Professional Conduct 32:3.6.

5. Likewise, paragraphs 5 and 7 on the first page of the “media update” contain direct quotes from Plaintiff’s attorney Bradley Schroeder which are unethical because they are comments upon ongoing litigation. Id.

6. Paragraph 8 on the first page of the “media update” is another unethical and improper and incorrect comment upon ongoing litigation. That paragraph calls the franchise fee a “illegal franchise tax.” Of course, whether or not the fee is legal or illegal is the fighting issue in this case. Plaintiff’s categorization of the same as an illegal tax is premature and unethical.

7. The tenth paragraph on the first page of the “media update” contains a half-truth. It says that the trial court has allowed the Plaintiff’s attorneys to examine supporting documents but that the same cannot be released to the general public. However, as the court well knows according to the order of the court signed just recently, the Plaintiff’s attorneys can at any time move to have the protective order lifted and the documents made public. The obvious distortion and omission in paragraph 10 is another attempt to sway public opinion and, perhaps, to sway the trier of fact as well.

8. The final paragraph on the first page of the “media update”, which carries over to the second page, is another illegal comment upon ongoing litigation. Part of the paragraph says, “the City’s attempt to conceal the documents defeats the purpose of a public entity.” As the court well knows, the City agreed that certainly at time of trial, if not before, all of the information will become a matter of public record.

9. The second full paragraph on the second page of the “media update” is a flat out lie and misrepresentation of the Kragnes decision issued by the Supreme Court. That paragraph

in the “media update” reads:

The Iowa Supreme Court has held that for a franchise fee to be valid, it may only recover expenses actually incurred.”

However, as the Court well knows, the Kragnes decision said no such thing. Instead, the Kragnes decision said that the fees need only be “reasonably related” to the City’s costs and that those costs include other “incidental consequences” of franchise regulation. Kragnes v. City of Des Moines, 714 N.W.2d 632, 642-43 (Iowa 2006).

10. The third full paragraph on the second page of the “media update” is another misrepresentation. That paragraph says:

The City released the Springsted report, but doesn’t want to disclose the methods and supporting documents used by Springsted to come up with its annual cost figure of \$19.6 million for gas and electric utilities.”

As the court will recall, the City was at all times willing to give the document to the Plaintiff’s attorney with the only caveat being that they be under a protective order until such time as the protective order was no longer necessary.

11. The fifth full paragraph on the second page of the “media report” contains another lie. The second sentence of that paragraph says:

The Supreme Court ruling from May 2006 cited that anything over the City’s “actual cost” constituted an illegal fee.

Of course, as discussed above, the Supreme Court said that the fee need only be reasonably related to the City’s cost and that those costs and expenses could include incidental consequences as well. Id.

WHEREFORE, the City prays the Court issue a gag order, to prevent the Plaintiff and

specifically, her attorneys, Bruce Stoltze and Bradley Schroeder from engaging in any public comment on this case until such time as the court lifts the gag order or the case is no longer active, and for such other relief as is appropriate.

### **MOTION FOR SANCTIONS**

COMES NOW the City, and for its motion for sanctions states:

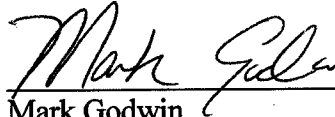
1. The “media update” issued at the hands of Plaintiff’s attorneys Bruce Stoltze and Bradley Schroeder is improper and unethical and should never have been authored or disseminated to the public.

2. Likewise, the efforts by the City to contain the same and stop its recurrence should never have had to been undertaken at taxpayer expense.

3. The undersigned has spent approximately 1.5 hours reading the “media update”, discussing the same in-house, and drafting this motion. In addition, the undersigned anticipates spending several hours preparing for and attending the hearing upon this motion.

4. It would be only fair to compensate the taxpayers of the City of Des Moines for the time the undersigned had to spend upon this unethical and improper “media update.”

WHEREFORE, the City prays the Court, after hearing, sanction Plaintiff’s attorneys, Bruce Stoltze and Bradley Schroeder in an amount which will reimburse the taxpayers of the City for the expenses incurred because of the unethical and unnecessary release of the “media update”, and for such other relief as is appropriate.



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**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses

disclosed on the pleadings on 3-12-08

By:  U.S. Mail       FAX  
 Hand Delivered       Overnight Courier  
 Federal Express       Other:

Signature Diane Roscoe

## EXHIBIT A

### **MEDIA UPDATE**

## **Questions of Fairness and Secrecy Surround City of Des Moines' Justification of Gas, Electric Franchise Tax**

Attorneys for a Des Moines homeowner have convinced a judge to order the City of Des Moines to turn over the supporting documents used by the city to rationalize its policy of charging residents and businesses what the Iowa Supreme Court has already ruled is an illegal tax on their gas and electric bills.

The documents, however, still won't be available to the general public. The city requested a protective order, which keeps the documents under seal.

Questions of fairness also surround the fees, including the possibility that several large Des Moines businesses aren't being charged the fee at all. Homeowners, however, must pay the city a fee of 5 percent of their utility bill every month.

The city gave rebates totaling about \$404,400 to businesses in 2005. In 2006 and 2007, the city simply told MidAmerican Energy to leave the fee off of bills to those businesses. Attorneys are attempting to get a full list of businesses exempted from the 5-percent franchise fees.

"Meanwhile, homeowners pay their 5 percent fees every month," said attorney Brad Schroeder.

Schroeder, attorney for Des Moines homeowner Lisa Kragnes, had gone to court to force the city to release papers used by the city to justify the fee.

"We're puzzled by the fact that they want to keep public documents out of the public domain," said Schroeder.

Kragnes filed a lawsuit in 2004 challenging the fee and the city's right to raise the charge from 1 percent to 5 percent of a gas and electric bill. The 5 percent fee generates approximately \$14 million in additional revenues annually for the city. The city raised the rate of the illegal franchise tax from 3 percent to 5 percent after the lawsuit was filed without ever conducting any study into its true out-of-pocket costs.

The case, certified as a class action covering all Des Moines gas and electric customers, has been all the way to the Iowa Supreme Court, which referred it back to Polk County for trial, scheduled in October.

Polk County District Judge Joel Novak has ruled that Kragnes and her lawyers may examine supporting documents that they request, but the information can't be released to the general public.

The information is the foundation of the city's rationalization for setting the amount of the franchise fee. The city's attempt to conceal the documents defeats the purpose of a public entity – everything the

city does should be a public record, especially information used to determine how much residents and businesses will pay in a fee on their gas and electric bill.

The cost documents were prepared by Springsted Inc. of St. Paul, Minn., hired by the city to put together a report detailing the costs that the city incurs related to utility electric and gas service.

The Iowa Supreme Court has held that for a franchise fee to be valid, it may only recover expenses actually incurred.

The city released the Springsted report, but doesn't want to disclose the methods and supporting documents used by Springsted to come up with its annual cost figure of \$19.6 million for gas and electric utilities.

The report took five months longer than expected to prepare, and wound up concluding that the amount of justified fee is more than the total now collected by the city.

Part of the justification, however, involves so-called "lost opportunity costs," rather than out-of-pocket expenses. The Supreme Court ruling from May 2006 cited that anything over the city's "actual costs" constituted an illegal fee.

City costs cited by the Springsted report included:

- One-third of the \$102,000 charged by Springsted for preparing the report itself.
- Nearly \$3.5 million for the lost value of trees trimmed and removed from city property.
- \$2 million in lost property tax revenue.
- \$10 million in lost opportunity costs from border area rights-of-way.
- \$3 million in increased construction and related costs because of the presence of utilities within city right-of-way.