

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al., Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.</p>	<p>230. 06.26 PM 2:45 Equity No. 49273 CLARK DISTRICT COURT PLAINTIFF'S RESISTANCE TO DEFENDANT'S PROPOSED NOTIFICATION LANGUAGE REGARDING POSSIBLE FINANCIAL CONSEQUENCES OF THE LITIGATION</p>
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COMES NOW the Plaintiff, Lisa Kragnes, and hereby submits to the Court a Resistance to the proposed language of the Defendant City of Des Moines as to the possible financial consequences of this litigation.

1. The Defendant filed proposed notification language concerning possible financial consequences of the litigation. Plaintiff resists that language. The language submitted by the City is beyond that required or even contemplated by the Rules, not supported factually and legally inaccurate. This is true, in part, because of the following:

a. The Rules of Civil Procedure do require under Rule 1.266(2)(c) a description of possible financial consequences "on the class". That language is clearly intended to refer to the financial consequences on the class from being a Plaintiff in the class meaning judgment recovered, attorney's fees, expenses and court cost obligations. It is not intended to refer to the consequences that will be incurred if that member also happens to be affected by the class of people who share ownership in the Defendant. Put a very precise way, the consequences referred to under the rules are those consequences in the control of the Court and cannot be rationally argued to include factors outside of the Court's control, such

as what the City may or may not do utilizing its legal authority this year, next year or ten years from now.

b. Furthermore, the language in the Rule is intended to refer to what the class member will receive, not what separate consequences may be imposed by a governmental entity on some members of a class.

c. Extensive speculation is offered in the proposed statement by the City that a "majority" of class members may "actually lose money" as a "result" of the litigation. The City Council, not City staff as noted in the testimony offered by the City, control taxation after hearings required throughout the budget process. Taxation is a political process that cannot be speculated about as City Council membership changes, the public offers input, and as Rick Clark suggested in testimony, taxation is not favored by the Council which disregards recommendations of city staff on revenue issues from time to time. Defendant is attempting, using pure speculation and conjecture, to bring the Court into its separate political process through its proposed language.

There is nothing in the record or before the Court that a "majority" of class members will lose money. Furthermore there is no proof that there is an actual "loss" of money. Rather, the information submitted by the Defendant demonstrates that members will receive money if Plaintiff is successful. Even after payment of attorneys fees the Defendant's information demonstrates members will receive that money. Furthermore, the Defendant's calculations fail to consider the effect of the need not to pay franchise fees in the future and fail to take into consideration tax effects (i.e. citizens are able to deduct property tax payments but deductions are not available for franchise fee payments).

Furthermore, the Defendant's suggestions fail to take into account that it is the Defendant's conduct, not the Plaintiff's lawsuit, that is causing the speculative financial consequences of any increase in taxes suggested by the defendant. Indeed, the Court is aware from the testimony that the Defendant has refused to stop collecting the franchise fee. The Defendant has done so even though this lawsuit was filed in 2004, prior to any increase in prior franchise fees by the City. The only way to sort out the issue as to illegal conduct is to have this matter proceed to trial. Furthermore, staff of the defendant claim they have spent all of the franchise revenue received despite the existence of this litigation and the potential for refunds. Put another way, had the City not spent the franchise fee revenue, decided not to collect the increased franchise fee until the litigation was concluded, or planned in other ways for the potential for refunds, there would not be the potential for the need for increased taxes in the manner claimed by the staff of the Defendant. Accordingly, it is the decision of the elected officials of the City of Des Moines and the administration of the City of Des Moines to continue to charge the fee, not this lawsuit, that may lead to increasing the tax levy to satisfy a judgment. As a result, the information requested by the City is speculative, inaccurate and inappropriate.

d. The notice speculates about whether the City may "finance a large refund" with an increase in property taxes. This is speculation as to how a judgment will be paid, not anything relating to the processing and recovery in this case. The testimony of City Manager Rick Clark at hearing on August 20 was that he merely recommends action to the City Council, and that the Council actually makes the decisions. The Council has not yet decided how they would finance a judgment in this case. Therefore, talk of raising property taxes is, by definition, speculative. Furthermore, Mr. Clark testified that his recommendation

to the Council would likely include a combination of budget cutting measures and revenue raising measures. There was no testimony regarding the relative size of such measures. Accordingly, such general, hypothetical, and speculative discussions do not constitute the required notice of "financial consequence of the litigation" contemplated by the Iowa Rules of Civil Procedure.

e. The last paragraph in Defendant's proposed language speculates as to non-profits and as to landlords and purchasers of property who may not share in a refund but allegedly may have a property tax increase. While these refer to the decisions of the Defendant, they do not refer to issues relating to the litigation. It appears the City is enunciating its political and legislative agenda and not addressing the issues in the litigation. It is inaccurate and inappropriate in a class notice.

2. As the Court will note from the previous statements, the difficulty presented to the Court now results from the conduct of the Defendant. The Defendant was advised prior to its increase in its franchise fees in 2004 of the Plaintiff's complaint that it was illegal. The Defendant chose to implement the franchise fee despite knowledge of these potential problems if a judgment is paid. The Defendant now is attempting to use a form of legal extortion by threatening the class and the Plaintiff and this Court by stating that because it has chosen a particular process in the past, class members have to be told that it is the lawsuit, not their conduct, that is causing these financial consequences. That is in spite of the fact that the Defendant refuses to stop charging the franchise fees that are claimed to be illegal.

3. In point of fact, if the franchise fees are not illegal, the class will recover nothing and will have to pay nothing and there will be no change in property taxes.

However, if the class is successful, the conduct of the City administration and the City officials who are elected, will be shown to have caused financial difficulties for the City. That is the information that the class should be told, not any insinuation that it is this case that is causing a loss of money. The attempt by the City to misconstrue and mislead the public, the class and this Court should be rejected.

4. The Court should consider this in concept of other class actions. Every Defendant who gets held liable in a case must pay for a judgment. That means when Microsoft was recently sued, its stockholders, and the purchasers of its products could sustain a resulting increase in prices or decrease in profits from such judgment. There is nothing in any previous class notice that the Court can look at or has been supplied by the Defendants to demonstrate that that is the kind of information that is placed in a class notice. The Court can look at *Vignaroli v Blue Cross of Iowa*, 360 N.w.2d 741 (Iowa 1985), and concept would be, under the City of Des Moines' considerations, that the court would have had to notice the class members telling them that there may be affects on salary, vacations, lowering of stock and other issues for the Defendant if the Defendant has to pay the judgment, that Defendant having been the Plaintiff's class employer. Again that is not the kind of information that is to be supplied in a class notice.

That this is correct can even be seen by reviewing the form class notice submitted by the Defendant, attached to its Second Objection to Plaintiff's Proposed Class Notice, filed on August 8, 2008. The Court will note that this form notice came from Newburg on Class Actions. The Court will also note that this form as submitted by the Defendant does not contain any of the kind of financial information the Defendant is now requesting this Court to include in this case.

5. In the amended class notice attached to the Plaintiff's Reply submitted on August 20, 2008, the Plaintiff put the following in as to the financial consequences in compliance with Rule 1.266(2)(c), to wit:

The purpose of this notice is to advise you that you may be a member of this class and may thereby entitled to protection by an injunction prohibiting the Defendant from imposing any illegal portion of the fee and to a refund if a refund is ordered. Because of the nature of this class action there is no right to opt-out. Any judgment entered, whether favorable or not, will be binding upon all members of the class. Plaintiff's attorneys fees and expenses will be paid out of any recovery in this case pursuant to a contract previously approved by the Court. In addition attorneys fees and expenses may be recovered from the Defendant if and as ordered by the Court.

This phraseology appropriately informed the class that they may not have to pay the franchise fee in the future, that they may receive a refund of the fees in the past and that they would not have to pay any attorneys fees out of their pocket other than out of the judgment or the Defendant may have to pay those fees and expenses in addition to the judgment. That is sufficient in connection with any proposal of financial consequences to the class. It is a provision that complies with the Rule and does not mislead the class.

6. The Plaintiff suggests to the Court that the kind of a statement as suggested by the Court at the August 20 hearing and the one as proposed by the Defendant, continues to suggest that it is this lawsuit that may result in a loss to the class members when it is actually the conduct of the Defendant in the way it managed the City and the way it pays for any judgment that results in the loss. Again it must be pointed out that the City refuses to stop charging the illegal franchise fee. Accordingly, this lawsuit is not causing any potential net loss. While the Plaintiff understands that the officials and city administration may want to point to the lawsuit as the cause of the loss, it is actually the city officials and the

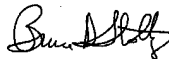
administration that may cause those consequences. It must be kept in mind that the actions of the City council has not acted and any actual possible cause is simply not known.

WHEREFORE the Plaintiff respectfully requests the Court to approve the previously submitted amended notice proposed by the Plaintiff. In the alternative, the Plaintiff makes the request as submitted above.

Respectfully submitted,



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ORIGINAL FILED.

CERTIFICATE OF SERVICE:

A COPY of the foregoing has been hand-delivered this 25th day of August, 2008, to the following:

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Michelle Hirsch

By: _____