

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, et al. Plaintiffs, vs. CITY OF DES MOINES, IOWA, Defendant.	Case No. CE 49273 RULING ON MOTION FOR APPROVAL OF CLASS NOTICE
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This matter came before the Court for hearing on August 20, 2008. Plaintiffs were represented by attorneys Bruce Stoltze and Brad Schroeder. Defendant was represented by attorney Mark Godwin. Having given the matter due consideration, the Court now makes the following ruling:

Background

This case involves a class action brought on behalf of residents of the City of Des Moines who allege that a franchise fee Defendant has assessed in its franchise agreements for gas and electrical power services is an illegal tax. The facts and procedural background of this case have been set forth in the Iowa Supreme Court's previous decision remanding this case to the district court. *See Kragnes v. City of Des Moines*, 714 N.W.2d 632 (Iowa 2006). Plaintiff, Lisa Kragnes, has submitted a proposed Notice of Class Action in a motion for approval to which Defendant raises numerous objections. The Court has reviewed this notice, as well as an amended notice contemporaneously provided with and attached to Plaintiff's response in this matter. (See Plaintiff's Exhibit 1). The objections raised by Defendant with regard to the form and substance of the Notice of Class Action will be dealt with in the course of this ruling, and the Court will then make its finding with regard to the sufficiency of notice in its order.

Discussion

1. Necessity of "opt-out" provision.

Defendant argues that an opt-out provision in the notice to class members must be provided so as not to violate the constitutional due process and associational rights of members of the class who do not wish to be part of this litigation. It is noted that the Court previously certified this class pursuant to its determination under Iowa Rule of Civil Procedure 1.263(1) that a joint or common interest exists among the class members at issue in this dispute, and further that prosecution of separate actions by members of the class would create a risk of inconsistent or varying adjudications. (See Ruling on Motion Pursuant to Iowa R. Civ. P. 1.276 and to Expand Findings and Reconsider Ruling on Motion for Class Certification; Ruling on Motion for Class Certification). As such, the Court may only require an opt-out provision in the notice if it is demonstrated that Iowa Rule of Civil Procedure 1.267 is unconstitutional, as this rule precludes the voluntary exclusion of class members where such findings are made. See Iowa R. Civ. P. 1.267(1)(b).

Defendant cites to the case of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) in support of its argument that an opt-out provision is necessary to satisfy the requirements of constitutional due process in this matter. This case is not dispositive of the issue before the Court, as it dealt with the issue of whether a Kansas court could, consistent with due process, exercise jurisdiction over absent class members who did not have minimum contacts with the state. *Id.* at 811-12. There the petitioner argued that since Kansas had no pre-litigation contact with many of the class members, due process required that each absent class member "opt-in," and, in effect, affirmatively consent to the court's jurisdiction. See *id.* at 812. The court

disagreed and found that an "opt-out" provision was sufficient to satisfy constitutional requirements of due process. The present case is distinguishable from *Shutts* in that all of the class members at issue, by virtue of being residents of the State of Iowa and/or paying electric franchise fee payments during the years 1999 through the present, have sufficient minimum contacts with the State such that specific jurisdiction may be exercised over their claim regarding franchise fees.

Defendant also claims that the lack of an "opt-out" provision in the notices at issue violates the associational rights of class members as protected by the United States Constitution. Defendant cites no authority in support of this proposition. It is recognized that the right to association as protected by the Constitution "affords two distinct freedoms: freedom of 'intimate association' (the choices to enter into and maintain certain intimate human relationships) and freedom of 'expressive association' (association for the purposes of engaging in activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion)." 16A AM. JUR. 2d *Constitutional Law* § 540. However, Defendant fails to explain how the class members' corollary to right to disassociate from intimate relationships or expressive conduct is affected by Iowa Rule of Civil Procedure 1.267. As such, the Court will not address this argument.

The ultimate issue before the Court is whether the proposed notice at issue will satisfy the requirements of constitutional due process. The Supreme Court of Iowa has set forth specific requirements for notices in class action suits that are to be followed by all litigants, *see* Iowa R. Civ. P. 1.266, and has further determined that the exclusion of class members must be precluded under the appropriate circumstances to ensure fair and efficient adjudication of controversies. Iowa R. Civ. P. 1.267. Certainly the Supreme Court would have considered notions of due

process in drafting these rules, and by its adoption of said rules would have reached the determination that they infringe upon no constitutional rights. In the absence of authority compelling a contrary result, the Court will not find that Rule 1.267 is unconstitutional. The Court finds that Iowa Rule of Civil Procedure 1.267 governs and consequently requires the absence of an "opt-out" provision in the notice at issue.

Defendant also argues that an opt-out option must be provided for class members who may have a conflict of interest in this litigation. Iowa Rule of Civil Procedure 1.267 is clear, however, in providing that no class members will be entitled to exclusion if a class is certified in part pursuant to a finding under Iowa Code section 1.263(1)(a),(b), or (c). Through the promulgation of this rule, the Supreme Court has spoken on the matter. If the law as it stands is to be changed, it is the Supreme Court or legislature that should make such decision. *Riniker v. Wilson*, 623 N.W.2d 220, 227 (Iowa Ct.App.2000); *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957).

2. Financial Consequences.

Defendant objects to the proposed notice offered by Plaintiff on grounds that it fails to disclose pertinent information pertaining to the financial consequences of this class action. In sum, Defendant proposes that the notice to class members contain a statement indicating that if any members of the class own homes or businesses within the City of Des Moines, a successful verdict in their favor may cost them money in the form of increased taxes, loss of services, and possibly loss of jobs for City employees.

Iowa Rule of Civil Procedure 1.266(2)(c) requires a description of possible financial consequences on the class. The Court agrees with the plaintiffs that this language is intended to refer to the financial consequences of the class from being a plaintiff in the class, such as the

judgment recovered, attorney fees, expenses, and court costs. The rule does not require the Court to mandate the "purveyor of gloom and doom" consequential language suggested by defendant.

The Court concludes that the amended class notice attached to the plaintiffs' reply submitted on August 20, 2008, meets the financial consequences requirement of Rule 1.266(2)(c).

3. Cost of notice and costs of administration.

Defendant also objects to the proposed notification to class members because "none of the assumptions made by the Plaintiff's attorneys regarding cost of notice and cost of administration are apparent anywhere in the notice." The Court believes that information regarding the cost of notice and cost of administration is important and should be disclosed at some point in this litigation. However, the Court also realizes that Plaintiff cannot conclusively determine what those costs will be at this time. The Iowa Rules of Civil Procedure do not require such disclosures in notices provided to class members. The Court believes that this information may be more accurately conveyed at a later time through the channels of communication Plaintiff has selected to update class members as to the status of litigation.

4. Provisions for non-English speaking class members.

Defendant objects to the proposed notice to class members because the notice is printed only in English. Defendant asserts that the notice must make provision for those who speak a language other than English, particularly those who speak only Spanish. Defendant cites no authority that would compel the provision of notice in non-English languages. Furthermore, the Court acknowledges that by requiring notices to be printed in languages other than English, it may be violating the law. *See* IOWA CODE § 1.18. While Iowa Code section 1.18(4)(h) makes an

exception for "any language usage required by or necessary to secure the rights guaranteed by the Constitution and laws of the United States of America or the Constitution of the State of Iowa." Defendant has not argued that such an exception should have application to this case. The Court consequently rejects Defendant's argument that notices must be provided in non-English languages.

5. Toll free number.

Defendant asserts that Plaintiff's proposed plans for a website containing information regarding the lawsuit is simply not sufficient to apprise class members of pertinent and up to date information regarding the class action. Defendant asserts that a toll free number, staffed by competent staff personnel as approved by the Court, should be open during regular business hours to answer questions that class members may have regarding the litigation. The Court finds that such is not necessary to satisfy constitutional due process, *see Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 615 (Iowa 2003), and is further not compelled by the Iowa Rules of Civil Procedure. Iowa R. Civ. P. 1.266. The Court declines to require that such a costly measure be taken in this matter when the use of a website can serve as a more efficient and economically feasible means of apprising interested members of the status of litigation. It is reasonable to assume that a significant number of class members will have access to the internet either through their own personal and/or work computers or through their local library. Moreover, the notice advises members that they can obtain further information about the case by reviewing the Court file at the Polk County Courthouse in Des Moines, Iowa, or by writing the counsel of record for Plaintiffs at an address provided therein. This will provide an adequate channel of communication for the dissemination of pertinent information pertaining to the class action.

6. Attorney Fees.

Defendant objects to the proposed notice on grounds that it contains no mention of the attorney's fees to be requested if the Plaintiff is successful. Plaintiff has submitted an amended notification providing that "Plaintiff's attorney's fees and expenses will be paid out of any recovery in this case pursuant to a contract previously approved by the Court." The Court finds this information sufficient to address Defendant's concern and approves the inclusion of this provision in the notice at issue.

7. Disclaimer.

Defendant asserts that the notice is insufficient because it fails to state that the Court has not made any decision as to the merits of the case. Plaintiff's amended notice provides such a disclaimer. Defendant's concern has therefore been addressed.

8. Court Order.

Defendant objects to the notice because it does not indicate that it is a Court order. Plaintiff's amended notice provides such information. Defendant's concern has therefore been addressed.

9. Class action administrator / Means of notice

Defendant objects to the notice at issue because it does not contemplate the appointment of a class action administrator for the dissemination of notice. Plaintiff has discussed three options with the Court that may be utilized for the dissemination of notice. These options include: (1) the use of a class action administrator; (2) the use of a third party vendor to disseminate notice; or (3) through mailings sent by Mid American Energy. The means of notice selected by Plaintiff need only be reasonably calculated to apprise the members of the class of the pendency of the action. Iowa R. Civ. P. 1.266(5); *Barkema*, 666 N.W.2d at 615. The Court finds that the option selected by Plaintiffs' counsel, the use of third party vendor to disseminate

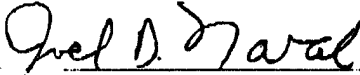
notice, is sufficient to satisfy this requirement. In addition to the mailing of notices through utilization of the third party vendor, the Court also requires that notice be published in a newspaper of general circulation once a week for four consecutive weeks.

Based upon the foregoing, the Court enters the following order:

ORDER

IT IS THE ORDER OF THE COURT that Plaintiff's proposed notice, as amended, is hereby approved subject to the following requirements: (1) the Notice shall be mailed to all class members whose last known mailing addresses are reasonably ascertainable through utilization of the third party vendor selected by Plaintiffs' counsel; (2) the Notice shall be published in a newspaper of general circulation once a week for four consecutive weeks, and (3) the Notice shall be made available on a website that will be accessible to the general public.

SO ORDERED this 27th day of August, 2008.


JOEL D. NOVAK, District Judge
Fifth Judicial District of Iowa

Original Filed

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