

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p><b>LISA KRAGNES, et al.</b></p> <p><b>Plaintiffs,</b></p> <p><b>vs.</b></p> <p><b>CITY OF DES MOINES, IOWA,</b></p> <p><b>Defendant.</b></p>	<p><b>Case No. CE 49273</b></p> <p><b>RULING ON DEFENDANT'S THIRD MOTION TO DECERTIFY CLASS</b></p>
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This matter came before the Court for hearing on September 26, 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 (hereinafter "Kragnes"), as representative of the class at issue, seeks an injunction restraining the City from further collection of franchise fee payments, and further seeks reimbursement for fees paid upon the theory of unjust enrichment. Defendant seeks to decertify the class, arguing that conflicts of interest in this matter require decertification, and further that the recovery to be gained by class members does not justify the expenses of this litigation.

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## Discussion

### 1. Conflicts of interest.

Under Iowa Rule of Civil Procedure 1.262(2), a court may not certify a class action unless it finds that the representative parties of the class (i.e. the named plaintiff(s)) will fairly and adequately protect the interests of the class as a whole. Iowa R. Civ. P. 1.262(2)(c). In order for the court to make such a finding, it must be satisfied that “[t]he representative parties do not have a conflict of interest in the maintenance of the class action.” Iowa R. Civ. P. 1.263(2)(b). The Rules therefore direct the court to determine whether there are potential conflicts between named plaintiffs and other class members. This is the appropriate inquiry for purposes of this ruling.

In the present case, Defendant has offered evidence in this matter which it contends demonstrates that the reimbursement remedy sought by Kragnes will work to the detriment of numerous class members. (*See* Def’s Appendix, pp. 18, 23-25). Defendant asserts that in order to satisfy a potentially large judgment that may result from this action, the City will be forced to raise property taxes and/or potentially cut jobs and services. (Def’s Appendix, p. 18). Defendant asserts that an increase in property taxes to account for a refund will ultimately result in a net loss to property taxpayers of the City of Des Moines. (*See* Def’s Appendix, pp. 23-25, 34). Because there are members of the class who do not wish to experience an increase in property taxes, potentially lose their jobs, or experience a reduction in services, (*see* Def’s Appendix, Affidavits), Defendant argues that the interests of Kragnes in seeking a refund of alleged illegally charged franchise fees are antagonistic to the interests of those she represents.

Under our rules for class certification, “[n]ot every disagreement between a representative and other class members will stand in the way of a class action suit.” *Vignaroli v.*

*Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985); accord *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994). To defeat certification, the conflict must be fundamental, relating “to the specific issues and controversies common to the class.” *City of Dubuque*, 519 N.W.2d at 792; *Vignaroli*, 519 N.W.2d at 792. Conflicts relative to issues of liability therefore predominate over issues concerning an appropriate remedy once liability is established in the Court’s evaluation of potential class conflicts. See *Jacobi v. Bache & Co., Inc.*, 16 Fed. R. Serv. 71, 1972 WL 560, at \*3 (S.N.D.Y 1972).<sup>1</sup> “The fact that some members of an alleged class do not favor the bringing of a lawsuit, or may feel that the representative party may have ulterior motives for bringing the suit, will not defeat the bringing of a class action.” *Vignaroli*, 360 N.W.2d at 747.

In the present case, the crux of Plaintiffs’ suit is the alleged illegality of the franchise fee. To succeed with their claim, Plaintiffs must prove that the franchise fee has been/continues to be charged in violation of the laws of this state. This is the liability component of the suit, and there are no fundamental conflicts between Kragnes and other class members with regard to this central issue. All class members have a beneficial interest in having the appropriate amount of

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<sup>1</sup> In *Jacobi*, a case relied upon by the court in *Vignaroli*, class representatives brought suit on behalf of themselves and those similarly situated, claiming that the defendants had conspired to not pay commissions to security representative employees in violation of anti-trust laws. It was claimed that the representative plaintiffs’ interests were antagonistic to those of the defendants’ employees (also class members) who were then participating in the defendants’ profit sharing or pension plans, had subordinated loans to the defendants, or owned stock of the defendants. In addressing whether potential conflicts as to the appropriate remedy for an anti-trust violation warranted decertification, the court explained:

In anti-trust litigation, it is the existence of the conspiracy which is the central issue in the litigation and it is the restoration of competition which is the benefit derived from the litigation. Differences in view among the members of the class as to the appropriate remedy once a violation is established are secondary to the basic liability issue of establishing the existence of the conspiracy. Therefore, divergent views on the appropriate remedy, or even whether there should be a remedy, do not destroy the representative status of a particular plaintiff insofar as the central liability issue of conspiracy is concerned.

*Jacobi*, 1972 WL 560 at \*3 (emphasis added).

franchise fees that can be charged by Defendant judicially determined, and in having the collection of any illegal taxes/fees ceased. This is not the type of case where a representative class member claims to have been harmed by the same conduct that has benefited other class members. *See, e.g., Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000). All members of the class have an interest in ensuring proper taxation by their municipal government. A fundamental conflict under Rule 1.263(2) with regard to the central issue of liability has not been presented.

Defendant's claim of conflict goes to the issue of an appropriate remedy to be provided once liability is established in this matter. This issue is secondary to the basic liability issue of the illegality of the franchise fees. *Jacobi*, 1972 WL 560 at \*3. The Court is cognizant of the extra-jurisdictional case law cited by Defendant which appears to suggest that it may be appropriate to decertify a class where the remedy pursued by a representative class member will be contrary to or detrimentally affect the interests of other members of a class. *See, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338-39 (4th Cir. 1998); *Alston v. Virginia High School League, Inc.*, 184 F.R.D. 574, 578-80 (W.D. Va. 1999). However, Defendant's prediction of a net loss to property taxpayers and/or the elimination of services and jobs that will be necessitated by the satisfaction of any judgment in this matter is contingent on a number of uncertain variables, including but not limited to the total amount of recovery (if any) that may be supported by a judgment in Plaintiffs' favor, the course of action that City Council members may ultimately choose to take in generating funds to satisfy a favorable judgment once a judgment must be paid, and the time frame within which the City chooses to pay the judgment to claimants who elect to receive a refund. The conclusion that some class members will

ultimately suffer a loss as a result of the remedy selected by Kragnes is speculative at this point and does not support decertification.

Notwithstanding the foregoing, Defendant asserts that the class must be decertified because one of Kragnes' attorneys, Mr. Stoltze, cannot adequately represent the interests of the class. *See* Iowa R. Civ. P. 1.263(2)(a). Defendant asserts that Mr. Stoltze is conflicted in this matter because he is also a class member, and that his status as both a class member and counsel of record inhibits fair and adequate representation. Moreover, Defendant argues that Mr. Stoltze has undivided loyalties in this matter to only those members of the class who wish to obtain a refund, and further that his prior business relations with Kragnes' ex-husband<sup>2</sup> make it likely that he will wield a great deal of influence over Kragnes to the detriment of the class. The Court finds these allegations to be unsupported.

At the outset, the Court notes that the primary purpose of this litigation, as pursued by Kragnes, is to obtain an injunction restraining the further collection of any illegal taxes/fees imposed by the City and to obtain a refund for any illegal fees/taxes so collected. The Court finds nothing in the record which reasonably suggests that Mr. Stoltze is unqualified, inexperienced, or otherwise unable to competently and diligently pursue these goals on behalf of all class members. The fact that some class members may be opposed to a refund in this matter does not change the fact that Mr. Stoltze, as one of the counsels of record, must diligently pursue both remedies on behalf of the class without regard to asserted preferences for a particular remedy. To say that Mr. Stoltze is loyal only to those who may favor a refund simply because a refund may support a greater award of attorney fees ignores the fact that any attorney representing the class at issue, under this theory, would be disqualified from representation

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<sup>2</sup> Evidence in the record shows that Mr. Stoltze worked on a number of unrelated cases with Kragnes' ex-husband, also an attorney, as co-counsel.

regardless of the circumstance. The Court declines to find that Mr. Stoltze possesses divided loyalties in this matter such that he may not adequately represent the class.

In addition to the foregoing, the Court does not agree that Mr. Stoltze's status as both a class member and counsel of record necessarily requires decertification of the class. In support of its argument in this regard, Defendant cites to a number of cases from other jurisdictions which recognize that an attorney who also serves as a class representative or has a close relationship with a representative plaintiff may be subject to disqualification. See *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1155 (8th Cir. 1999) (finding close familial relationship with representative class member presents danger that representative "may have some interests in conflict with the best interests of the class as a whole when making decisions that could have an impact on attorney fees."); *Hamer v. Bd. of Ed.*, 367 N.E.2d 739 (Ill. App. 1977) (recognizing a conflict of interest where a sole class representative is also the attorney of record and entitled to compensation for representing the class). In the present case, Mr. Stoltze is not a class representative, and does not share the type of close personal relationship with a class representative that would present the type of danger recognized in *Petrovic*.<sup>3</sup> Moreover, while the Court acknowledges that at least two federal circuits appear to have adopted a per se rule against a class member also serving as an attorney for his/her respective class, see *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978), Defendant has presented no controlling authority mandating the same result under our rules for class certification, and the Court has similarly been unable to locate any such authority. It is clear that the concern underlying the per se rule discussed in *Zylstra* is the concern for impropriety that may result from an attorney

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<sup>3</sup> There mere fact that Mr. Stoltze has worked on unrelated cases with Kranges' former husband and therefore may have been familiar with Kragnes prior to this litigation does not support a finding that Mr. Stoltze is able to wield undue influence over Kragnes, or that Kragnes is motivated in this action by concerns for her attorneys' pocket books.

elevating his own financial interests above the interests of the class he represents. *Id.* However, the Court finds nothing in the record or otherwise which reasonably suggests that Mr. Stoltze will pursue his own economic interests to the detriment of the remainder of the class, especially in light of the fact that this case was originally filed by a non-class member attorney who is also serving actively as counsel in this matter. The Court therefore declines to decertify the class due to Mr. Stoltze status as a class member.

As a final matter, Defendant argues that the class should be decertified due to alleged conflicts of interest in this matter because Iowa Rule of Civil Procedure 1.267, as written, does not allow for the opting out of class members. Defendant argues that the lack of an opt-out provision violates the due process rights of class members who wish not to be part of this litigation. The Court has already addressed this argument in its prior Ruling on Motion for Approval of Class Notice and declines to do so again here.

## **2. Fair and efficient adjudication.**

Under our rules for class certification, a court must find that a class action will provide a fair and efficient adjudication of the controversy before certification may be had. Iowa R. Civ. P. 1.262(2)(b). Rule 1.263 directs the Court to consider and give appropriate weight to thirteen different factors in determining whether a class action will provide for fair and efficient adjudication. *See* Iowa R. Civ. P. 1.263(1)(a)-(m). A finding weighing against certification under one factor alone is not necessarily dispositive, as other factors may weigh in favor of certification and bear greater weight in the court's decision. *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 322 (Iowa 2005). Moreover, "[t]he rule does not require the district court to assign weight to any of the criteria listed ... [n]or does the rule require the court to make written *findings* as to each factor...." *Id.* at 321 (citations omitted). "The rule merely requires the court to weigh

and consider the factors and come to a reasoned conclusion as to whether a class action should be permitted for a fair adjudication of the controversy.” *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 45 (Iowa 2003) (citation omitted).

In a previous order certifying the class, the Honorable Judge Huppert found the factors listed subparagraphs (a), (b), (c), (f), and (g) of Rule 1.263(1) to have the most relevance for purposes of the court’s decision, and approved certification based upon findings under these factors. (See Ruling on Motion Pursuant to Iowa R. Civ. P. 1.276 and to Expand Findings and Reconsider Ruling on Motion for Class Certification, p. 5; Ruling on Motion for Class Certification). Defendant now directs the Court’s attention subparagraph (m) of Rule 1.263(1), and argues that subparagraph (m) requires decertification because the net monetary recovery that may be experienced by a significant number of class members does not justify the expenses of this litigation.

Subparagraph (m) of Rule 1.263(1) directs the Court to consider “[w]hether the claims of individual class members are insufficient in the amounts or interest involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.” Defendant argues that resident property taxpayers who are members of the class will suffer a net loss as a result of this litigation based upon an assumption that the City will be required to raise property taxes to account for a judgment in Plaintiffs’ favor. Defendants argument in this regard, based upon an assumed net monetary loss (even if such loss is not based upon speculation at this point), ignores the fact that there is also significant non-monetary relief to be potentially gained as a result of this litigation. A successful judgment in Plaintiffs’ favor will not only support a refund if appropriate, but will also establish the appropriate amount of franchise fees that may be charged by the City of Des Moines, and will also cease the future

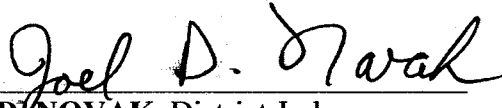
collection of fees determined to be an illegal tax. All members of the class have a significant interest in ensuring lawful taxation by their municipal government. To this end, the Court finds the findings made in the prior certification ruling under subparagraphs (f) and (g) of Rule 1.263(1) to provide the most compelling reasons for certification. (See Ruling on Motion for Class Certification, pp. 6-7). The Court declines to decertify the class based upon the grounds asserted by Defendant.

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

**ORDER**

**IT IS THE ORDER OF THE COURT** that Defendant's Third Motion to Decertify Class is hereby **DENIED**.

**SO ORDERED** this 8 day of October, 2008.

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

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