CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 02-5170
c/w 09-5493

DIVISION "N" SECTION 8

A. REMY FRANSEN, JR. AND ALLAN F. HARDIN

VERSUS

THE CITY OF NEW ORLEANS, et al

JUDGMENT

On May 26, 27, and 28, 2015, this court held a class certification hearing in the above captioned suit. At the close of oral argument, the court granted counsel leave of court to submit post hearing memoranda of law. These memoranda have all been submitted.

PRESENT: Allain F. Hardin and A. Remy Fransen, Jr., Counsel for Plaintiffs

James A. Brown and Shannon S. Holtzman, Counsel for Defendants, Linebarger Goggan Blair & Sampson, LLP and United Governmental Services of Louisiana, Inc.

Lawrence Blake Jones and Errol B. Conley, Counsel for Defendant, City of New Orleans

Considering the law and evidence:

IT IS ORDERED, ADJUDGED, AND DECREED that class certification be and is hereby granted as to plaintiffs' claims against defendant, The City of New Orleans. The definition of the class is as follows:

> Those persons and/or entities or their heirs, successors or assigns, who pursuant to New Orleans City Ordinance No. 18637 were assessed city penalties and collection/penalty fees by defendants and who paid these unconstitutional penalties and collection/penalty fees from April 17, 2000 through February 21, 2002.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that as to the issue of excessive legal fees, class certification be and is hereby denied as to defendants, Linebarger Goggan Blair & Sampson, LLP and United Governmental Services of Louisiana, Inc., and as to the issue of these defendants being debt collectors, class certification be and is hereby granted.

New Orleans, Louisiana this 24 day of November, 2015.

JUDGE ETHEL S. JULIEN

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REASONS FOR JUDGMENT

This matter was filed as a Class Action Petition for Recission and Return of Unjustly Assessed Penalties and Attorney's Fees. Original plaintiffs, A. Remy Fransen, Jr. and Allain F. Hardin asserted that defendant, City of New Orleans Ordinance No. 18637 codified in the New Orleans Code of Ordinances, Chapter 150, Article II, Sections 150-46.1 through150-46.6 was unconstitutional. [See the original Petition filed on April 1, 2002.] The Ordinance provided that the City could impose collection fees, attorney's fees, costs, and expenses on delinquent ad valorem taxes. [See Exhibit 2, Ordinance No. 18637.]

Also named as defendants are the law firm of Heard Linebarger Graham Goggan Blair Pena & Sampson, LLP, [now known as Linebarger Groggan Blair & Sampson, LLP and hereinafter referred to as Linebarger] and United Governmental Services of Louisiana, Inc. [UGSL], the entities who provided the tax collection services under the Ordinance. [See the original Petition filed on April 1, 2002 and the First Amending petition filed on April 29, 2002.] Plaintiffs assert that these defendants did absolutely nothing to collect the amount asserted to be past due and assessment of attorney's fees was arbitrary, improper, excessive, unreasonable, and not authorized by law. In addition, plaintiffs assert that defendants were unjustly enriched. Id.

In a subsequent Petition, plaintiffs made additional allegations. Specifically, plaintiffs allege that: defendants, Linebarger and UGSL acted in concert with the defendant, City of New Orleans to deprive them [plaintiffs] of money by improperly manipulating the bidding process such that the Request for Proposal

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only applied to them [Linebarger and UGSL]; UGSL became partnered with the Linebarger law firm and improperly interposed itself between the City and the Linebarger law firm, and obtained direct payment of the penalties and/or attorney fees that were collected by the City and placed in a lockbox for the sole use, access, and benefit of UGSL and/or the Linebarger law firm; if the penalties and fees were attorney's fees this was improper fee splitting between the attorneys at Linebarger and the non-attorneys at UGSL; due to the illegal and invalid penalty/fee, the method by which it was initiated and implemented, no attorney/client relationship existed between the City and Linebarger; UGSL and Linebarger acted as debt collectors and per the contract and Louisiana law, Linebarger and UGSL were required to register with the State and had not done so; any assertion by the Linebarger firm that it was acting only as legal counsel for the City was false because if Linebarger was acting as a debt collector, they were not acting as counsel for the City and along with UGSL, are subject to suit directly. [See the Third Amending Petition filed on May 22, 2007.]

In Fransen v. City of New Orleans, 988 So.2d 225, 242 (La. 7/1/08), the Louisiana State Supreme Court held that Ordinance No. 18637 was unconstitutional with respect to any provisions that permitted the City to place delinquent ad valorem property taxes on immovable for collection with an attorney or agent and/or that permitted the City to proceed in any manner other than by the constitutionally mandated manner of tax sales to collect delinquent ad valorem property taxes on immovables. [See Article VII, Section 25(A) of the Louisiana State Constitution.]

In May, 2009, plaintiffs filed an Amending Petition Adding New Putative Class Representatives. [See the Petition filed on May 20, 2009.]

Plaintiffs now seek to certify this suit as a class action. While the Louisiana State Supreme Court has held that the penalty provisions of Ordinance No. 18637 were unconstitutional, in defining a potential class, the court is constrained by statutes and cases which address the required procedures for challenging the assessed penalties, interest, and attorney's fees.

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Prior to April 17, 2000, La. R.S. 47:2110(A) stated in pertinent part:

> Any person resisting the payment of any amount of tax found due, **or the enforcement of any provision of the tax laws in relation thereto,** shall pay the amount found due to the officer designated by law for the collection of such tax and shall give him and the officer or agency that has given rise to the cause of action notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit.
> [Emphasis added.]

After April 17, 2000, La. R.S. 47:2110 A(2) was amended to state in pertinent part:

> Any person resisting the payment of any amount of tax due shall pay the amount found due to the officer designated by law for the collection of such tax and shall give him, the parish or district assessor, and the Louisiana Tax Commission written notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is timely filed contesting the correctness of the assessment pursuant to R.S. 47:1998 and seeking the recovery of the tax, then that portion of the taxes paid that are in dispute shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is neither in dispute nor the subject of a suit contesting the correctness pursuant to R.S. 47:1998 shall not be made subject to the protest.

On February 21, 2002, the New Orleans City Council adopted Ordinance No. 20556 to provide for a legal mechanism to challenge the imposition of collection penalties by paying such penalties under protest. Specifically, Ordinance No. 20556, which was codified in Section 150-46.7 of the Code of the City of New Orleans was amended to state:

> A. With respect to any penalty assessed under subsections 150-46.2 or 150-46.3 of this ordinance, the taxpayer may challenge such penalty by paying the penalty under protest no later than May 1 of the year in which the penalty was imposed with a letter delivered to the Director of Finance at the time of payment (1) notifying the Director that the penalty is being paid under protest, (2) stating the grounds for the protest, and (3) thereafter filing suit to recover the penalty amount within 30 days of the date on which the penalty was paid.
>
> B. With respect to any penalty under subsections 150-46.2 or 150-46.3 of this ordinance assessed prior to the effective date of this amendment, and which penalty or penalties have not been paid as of the date of this amendment, the taxpayer may challenge such penalty by paying the penalty under protest no later than

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> May 1, 2002 with a letter delivered to the Director of finance at the time of payment (1) notifying the Director that the penalty is being paid under protest, (2) stating the grounds for the protest, and (3) therafter filing suit to recover the penalty amount within 30 days of the date on which the penalty was paid.

Therefore, the dates that the delinquent taxes were paid is dispositive as to which procedures taxpayers/potential class members were required to follow to preserve their claims.

As for those taxpayers who paid the penalties, interest, and attorney's fees imposed by Ordinance No. 18637, from the date the Ordinance went into effect in March, 1998 through April 16, 2000, the version of La. RS 47:2110 (A) that was in effect at that time required that a taxpayer who objected to the amount of tax assessed or the enforcement of any provision of the tax laws had to give notice at the time of payment of his intention to file suit [that he was paying under protest] and had to file suit within thirty days. [See Cooper v. City of New Orleans, et al, 780 So.2d 1158 (La. App. 4 Cir. 2/14/01), writ denied 5-11-01 and Affordable Housing Developers, Inc. v. Kahn, 785 So.2d 251 (La. App. 4 Cir. 4/25/01), rehearing denied 5-31-01.]

However, as for taxpayers who paid penalties, interest, and attorney's fees imposed by Ordinance No. 18637 between April 17, 2000 and February 21, 2002, after La. R.S. 47:2110 (A)(2) was amended to delete the language "or enforcement of any provision of the tax laws in relation thereto", and prior to the City's enactment of Ordinance No. 20556 codified at Section 150-46.7, they had no applicable prescriptive period within which to make their protest known. [See Fransen v. City of New Orleans, 862 So.2d 142 (La. App. 4 Cir. 11/19/03).]

With these procedural parameters in mind, the court now addresses the requirements for class certification which are set forth in La. C.C.P. article 591(A) and (B).

La. C.C.P. article 591 (A) requires:

A. Numerosity

Numerosity is not based upon the number of potential class members alone

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but that joinder would be impracticable. [Doe v. Southern Gyms, LLC, 112 So.3d 822, 831 (La. 3/19/13).] There is no set number at which a class is considered so numerous as to make joinder impracticable. Id. Rather, the question of whether a class is so numerous as to make joinder impracticable is based upon the facts and circumstances of each individual case. Id.

Therefore, in the case at bar, the court must look at what evidence was introduced at trial as to delinquent ad valorem tax payers during the relevant time period and determine whether that number was so numerous as to make joinder impracticable.

Ms. Li Downing, a Certified Public Accountant was accepted by the court as an expert in Data Analysis and Claims Processing. She testified that she reviewed the City's data relative to tax payments, interest paid, penalties paid, and collections.

While there was evidence of penalties being paid from May 1, 1998 to April 17, 2000, there was no showing made as to how many of those taxpayers paid under protest as was required by La. R.S. 47:2110 (A). Therefore, the court finds that as to those taxpayers, the numerosity requirement is not met.

As to those taxpayers who paid penalties, interest and attorney's fees, between April 17, 2000 to February 21, 2002, while Ms. Downing did not provide a specific number for that time span, she did have data from April 17, 2000 to May 1, 2002. Ms. Downing testified that during that period, there were 31,492 assessed owners who paid penalties and/or collections to the City of New Orleans. The court finds that this data provides a reasonable, albeit rough estimate of the number of potential plaintiffs and that the numerosity requirement is met as to the defendant, City of New Orleans.

As to defendants, Linebarger and UGSL, the issue is more complicated as plaintiffs assert a myriad of claims including claims that Linebarger collected excessive legal fees and split them with defendant, UGSL, and that these defendants acted as debt collectors without complying with the laws of the state. However, as the issue before the court is class certification, the court cannot not determine liability, nor is it the correct venue to decide the merits of the case or defenses the

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defendants may allege. [Doe v. University Healthcare System, L.L.C., 145 So.3d 557, 565 (La. App. 4 Cir. 7/9/14), rehearing denied 7/28/14.] [Smith v. City of New Orleans, 131 So.3d 511, 518 (La. App. 4 Cir. 12/23/13), writ denied, 135 So.3d 644 (La. 4/4/14), writ denied, 135 So.3d 645 (La. 4/4/14).] Rather, the court is limited to determining whether a class action is the appropriate procedural device under the factual circumstances presented; and, those matters are resolved at the trial on the merits. Id.

With these constraints in mind, the court finds that as to the claim for excessive legal fees, there was no evidence to demonstrate what work was done by defendants, Linebarger or UGSL during this time period to determine if the numerosity requirement for class certification was met as to them. However, as to the claim that these defendants were debt collectors, the court finds that the numerosity requirement was met for the same reasons it was met as to the defendant, City.

B. Common questions of law and fact.

To meet the common cause requirement for class action, each member of the class must be able to prove individual causation based on the same set of operative facts and law that would be used by any other member to prove causation. [Guidry v. Dow Chemical Co., 105 So.3d 900, 905 (La. App. 4 Cir. 11/14/2012).]

In the case at bar, as to the defendant, City and defendants, Linebarger and UGSL as alleged debt collectors, the common issue is the fact that the potential class members, delinquent taxpayers all paid penalties under an unconstitutional Ordinance. Therefore, the court holds that as to the City and Linebarger and UGSL as alleged debt collectors, the commonality requirement is met.

As to Linebarger and UGSL and the claim that they collected excessive legal fees, the court finds that this issue goes beyond the constitutionality question. As noted by the Louisiana State Supreme Court in Jackson v. The City of New Orleans and The Director of Finance for The City of New Orleans, 144 So.3d 876, 891 (La. 1/28/14), rehearing denied 4/4/14, relative to the collection of delinquent ad

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valorem taxes, the recoverable costs are the actual costs reasonably incurred to collect a particular taxpayer's delinquent ad valorem taxes, the assessment of which can only be made on a case-by-case basis.

For these reasons, the court finds that there is no common issue as to Linebarger or UGSL on the issue of excessive legal fees.

C. Typicality

The "typicality" requirement for class certification is satisfied if the claims of the class representatives arise out of the same event, practice, or course of conduct giving rise to the claims of the other class members and are based on the same legal theory. [Smith v. City of New Orleans, 131 So.3d 511, 522 (La. App. 4 Cir. 12/23/13), writ denied, 135 So.3d 644 (La. 4/4/14), writ denied, 135 So.3d 645 (La. 4/4/14).]

In the case at bar, as to the class representatives, the evidence and testimony is as follows:

Ms. Carolyn Bryant testified that she did not purchase her property until May of 2002, her tax payments did not become delinquent until February 1, 2003, and her payments were made after February 1, 2003. [See Exhibit P-1-L.] Therefore, any delinquent tax payments she made fell outside of the relevant time period and she must be excluded as a class representative.

As to Mr. Johnny Smith and Mrs. Rochelle Smith, the evidence revealed that while they paid taxes, interest, or penalties, none of the payments were made within the relevant time period. [See Exhibit P-1-M.] Therefore, they must be excluded as class representatives.

As to John Massicot, he testified that he purchased blighted property on Bienville Street and on St. Claude Avenue at tax sale. At the time he purchased the property, he knew of the penalties and the purchase price was lowered due to the penalties. He testified that he also owned a piece of immovable property on Canal Street with his law partner. He paid the taxes, interest, and penalties on that piece of property in 2003. [See Exhibit P-1-K.]

As to the properties Mr. Massicot purchased at tax sale, the court finds that as

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he purchased these properties with known outstanding penalties and received a reduction in the purchase price, these claims are not typical of the claims of the proposed class. And, as to the Canal Street property, the taxes, interest, and penalties paid fell outside of the relevant time period. Id. Therefore, he cannot be a class representative.

As for Mr. Thomas Monahan, III and Mrs. Sandra Monahan, there is evidence that they paid delinquent taxes and penalties within the relevant time frame. [See Exhibits P-1-I and 1-J.]

As proposed class representative, Mr. Allen Borne, Jr., he did not even purchase blighted property at a tax sale until 2003. Therefore, as this is not within the relevant time frame, for this reason alone, he must be excluded as a class representative.

Therefore, only two of the proposed class representative could be members of a class action. However, the court finds that their claims are typical of those of the potential class members. Therefore, the typicality requirement is met.

D. Adequacy of Representation

The test for determining adequate representation of parties seeking to maintain a class action consists of three elements: (1) the chosen class representatives cannot have antagonistic or conflicting claims with other members of the class; (2) the named representatives must have a sufficient interest in the outcome to ensure vigorous advocacy; and (3) counsel for the named plaintiffs must be competent, experienced, qualified, and generally able to conduct the litigation vigorously. [Williams v. SIF Consultants of Louisiana, Inc., 103 So.3d 1172, 1179 (La. App. 3 Cir. 11/7/12), writ denied, 109 So.3d 381 (La. 3/15/13) and Stewart v. Rhodia Inc., .96 So.3d 482, 495 (La. App. 1 Cir. 3/14/12).]

In the case at bar, Mr. Monahan had his own business and is now retired and the court finds that he and his wife will be able to devote the time and energy needed of a class representative. The court also finds that these proposed class representatives, as property owners who paid the penalties imposed by Ordinance No. 18637 have interests that are aligned with the interests of other potential class

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members and they would have a sufficient interest in the outcome of this litigation to ensure vigorous advocacy.

As for plaintiffs' counsel, Mr. Fransen and Mr. Hardin, the court notes that they initially acted as both counsel and putative class members. However, at this point, they are no longer putative class members. As class counsel, the record reflects that they have vigorously conducted this litigation for a period of several years, before various courts including the Fourth Circuit Court of Appeal and the Louisiana State Supreme Court. The court finds that they have demonstrated the competence, experience, and qualifications necessary for counsel of the potential class.

As for La. C.C.P. article 592 (B), only one of these criteria must be met for certification. In the case at bar, for reasons previously stated, the court finds that as to the defendant, City and defendants, Linebarger and UGSL, on the issue their being debt collectors, questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. However, and also for reasons previously stated, the court finds that as to defendants, Linebarger and UGSL on the issue of excessive legal fees, questions of law and fact common to the members of the class do not predominate over questions affecting only individual members.

Based upon the law and evidence, the court finds that as there is no evidence to establish numerosity or typicality among the claims asserted against defendants, Linebarger and UGSL on the issue of excessive legal fees, and common questions do not predominate, a class action cannot be certified as to them on this issue. However, as to defendant, the City of New Orleans and defendants, Linebarger and UGSL on the issue of their being debt collectors, the court finds that while there are many issues that have yet to be decided, class certification is the appropriate method for resolving all future issues with regard to the claims against the City and

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Linebarger and UGSL on the issue of their being debt collectors.

New Orleans, Louisiana this 24 of November, 2015.

JUDGE ETHEL S. JULIEN

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