

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al  Plaintiff,  vs.  CITY OF DES MOINES, IOWA,  Defendant.</p>	<p>Equity No. 49273  <b>PLAINTIFF'S RESISTANCE TO DEFENDANT'S MOTION TO AMEND ANSWER TO INCLUDE AFFIRMATIVE DEFENSES AND COUNTERCLAIM</b></p>
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IOWA DISTRICT COURT

COME NOW the Plaintiffs and hereby resist the Defendant's Motion to Amend Answer To Include Affirmative Defenses and Counterclaim. Specifically, the Plaintiffs respectfully state:

1. The Defendant has now attempted to again assert various affirmative defenses. It also now desires to assert a Counterclaim.

2. In *Remicker v. MCI Telecommunications Corporation*, 420 N.W.2d 427 (Iowa 1988), the Iowa Supreme Court said the following:

“Leave to amend shall ordinarily be freely given, according to Iowa Rule of Civil Procedure 88. Although amendments are the rule and denials are the exception, the trial court has considerable discretion in allowing amendments. *Ackerman v. Lauver*, 242 N.W.2d 342, 345 (Iowa 1976). Amendments may be allowed at any time, but they should not be allowed after a responsive pleading has been filed, if the pleading substantially changes the issues. *Id.*; see also *Smith v. Village Enters., Inc.*, 208 N.W.2d 35, 37 (Iowa 1973).”

3. The Motion appears to request the adding of affirmative defenses 7, 8 and 9. While the Plaintiffs recognize that Iowa Rule of Civil Procedure 1.402(4) provides that leave of court to amend is to be freely given, these affirmative defenses are facially without any merit, change the issues, unfairly prejudice the Plaintiffs and should not be allowed.

4. The Motion also appears to request the adding of a Counterclaim which asserts a claim against the Plaintiff class upon a theory of unjust enrichment. In other words, the Defendant, who would be found to have illegally imposed taxes to the extent the franchise fees assessed are in excess of its regulatory costs, is seeking to recover from the Plaintiffs the monies it illegally collected. Again, while the Plaintiffs recognize that leave of court to amend is to be freely given, this Counterclaim changes the issues, is facially without any merit, unfairly prejudice the Plaintiffs and should not be allowed.


5. Finally, this matter is currently set for trial on October 29, 2007. Defendant continues to assess and collect the entirety of the franchise fee allowed by its ordinances. Plaintiffs would also be further unfairly prejudiced if the Defendant were allowed to assert these matters and be allowed to delay the trial in this case. Before the Court allows the amendments sought herein, the Court should seek assurances from the Defendant that it will not seek a continuance of the currently set trial date if these affirmative defenses and counterclaim were to be allowed by the Court.

WHEREFORE, the Plaintiffs respectfully resist as set forth above the Defendant's Motion to Amend to assert Affirmative Defenses and Counterclaim.



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Original filed.

Copies of the foregoing have been mailed this  
14<sup>th</sup> day of May, 2007, to the following;

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