

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES,

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

)
)
) Equity No. 49273
)
)

) DEFENDANTS' BRIEF IN
) SUPPORT OF ITS MOTION
) FOR LEAVE TO AMEND TO
) INCLUDE A COUNTERCLAIM
)

COMES NOW the Defendant and for its brief states:

FACTS

1. The Plaintiff class claims that some or all of the gas and electric utility franchise fees it has paid were unwarranted because they are not reasonably related to the City's cost of regulating the presence of the utilities in the right-of-way. (See Petition).

2. The Plaintiffs have asked for a refund of any fees that are above the City's costs. (See Petition).

3. Des Moines City Manager Richard A. Clark is a member of the class and does not want a refund. (See attached Affidavit).

4. Moreover, Mr. Clark states that he has received benefits for the franchise fees he has paid. (See Affidavit).

5. Moreover still, Mr. Clark states in his Affidavit that because he has received services for the franchise fees he has paid, it would be detrimental to the City were he to receive a refund of those franchise fees. (See Affidavit).

6. Indeed, Mr. Clark says that were he to receive a refund then he will have received

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his money back and he will have received the services paid for with that money and will be doubly enriched. (See Affidavit).

7. In addition, Mr. Clark points out that not only will he and any other member of the class who received a refund be doubly enriched, but that the City will be doubly prejudiced because the City will have provided the services and then will have had to refund the money which it had already paid to provide those services. (See Affidavit).

ARGUMENT

Motions for leave to amend should be freely given. Grace Hodgson Trust v. McClannahan, 569 N.W.2d 397, 399 (Iowa Court App. 1997). Allowance is the rule and denial is the exception. MZ Enterprises, Inc. v. Hawkeye Security Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982). The only real constraint upon motions for leave to amend is that they should not be granted in close proximity to trial if the motion will substantially alter the issues. Britt Tech Corp. v. American Magnetics Corp., 487 N.W.2d 671, 674 (Iowa 1992). Other considerations are whether the amendment relates back to the original claim and whether the amendment seeks to add new parties. MZ Enterprises, 318 N.W.2d at 411. A grant of a motion for leave to amend is reviewed for abuse of discretion. Bailiff v. Adams County Conference Board, 650 N.W.2d 621, 626 (Iowa 2002).

In this case, the motion was made May 1, some 6 months before trial, and trial is still more than four months away. In addition, even if we were close to trial, the motion to amend will not substantially alter the issues at trial. Indeed, the City already has made a motion for summary judgment on the refund issue and the motion to amend to include the counterclaim of unjust enrichment is just a logical extension of that issue. When such a situation occurs, there is no abuse

of discretion in allowing the amendment. Union Planters, NA v. Fitzpatrick, slip copy, 2007 WL 911893 (Table) *2 (Iowa App. 2007). Of course, the unjust enrichment claim relates back to the original claim. Indeed, they are mirror images of one another. And, of course, no new parties are added by the counterclaim.

The doctrine of unjust enrichment is, “based on the principal that a party should not be permitted to be unjustly enriched at the expense of another or received property or benefits without paying just compensation. State Ex. Rel. Palmer v. Unisys Corporation, 637 N.W.2d 142, 154 (Iowa 2001). Although sometimes referred to as a theory founded in quasi contract, unjust enrichment is equitable, not contractual. Id.

The claim of unjust enrichment has three basic elements:

- (1) The Defendant has been enriched by the receipt of a benefit;
- (2) That enrichment came at the expense of the Plaintiff;
- (3) It will be unjust to allow the Defendant to retain the benefit under the circumstances.

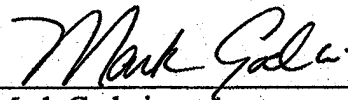
Id. at 154-155.

The Iowa Supreme Court has recognized unjust enrichment as “a broad principle with few limitations” upon which the “critical inquiry is that the benefit received be at the expense of the Plaintiff.” Id. at 155. In our case, the three elements are easily met. As the Affidavit of City Manager Richard A. Clark shows, the class has received benefits from the money it paid into the general fund, those benefits came at the expense of the City which paid for those benefits received and it would be unjust to allow the class to retain any refund because then they get their money and other services and the City (and every other non-class member citizen) is prejudiced. In addition, the amendment does not violate any scheduling order. A review of the one scheduling order

existing in this case will show that it did not set a pleading deadline.

CONCLUSION

The members of the Plaintiff class have paid gas and electric utility franchise fees to the City. In return, each and every one of those members has received back from the City benefits and services in the form of, for example, police and fire protection and public works maintenance. If the City is forced in this litigation to give back to the Plaintiff class members some or all of the franchise fees they have paid, then the only fair thing for the City to get in return would be a return of the services that the class has received for those franchise fees paid. Of course, the citizens cannot return those services. Police calls, once answered, cannot be unanswered. Streets, once paved, cannot be unpaved. Thus, the only fair and equitable solution to this problem is to allow the City's amendment for unjust enrichment to stand and to be tried.



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ATTORNEY FOR DEFENDANT
CITY OF DES MOINES

Original Filed.

Copy to:

Honorable Don Nickerson
Judge, 5th Judicial District

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses

disclosed on the pleadings on 6-25-07

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:

Signature Diane Roscoe

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STATE OF IOWA)

) ss.

COUNTY OF POLK)

I, Richard A. Clark, after first being duly sworn upon oath do depose and state as follows:

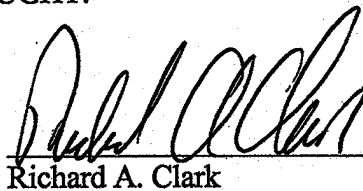
1. This Affidavit is made of my personal knowledge.
2. At all times material hereto I have been the Manager for the City of Des Moines and a customer of MidAmerican Energy, and hence a member of the Plaintiff class.
3. I have paid franchise fees to MidAmerican Energy as a customer of MidAmerican Energy.
4. In return for those franchise fees that I have paid, I have received services from the City.
5. I know from my position as City Manager that the franchise fees go into the general fund and that out of the general fund come such basic municipal services as police, fire, public works and the like.
6. I also know from my position as City Manager and as an item of common knowledge that once City services are provided, they cannot be unprovided. That is to say that once police have answered a call for help, the call cannot be unanswered. Once a street has been paved,

it cannot be unpaved.

7. Were I to receive a refund as part of this litigation, then I would be doubly enriched. I would have the benefit of the City services I already had received and then I would get back the money that I have paid for the services that I have received.

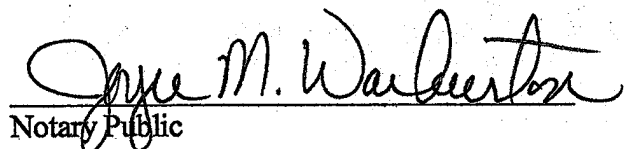
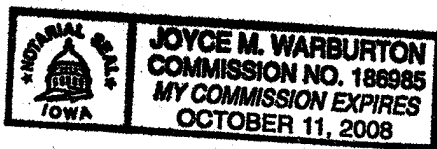
8. In addition, the City would be doubly prejudiced. It would have provided to me the services for which I would have paid and then it would have had to give me the money with which I paid for those services. Because a refund amounts to unjust enrichment for the class members, I do not wish to receive a refund if one is ever ordered as a result of this litigation. Instead, I asked to be placed in a subclass of people who do not wish a refund even if one is ordered.

FURTHER YOUR AFFIANT SAYETH NAUGHT.



Richard A. Clark

Subscribed and sworn to before me this 14th day of June, 2007.



Notary Public