

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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POLK COUNTY, IA
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CLERK DISTRICT COURT

LISA KRAGNES and all others similarly situated,

Plaintiffs,

Vs.

CITY OF DES MOINES, IOWA,

Defendant.

Equity No. CE 49273

**PLAINTIFFS' RESISTANCE TO
MICHAEL J BENDER
INTERVENTION AND MOTIONS TO
DECERTIFY CLASS AND ESTABLISH
SUBCLASSES, ALLOW OPT OUTS
AND REALIGN WITH DEFENDANT**

COME NOW the Plaintiffs and resist the Intervention and Motions to Decertify, Create Subclass and Realign with the Defendant City of Des Moines filed by Class Member Michael J Bender as follows:

I. RESPONSE TO INTERVENTION.

1. The Plaintiffs do not resist any attempt by Class Member Bender to appear personally in this action. The right of a class member to appear personally is provided in I.R.C.P. 1.266(2)(e) and was provided by Order of this Court in the Notice to Class Members.

2. The Plaintiffs resist the intervention of Class Member Bender.

3. To the extent Class Member Bender attempts to "intervene" personally, it is an inappropriate motion, as he is already a party to this suit as a class member, and it is illogical for a person who is already a party to a lawsuit to "intervene" in that suit.

4. The Plaintiffs also resist the intervention of Class Member Bender to the extent he attempts to intervene "on behalf of all class members who are

similarly situated.” This class he seeks to represent is already represented by Lisa Kragnes.

5. The Court should note that Class Member Bender asserts he is a gas and/or electric ratepayer who is a residential real estate taxpayer in Des Moines. Thus his status appears identical to Lisa Kragnes. Bender presents to the Court no basis for his assertions he should be a class representative, or a even subclass representative, other than a desire to oppose the remedy the Court has already determined is appropriate.

II. RESISTANCE TO MOTION TO DECERTIFY CLASS AND ESTABLISH SUBCLASSES

6. Plaintiffs resist the Motion to Decertify the class and deny that the class does not represent the best interests of the members of the class, including Class Member Bender.

7. Bender asserts that the present class does not properly represent “many, if not most, of those in the class” , including him. Yet Class Member Bender requests in his motion that he be allowed to re-align with the Defendant. It is difficult to comprehend a more inappropriate class representative than one that chooses to “align” with the very Defendant who has been held by Order of this Court to have violated the rights of the class and from whom remedy is, by Court Order, owed.

8. There is no intra-class conflict between members of the class who pay property taxes and those who do not as it relates to this case. The rights of the class

remain identical in the enforcement and correction of the rights violated as determined in this case.

9. The Court should note that Class Member Bender gives the Court no explanation of any cognizable conflict. As in all cases, the owners of the Defendant will need to pay any judgment. Yet, even taking Class Member Bender as he asserts, Class Member Bender cannot assure this Court that his interest in "no refund" is somehow the same as the interests of all other property taxpayers. Indeed, his position differs from the property taxpayers who want a refund, as well as those who may want spending reduced, who may want different City Management from the one that created this judgment, and who may want the budget cut to save the money and not have it imposed as additional taxes. Thus Class Member Bender, like the Defendant, seeks merely to allow the wrongful conduct to go un-recompensed for all Plaintiffs. Class Member Bender's opinions are not seeking the best of all, or even of a distinct subclass, but only seek one avenue of relief for himself. Yet he fails to acknowledge that the current judgment allows for him to refund any money he receives back to the City so the City need not raise taxes and need not cut spending as much as he contends would otherwise be required. Class Member Bender seems to seek to require that all persons whose rights have been violated and who are entitled to a refund, to instead live according to his own personal desires, rather than seeking to do equity and justice for all concerned. His expressed opinions do not bode well as a representative of all residents of Des Moines. Rather, the proper mode and attitude of representation of

all is carried out by Lisa Kragnes who sought, and obtained, an order of the wrongful conduct of the City representatives and who has obtained an order for a refund of those illegally obtained monies. Each class member retains the right, under the approach of the present class representative, to keep any refund or to voluntarily give it back to the City. Even Class Member Bender himself retains that right. Class Member Bender seeks to take that right away from all other persons he claims he seeks to protect. His attitude is truly aligned with the Defendant City, which makes him an inappropriate class representative.

10. The Court has already properly ruled that the ordering of a refund is the proper remedy for illegal conduct. It simply is not known what will be the outcome of the award.

11. The cutting of spending and services may be a possible outcome, but it is presently unknown. Further, the effects of compensating for wrongful conduct do not dictate the propriety of the conduct.

12. As noted previously, Class Member Bender does not present with the qualifications to act in a proper fiduciary manner as a class representative. The statements made by Class Member Bender demonstrate a fundamental misunderstanding of the facts of this case and any potential remedy. As noted earlier, Class Member Bender's apparent interest has not allowed him to understand: all class members have the opportunity to send their refund money back to the City; cuts in service will be borne by all residents, i.e. whether they are property tax paying residents or not; monies from ratepayers will now be available

under the new legislation for the supplying of services so that all ratepayers may be required to contribute to the manner of paying for the City's illegal conduct. The point is that the wrongful conduct by the City that occurred with respect to all class members must be remedied.

13. Class Member Bender states that all class members received additional city services. Is that true? Meanwhile, he demonstrates a lack of distinction from the Defendant City when he asserts this without proof and while proclaiming that a refund will need to be paid by property taxpayers only. First, property taxpayers again can return any refund they obtain to the City. Second, ratepayers can now be required to contribute to city services beyond that previously allowed, so that their contribution can now be enforced. Further, any cut in spending and services would presumably be shouldered by all, or those whom those particular services touch. Also, no plan has been set out by the City as to how this will be carried out. The assertions of Class Member Bender are all speculative.

14. Class Member Bender ends this section of his Motion with a categorical statement that he opposes any refund. Thus this Court is presented with a purported representative who has expressed his desire to defeat the legitimate claims of those who he purportedly wants to represent. His potential position as a class representative cannot be authorized.

WHEREFORE Plaintiffs respectfully request the Court to overrule Class Member Bender's request for decertification and/or for subclasses.

III. RESISTANCE TO MOTION TO ALLOW CLASS MEMEBERS TO OPT OUT.

15. The Court has already addressed several times the issue of opt outs. The Rules of Civil Procedure do not allow opt outs in a case such as the present one. I.R.C.P. 1.267(1). Class Member Bender does not address this issue. Class Member Bender further continues to ignore that it is not known what will happen as far as how the refund will be paid. In any event a class member can return any refund to the City upon receipt.

16. Class Member Bender asserts, without citation to any law, that due process rights are being violated. Plaintiffs assert that is incorrect and incorporate all previous argument on that issue, which has already been ruled upon by this Court. This action has been and continues to be processed with regard to all legal and constitutional rights being accorded to class members.

IV. PLAINTIFFS' RESISTANCE TO INTERVENOR'S MOTION TO REALIGN WITH THE DEFENDANT CITY OF DES MOINES.

17. Plaintiffs continue to assert that the City has not yet taken the appropriate action to comply with the requirements of the recently enacted legislation as to gas and electric franchise fees. Accordingly, Plaintiffs deny that said legislation renders legal the current collection of franchise fees for gas and electric services.

18. The backward-looking relief awarded does not place the class representative Plaintiff in conflict with Class Member Bender. Rather, the class representative is properly complying with all duties, allowing for relief as accorded by law.

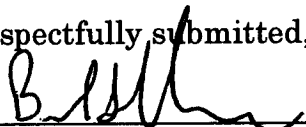
19. It is not inequitable to cause Class Member Bender to be a member of the class.

20. Class Member Bender should not be allowed to intervene in alliance with the Defendant City.

WHEREFORE Plaintiffs request the Court to allow the appearance, but not intervention, of Class Member Bender, to overrule the Motion to Decertify and/or Create Subclasses, to overrule the Motion to Allow Opt Outs and to Overrule the Motion to allow Class Member Bender to align with the Defendant City.


Respectfully submitted,

By:



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ORIGINAL FILED.

CERTIFICATE OF SERVICE:

A **COPY** of the foregoing has been hand delivered, emailed or mailed this 25th day of August, 2009, to the following:

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