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**IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

TERRY HOUSER, TERRY ODEGARD,)	
ROGER WEBB, MAE WOO, KATHRYN)	
ZURBUCHEN, THOMAS ZURBUCHEN,)	Case No. DV 18-0778
on behalf of themselves and all others)	Mary Jane Knisely
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	CLASS ACTION COMPLAINT
)	
CITY OF BILLINGS,)	
)	
Defendant.)	
)	
)	

COMES NOW PLAINTIFFS Terry Houser, Terry Odegard, Roger Webb,
Mae Woo, Kathryn Zurbuchen and Thomas Zurbuchen, on behalf of themselves

and all others similarly situated, hereby bring this action against the City of Billings and allege as follows:

INTRODUCTION

1. Plaintiffs challenge the unlawful practice of the City of Billings (hereinafter, the “City”) of raising revenue for its general fund by extracting monies from Plaintiffs and other similarly situated persons through the imposition of “franchise fees” for water, sewer services, and garbage disposal services. These “fees” are actually illegal sales taxes. The City should be enjoined from continuing to impose these taxes. Additionally, the City should be ordered to refund the illegal taxes it has previously extracted from Plaintiffs and similarly situated persons.

PARTIES

2. Plaintiff Terry Houser has resided in Billings, Montana since 1971. She is currently, and since 1971 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged by the City on those goods and services.

3. Plaintiff Terry Odegard has resided in Billings, Montana since 1990. He is currently, and since 1990 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged by the City on those goods and services.

4. Plaintiff Roger Webb has resided in Billings, Montana since 1990. He also owns and operates rental properties in Billings, Montana. He is currently, and since 1990 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged by the City on those goods and services.

5. Plaintiff Mae Woo has resided in the Billings, Montana metropolitan area since 1989. She also owns and operates rental properties in Billings, Montana. She is currently, and since 2012 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged by the City on those goods and services.

6. Plaintiff Kathryn Zurbuchen has resided in Billings, Montana since 1946. She is currently, and since 1986 has been a consumer of garbage disposal services and has paid the “franchise fees” charged by the City on those services. She is currently, and since 1990, has been a consumer of sewer services provided by the City and has paid the “franchise fees” charged by the City on those services.

7. Plaintiff Thomas Zurbuchen has resided in Billings, Montana since 1949. He is currently, and since 1986 has been a consumer of garbage disposal services and has paid the “franchise fees” charged by the City on those services. He is currently, and since 2005, has been a consumer of sewer services provided by the

City and has paid the “franchise fees” charged by the City on those goods and services.

8. Defendant City of Billings is a self-governed municipality which may exercise only those powers not prohibited by the Constitution or laws of the State of Montana.

JURISDICTION AND VENUE

9. The City has violated, and continues to violate, Mont. Code Ann. § 7-1-112(1) by imposing illegal sales taxes upon Plaintiffs and other similarly situated persons. Pursuant to Mont. Code Ann. § 3-5-302(1), this Court has subject matter jurisdiction over this action.

10. The City’s acts giving rise to liability in this matter occurred, and are occurring, within Yellowstone County in the State of Montana. Pursuant to Mont. Code Ann. § 25-2-126(2), venue is proper in the Thirteenth Judicial District Court.

FACTUAL ALLEGATIONS

A. The City and Its Municipal Utilities

11. At all times pertinent to this action, the City has sold water to its residents and businesses by means of a municipally-owned and operated utility.

12. At all times pertinent to this action, the City has provided sewer services to its residents and businesses by means of a municipally-owned and operated utility.

13. At all times pertinent to this action, the City has provided garbage disposal services to its residents and businesses by means of a municipally-owned and operated utility.

14. The above-described utility systems are owned, operated, maintained, supervised, and controlled by the City.

B. The City's Taxation of Water, Sewer, and Garbage Disposal Services

15. Montana law prohibits municipalities from imposing a tax on the sale of goods and services. Mont. Code Ann. § 7-1-112(1).

16. Although the City refers to the tax imposed upon its sale of water, sewer and garbage disposal services as a "franchise fee," it is in fact a sales tax.

17. A franchise fee is a payment for "the special privilege awarded by government to a person or corporation and conveys a valuable property right." *Montana-Dakota Utilities Co. v. City of Billings*, 2003 MT 332 ¶ 14, 318 Mont. 407, 80 P.3d 1247. No conveyance of a valuable property right has occurred with the provision by the City of water, sewer and garbage disposal services to Plaintiffs and similarly situated persons. Nor are Plaintiffs and similarly situated persons granted a right to occupy and use City property for those services.

18. At all times pertinent to this action, the City's rates for water include an amount above its actual cost of providing that service equal to four percent (4%) of its annual gross revenues from its water customers.

19. At all times pertinent to this action, the City's rates for sewer service include an amount above its actual cost of providing that service equal to four percent (4%) of its annual gross revenues from its sewer customers.

20. Commencing in 2012, the City's rates for garbage disposal service include an amount above its actual cost of providing that service equal to five percent (5%) of its annual gross revenues from its garbage disposal customers.

21. The water, sewer, and garbage disposal "franchise fees" are imposed and collected by the City for the primary purpose of raising general revenue for the City.

22. At all times pertinent to this action, the City's costs of providing water, sewer, and garbage disposal services are reflected in the rates charged by the City for the services. The "franchise fees" are in addition to the rates charged for these services and bear no relationship to the City's cost of providing water, sewer, and garbage disposal services to Plaintiffs and similarly situated persons.

23. The City collects the revenue derived from the "franchise fees" and transfers the funds directly into the City's general fund. After being deposited into the general fund, the monies are used to pay for the costs of the City's administration and for other services provided by the City, including the mayor, city council, city administrator, human resources, city attorney, municipal court, code enforcement, parks, recreation and public lands, and finance. According to

the “General Fund Overview” portion of the City’s 2018 fiscal year operating budget, “[t]he largest use of the general fund revenue is the transfer to the public safety fund.”

24. Plaintiffs have been forced to pay these illegal taxes to the City since they began receiving and paying for water, sewer, and garbage disposal services from the City.

25. The wrongful assessment, collection, and use of water, sewer, and garbage disposal “franchise fees” by the City described herein have proximately caused damages to Plaintiffs and those similarly situated.

CLASS ALLEGATIONS

26. All previous paragraphs are hereby incorporated as though fully stated herein.

27. Plaintiffs bring this action on their own behalf and on behalf of a proposed class consisting of all persons who are paying the illegal City taxes described above or have paid them at any time during the past eight years.

28. Plaintiffs bring these class action claims on behalf of themselves and all other persons similarly situated pursuant to Mont. R. Civ. P. Rules 23(a), (b)(1), (b)(2), and (b)(3).

29. Plaintiffs also bring this action on behalf of the following proposed subclasses:

- 1) a subclass consisting of all persons who, for the past eight years, have paid the illegal City taxes imposed upon water usage, hereinafter described as the “Water Usage Subclass”;
- 2) a subclass consisting of all persons who, for the past eight years, have paid the illegal City taxes imposed upon sewer service, hereinafter described as the “Sewer Usage Subclass”;
- 3) a subclass consisting of all persons who, since 2012, have paid the illegal City taxes imposed upon garbage disposal services, hereinafter described as the “Garbage Disposal Subclass”;

30. Both the class and the subclasses are sufficiently numerous to make joinder impractical, given that the total number of members of the class and each subclass likely exceeds 30,000.

31. The questions of law and fact raised by Plaintiffs’ claims are common to, and typical of, those raised by the class and subclasses they seek to represent.

32. Each member of the class and subclasses has paid, or continues to pay, the illegal sales taxes charged by the City.

33. Common issues of law and fact predominate over any individualized issues.

34. Questions of fact common to the class and subclasses include the nature and circumstances of the taxes illegally collected by the City from class members and transferred by the City into its general fund.

35. Questions of law common to the class and subclasses include whether it is lawful under Mont. Code Ann. § 7-1-112(1) for the City to collect the aforementioned taxes from members of the class and subclasses.

36. The violations of law and resulting harms suffered by the named Plaintiffs are typical of the legal violations and harms suffered by all members of the class and subclasses.

37. If brought individually, the claims of all members of the class and subclasses would necessarily require proof of the same material and substantive facts and would likely necessitate the same remedies.

38. The claims of the named class representatives and the absent members of the class and subclasses have a common origin and share a common basis as their claims originate from the same wrongful practices and policies of the City.

39. The City has acted in the same way towards Plaintiffs and the other members of the class and subclasses.

40. Consequently, Plaintiffs and each member of the class and subclasses have similarly been victims of the City's actions.

41. Plaintiffs are willing and prepared to serve the proposed class and subclasses in a representative capacity.

42. Plaintiffs will fairly and adequately protect the interests of the class and subclasses and have no interests adverse to, or that directly and irrevocably conflict with, the interests of other members of the class and subclasses.

43. Plaintiffs, as the class representatives, will vigorously prosecute the action on behalf of members of the class and subclasses.

44. Plaintiffs are represented by counsel experienced with complex litigation, including cases involving government liability and taxation. Plaintiffs' counsel are also experienced in litigating class action suits.

45. Plaintiffs' attorneys have identified and thoroughly investigated the claims in this action and have committed sufficient resources to represent members of the class and subclasses.

46. A class action is superior to other available methods for the fair and efficient adjudication of justice because individual joinder of claims by the members of the class and subclasses is impractical.

47. In light of the relatively small amount of potential damages that would be available to individual class members if individual actions were brought, there are not significant individualized interests in controlling the prosecution of separate actions.

48. The prosecution of separate actions by individual members of the class could result in inconsistent or varying adjudications with respect to individual members of the class.

49. In addition, adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.

50. By way of example, a ruling on the legality of the City taxes could create binding precedent for the adjudication of claims that are identical to those presented by Plaintiffs.

51. The City has acted on grounds generally applicable to all members of the class and subclasses, necessitating declaratory and injunctive relief for the class and subclasses.

52. In comparison to more complex class actions, the present proposed class action will clearly be manageable as the members of the class and subclasses are readily identifiable by the City and share common issues of fact and law, and counsel has already identified proper mechanisms for communicating with the class and subclasses.

CAUSES OF ACTION

COUNT I – DECLARATORY & INJUNCTIVE RELIEF REGARDING THE CITY’S VIOLATION OF MONT. CODE ANN. § 7-1-112(1),

53. All previous paragraphs are hereby incorporated as though fully stated herein.

54. Under Mont. Code Ann. § 7-1-112(1), local governments such as the City are prohibited from imposing taxes upon the sale of goods or services.

55. At all times pertinent to this action, the City has imposed “franchise fees” upon persons relying upon the City for their water, sewer services, and garbage disposal services.

56. These “franchise fees” are, and have been, based upon gross revenue received by the City when providing water, sewer services, and garbage disposal services.

57. The City collects the “franchise fees” for purposes of generating revenues and places them in its general fund rather than a segregated or special account designated to be used to pay for the City’s cost of providing water, sewer and garbage disposal services.

58. The monies collected from the “franchise fees” are used to support the general administrative costs of the City and other services provided by the City, including but not limited to public safety, municipal court, parks, recreation and public lands, and City finance costs.

59. The City’s “franchise fees” are not reasonably related to the City’s cost of providing water, sewer, and garbage disposal services.

60. The City’s “franchise fees” are, therefore, taxes imposed upon Plaintiffs and other persons similarly situated in violation of Mont. Code Ann. § 7-1-112(1).

61. Plaintiffs and other persons similarly situated are entitled to (1) a declaration from this Court that the aforementioned taxes are unlawful and (2) an injunction prohibiting the City from imposing these taxes in the future.

COUNT II – BREACH OF CONTRACT

62. All previous paragraphs are hereby incorporated as though fully stated herein.

63. The City and its utility customers, including Plaintiffs, entered into agreements for the provision of water, sewer service, and garbage disposal services.

64. Implied in each and every agreement is a covenant of good faith and fair dealing. Mont. Code Ann. § 28-1-211.

65. The City has breached its covenants of good faith and fair dealing by imposing upon its customers an illegal sales tax when billing its customers for providing water, sewer, and garbage disposal services.

66. This breach by the City has proximately caused Plaintiffs and others similarly situated to suffer damages for which this Court can and should provide relief.

COUNT III – RESTITUTION

67. All previous paragraphs are hereby incorporated as though fully stated herein.

68. The right of restitution has long been recognized when a person has been unjustly enriched at the expense of another.

69. The City has wrongfully exacted payments from Plaintiffs and others similarly situated by collecting from them illegal taxes based upon the City's provision of water, sewer services, and garbage disposal services.

70. If the City is allowed to keep the wrongfully exacted payments of Plaintiffs and others similarly situated the City will be unjustly enriched.

71. The Court should provide restitution to Plaintiffs and others similarly situated in order to prevent the unjust enrichment of the City.

PRAYER

A. For an order certifying the class and subclasses defined herein, appointing undersigned counsel as class counsel, approving Plaintiffs as class representatives, and requiring that notice be provided to the class at the City's expense, pursuant to Mt. R. Civ. P. 23;

B. For declaratory and injunctive relief, including enjoining the City from continuing to collect illegal taxes imposed upon persons relying upon the City for water, sewer services, and garbage disposal services;

C. For judgment on behalf of the class and subclasses as defined herein for the amount of any payments made to the City with interest thereon;

D. For reasonable attorneys fees and costs; and

E. For such other and further relief as this Court deems equitable or just under the circumstances.

Dated May 16, 2018.

s/ Kristen G. Juras
Kristen G. Juras

s/Matthew G. Monforton
Matthew G. Monforton

Attorneys for Plaintiffs and the Proposed Class