

UNITED STATES DISTRICT COURT DISTRICT OF NEBRASKA

MARIO MARTINEZ, JR., PAULA)	
MERCADO, MARTIN MERCADO,)	
JANE DOE, MARIA ROE, STEVEN)	
DAHL, ACLU NEBRASKA)	
FOUNDATION, AND UNITED FOOD)	
AND COMMERCIAL WORKERS)	
UNION, LOCAL 22,)	
)	
Plaintiffs,)	Civ. Action No. 4:10-cv-3140
)	
v.)	
)	DEFENDANTS' ANSWER TO
CITY OF FREMONT; DALE)	COMPLAINT FILED BY MARTINEZ,
SHOTKOSKI, IN HIS OFFICIAL)	<i>et. al.</i>
CAPACITY AS FREMONT CITY)	
ATTORNEY; AND TIMOTHY)	
MULLEN, IN HIS OFFICIAL)	
CAPACITY AS FREMONT CHIEF OF)	
POLICE,)	
)	
Defendants.)	

DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT

Defendants The City of Fremont, Nebraska, Dale Shotkoski, and Timothy Mullen hereby answer Plaintiffs' First Amended Complaint, responding to each enumerated paragraph as follows:

1. Defendants deny the characterization of Ordinance No. 5165.
2. Defendants admit the allegation of the first sentence of this paragraph that on June 21, 2010, Fremont voters passed a City Initiative Petition enacting Ordinance No. 5165. Defendants deny the characterizations of Ordinance No. 5165 by the Plaintiffs in the second and third sentences of this paragraph.
3. Defendants deny the first two sentences of this paragraph and with respect to the third sentence admit only that the Justice Department of the Obama Administration has taken the stated position.

4. Denied.

5. Defendants deny the allegations made in the first sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations made in the second sentence of this paragraph and therefore deny those allegations.

6. Denied.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

9. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

10. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

11. Defendants deny the characterization of the Ordinance as unlawful in the first sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of this paragraph and therefore deny those allegations.

12. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

15. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

16. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

17. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

18. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

19. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

20. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

21. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

22. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

23. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

24. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

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26. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

27. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

28. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

29. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

30. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

31. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

32. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

33. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

34. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

35. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

36. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

37. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

38. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

39. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

40. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

41. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

42. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

43. Defendants admit the allegations in the first sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence, which does not specify the actions in question, and therefore deny those allegations.

44. Admitted.

45. Admitted.

46. Admitted.

47. Admitted.

48. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

49. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

50. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

51. Defendants admit that Bob Warner introduced an ordinance similar to Ordinance 5165. Defendants deny that a tie vote of the City Council constitutes a “rejection” of an ordinance by the City Council, where the Mayor casts the deciding vote.

52. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

53. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

54. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations..

55. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

56. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

57. Defendants admit that on March 11, 2009, the City filed a petition for declaratory judgment in the Dodge County District Court in order to verify the constitutionality of the Ordinance prior to its adoption by the voters, and to avoid the expense of the litigation manifest in Plaintiffs’ Complaint. The City also contended that the Ordinance violated the single subject rule. Defendants deny the remaining allegations contained in this paragraph.

58. Defendants admit that the Nebraska Supreme Court held that the Ordinance did not violate the single subject rule. Defendants deny the Complaint's characterization that the "Supreme Court held that the measure had 'one general subject—the regulation of illegal aliens.'" The Supreme Court was quoting the holding of the District Court and agreed with the District Court's holding that the measure did not violate the single subject rule. Defendants deny that the Ordinance is a "regulation of immigration," as defined by the United States Supreme Court, which is "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

59. Admitted.

60. Admitted.

61. Defendants admit that the first sentence of this paragraph partially quotes the opening sentence of Section 2.A of the Ordinance. The complete text is:

It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

Defendants admit that the second sentence of this paragraph partially quotes Section 2.A.1 of the Ordinance. The complete text is:

For the purpose of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

62. Admitted.

63. Defendants admit the allegations contained in this paragraph. Additionally, according to Sec. 3.A of the Ordinance, occupants who are 18 years old must also obtain an occupancy license.

64. Defendants deny the characterization of the definition of an occupant in this paragraph. Sec. 1.E of the Ordinance states, “*Occupant* means a person, age 18 or older, who resides at a dwelling unit. A temporary guest of an occupant is not an occupant for the purposes of this ordinance.” Defendants admit that Plaintiffs have partially quoted Sec 1.C for the definition of a dwelling unit. The complete definition states:

Dwelling unit means a single residential unit with living facilities for one or more persons, including space for living, sleeping, eating, cooking, bathing and sanitation, whether furnished or unfurnished, that is let or rented for valuable consideration. There may be more than one rental unit on a premise. In a multifamily residence or apartment building, each residential unit or apartment constitutes a separate dwelling unit. The term dwelling unit does not include a dormitory room at a postsecondary educational institution, a room at a shelter for the homeless or the abused, or a hotel room.

65. Defendants deny the characterization of Sec. 3.D of the Ordinance. That section states, “Each occupancy license is valid only for the occupant for as long as the occupant continues to occupy the dwelling unit for which such license was applied. Any relocation to a different dwelling unit requires a new occupancy license.”

66. Admitted.

67. Defendants deny the characterization of Sec. 3.B of the Ordinance. That section states:

It is the occupant's responsibility to submit an occupancy license application to the Fremont Police Department, pay a fee of \$5 to the City, and obtain an occupancy license. If there are multiple occupants seeking to occupy a single rental unit, each occupant must obtain his or her own license. An applicant for an occupancy license may designate the owner or manager of the dwelling unit as his agent to collect the required information and submit the required application form(s), signed by the applicant, to the Fremont Police Department on the applicant's behalf. The City may establish a procedure whereby an applicant (or designated owner or agent) may submit the required application form(s), signed by the applicant, via facsimile or website portal.

68. Defendants deny the characterization of Sec. 3.E of the Ordinance. That section states:

Applications for occupancy licenses shall be made upon forms furnished by the City for such purposes and shall require the following information:

- (1) Full legal name of occupant;
- (2) Mailing address of occupant;
- (3) Address of dwelling unit for which occupant is applying, if different from mailing address;
- (4) Name and business address of dwelling unit owner or manager;
- (5) Date of lease commencement;
- (6) Date of birth of occupant;
- (7) Occupant's country or citizenship;
- (8) Full legal name and date of birth of each minor dependent residing with occupant;

69. Admitted.

70. Defendants partially admit the characterization of Sec. 3.E(9)(b) of the Ordinance.

However, Plaintiffs omit that if the declaration alien declares that “the alien does not know of any such number,” “[s]uch declaration shall be sufficient to satisfy this requirement.”

71. Admitted.

72. Defendants deny the characterization of Sec. 4.A of the Ordinance. That section states:

Promptly after issuance of an occupancy license to any occupant who has not declared himself or herself to be either a citizen or a national of the United States, the Department shall, pursuant to Title 8, United States Code, Section 1373(c), request the federal government to ascertain whether the occupant is an alien lawfully present in the United States. The Department shall submit to the federal government the identity and immigration status information contained on the application for the occupancy license, along with any other information requested by the federal government. The Department may enter into a memorandum of understanding to use the Systematic Alien Verification for Entitlements (SAVE) Program operated by the U.S. Department of Homeland Security, or utilize any other process or system designated by the federal government.

73. Defendants deny the characterization of Sec. 4.B of the Ordinance. That section states:

If the federal government reports that the occupant is not lawfully present in the United States, the Department shall send a deficiency notice to the occupant, at the address of the dwelling unit shown on the application for occupancy license. The deficiency notice shall state that on or before the 60th day following the date of the notice, the occupant may seek to obtain a correction of the federal government's records and/or provide additional information establishing that the occupant is lawfully present in the United States. If the occupant provides such additional information, the Department shall promptly submit

that information to the federal government. The occupant may also submit information directly to the federal government.

74. Defendants deny the characterization of Sec. 4.D of the Ordinance. That section states:

No earlier than the 61st day after a deficiency notice has been sent to an occupant, the Department shall again make an inquiry to the federal government seeking to ascertain the immigration status of the occupant. If the federal government reports that the occupant is an alien who is not lawfully present in the United States, the Department shall send a revocation notice to both the occupant and the lessor. The revocation notice shall revoke the occupant's occupancy license effective 45 days after the date of the revocation notice.

75. Defendants admit the characterization of Sec. 3.H contained in the first sentence of this paragraph. Defendants partially admit the characterization of Sec 3.I of the Ordinance contained in the second sentence of this paragraph. However, the Ordinance includes individuals who are 18 years of age, not merely those over the age of 18. Defendants partially admit the characterization of Sec. 3.J of the Ordinance contained in the third sentence of this paragraph. However, Plaintiffs omit that, "It is a defense to a prosecution under this paragraph that the landlord or agent has commenced and diligently pursued steps as may be required under the applicable law and lease provisions to terminate the lease or tenancy."

76. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants deny the characterization of Sec. 3.L of the Ordinance contained in the second sentence. That section states:

The lease or rental of a dwelling unit without obtaining and retaining a copy of the occupancy license of every known occupant, age 18 or older, shall be a separate violation for each occupant in a dwelling unit for which no license is obtained and retained, and for each day of such occupancy, beginning on the 46th day after the date of a revocation notice under Section 5.

77. Admitted.

78. Defendants deny the characterization of Sec. 4.F of the Ordinance contained in this paragraph. That section states:

F. Judicial review shall also be available as follows:

1. Any landlord or occupant who has received a deficiency notice or a revocation notice may seek pre-deprivation or post-deprivation judicial review of the notice by filing suit against the City in a court of competent jurisdiction.
2. In the event that such a suit is filed prior to or within fifteen days after the date of the relevant revocation notice, if any, revocation shall be automatically stayed until final conclusion of judicial review.
3. The landlord or occupant may seek judicial review of the question of whether the Department complied with the provisions of this Ordinance or other relevant provisions of federal, state, or City law, or the question of whether the occupant is an alien not lawfully present in the United States, or of both such questions.
4. In a suit for judicial review in which the question of whether the occupant is an alien not lawfully present in the United States is to be decided, that question shall be determined under federal law. In answering the question, the court shall defer to any conclusive ascertainment of immigration status by the federal government.
5. The court may take judicial notice of any ascertainment of the immigration status of the occupant previously provided by the federal government. The court may, either sua sponte or at the request of a party, request the federal government to provide, in automated, documentary, or testimonial form, a new ascertainment of the immigration status of the occupant pursuant to United States Code Title 8, Section 1373(c). The most recent ascertainment of the immigration status of an individual by the federal government shall create a rebuttable presumption as to the individual's immigration status.

79. Defendants admit the allegations contained in this paragraph.

80. Defendants admit the allegations contained in this paragraph.

81. Defendants admit the allegations contained in this paragraph.

82. Defendants admit the allegations contained in this paragraph.

83. Defendants admit the allegations contained in this paragraph.

84. Defendants admit the allegations contained in the first sentence of this paragraph.

Defendants lack knowledge or information sufficient to form a belief as to the truth of the

allegations contained in the second sentence of this paragraph and therefore deny those

allegations. Defendants admit the allegations contained in the third sentence this paragraph.

Defendants deny the allegations contained in the fourth sentence of this paragraph.

85. Admitted.

86. Admitted.

87. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

88. Denied.

89. Denied.

90. Denied.

91. Denied.

92. Admitted.

93. Admitted.

94. Admitted.

95. Admitted. The City suspended enforcement of the Ordinance via Resolution No. 2010-140 (passed on July 27, 2010) until fourteen days after a final decision is entered in this litigation.

96. Denied.

97. Denied.

98. This paragraph merely re-alleges and incorporates previous allegations and Defendants hereby incorporate their answers to those allegations as if fully set forth herein.

99-104. The allegations contained in Paragraphs 94-99 are legal conclusions to which no response is required.

105. This paragraph merely re-alleges and incorporates previous allegations and Defendants hereby incorporate their answers to those allegations as if fully set forth herein.

106. Denied.

107. This paragraph merely re-alleges and incorporates previous allegations and Defendants hereby incorporate their answers to those allegations as if fully set forth herein.

108. Denied.

109. This paragraph merely re-alleges and incorporates previous allegations and Defendants hereby incorporate their answers to those allegations as if fully set forth herein.

110. Denied.

111. This paragraph merely re-alleges and incorporates previous allegations and Defendants hereby incorporate their answers to those allegations as if fully set forth herein.

112. The allegations contained in this paragraph are legal conclusions to which no response is required.

113. Denied.

114. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore deny those allegations.

115. Admitted.

Dated: May 9, 2011

CITY OF FREMONT; DALE SHOTKOSKI, IN HIS
OFFICIAL CAPACITY AS FREMONT CITY
ATTORNEY; AND TIMOTHY MULLEN, IN HIS
OFFICIAL CAPACITY AS FREMONT CHIEF OF
POLICE.

Defendants

BY: /s/ Kris W. Kobach
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Nebraska by using the CM/ECF system.

All participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Executed on May 9, 2011, at Topeka, Kansas. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kris W. Kobach
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