STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,
Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN,
a municipal corporation,
Defendant.

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RESPONSE IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

NOW COMES Defendant, CITY OF NOVI, by and through its attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C. and for its Response in Opposition to Plaintiff's Motion for Class Certification states as follows:

1. Plaintiff's Motion for Class Certification should be denied because Plaintiff cannot even establish that he, on behalf of just himself, can maintain a cause of action, and also because he also cannot satisfy all of the factors required for certification of an entire class as enumerated in MCR 3.501(A)(1).

2. Plaintiff claims with no basis whatsoever that the reserve funds held by the City of Novi ("City") to pay for water and sanitary sewer infrastructure costs, maintenance, and daily operational costs, are improper. The truth is that the anticipated costs to maintain the systems, and to replace portions of the systems as and when necessary, *exceed* the amounts being held as reserves and charged as rates. **In addition, the City's Water and Sewer Proprietary Fund has had operating losses for every year as of June 30 going back to 2014 because the water and sanitary sewer rates charged by the City are insufficient to cover operating costs**. The City has been offsetting the losses with savings, the principal for which was accumulated before the start of the proposed class period.

3. Plaintiff fails to fully advise the Court of salient facts, including:

a. The horizontal assets of the City's water and sanitary sewer system include more than 361 miles of water mains and more than 289 miles of sanitary sewers. The City's vertical assets of the system include a 1.5 million gallon water storage tank and a 1 million gallon underground sewage retention basin. *See Aff. of B. Croy, Ex. A hereto.*

b. The total replacement cost of the horizontal water and sanitary sewer system exceeds $900 Million, and the total replacement cost of the City's vertical water and sanitary sewer system assets exceeds $50 Million. *See Aff. of B. Croy, Ex. A hereto.*

c. Estimated capital expenditures of $15 Million over the next 5 years will be required just to maintain the desired level of service. Over the next 10 years, that figure is estimated to be $20 Million, and over the next 20 years more than $26 Million in expenditures are expected to be required to maintain service levels. *See Aff. of B. Croy, Ex. A hereto.*

d. In addition to those maintenance needs, the City anticipates that within the next five (5) years it will need approximately $11.6 Million for water distribution capital replacements and $10.7 Million for sanitary sewer capital replacements, for an approximate

total of $22.3 Million—again in addition to maintenance needs. On top of that, the City already owes $18,500,000 from its reserves for capital projects that are in process (that is, under construction). *Ex. B, hereto, Aff. of C. Johnson.*

e. In addition to the required expenditures for maintenance and replacement, the City must ensure that some funds remain in reserve for other expenses related to daily operational costs. For the fiscal year 2020/2021, those necessary reserves equate to 21% of Total Water and Sewer Fund Expenses, plus Transfers-Out, less Depreciation, or $5 Million. *Ex. B hereto, Aff. of C. Johnson.*

f. When all these maintenance, replacement, and operating reserves are accounted for, it turns out that the reserves in the City's water and sewer fund do not amount to an unreasonable surplus as alleged by Plaintiff but are actually *insufficient* to cover anticipated near-term necessary costs. Here is what the descriptions above break down to:

Balance owed on existing projects	$18,500,000
5 Year Maintenance Requirements	$15,000,000
5 Year Capital Replacements	$22,300,000
Total	**$55,800,000**
Plus Working Capital Reserve Amount Estimate	$5,000,000
Total Required Working Capital to Provide Water & Sewer Service for the near term	**$60,800,000**
Amount held in reserves as of June 30, 2020*	$58,800,000
Total *Deficiency*	**$2,000,000**

**See Affidavit of C. Johnson, Ex. B hereto.*

g. The City's Water and Sewer Proprietary Fund has had operating losses for every single year as of June 30 going back to 2014 as follows:

2014 -$1,312,668
2015 -$2,919,253
2016 -$2,602,133
2017 -$1,376,493

2018 -$2,211,978
2019 -$1,348,032
2020 -$3,279,232

These losses have been offset by capital contributions from developers and investment value increases on prior savings (the market went up), which have allowed the City to maintain the same level of service and to continue engaging in capital improvements even though it was not actually charging—for any of the years relevant to this case—its rate payers enough in rates to cover the cost of operations. *Aff. of C. Johnson, Ex. B.*

h. And for this Court's purposes, it is going to prove to be impossible to identify all payers of the City's utility bills during those relevant years. Approximately 84% of the City's utility bills are addressed to "Occupant" and not to a named individual, and there is no specific data base from which a list of payers can be compiled, because the City does not track who pays utility bills. Each account, and each quarterly bill payment, would have to be reviewed to determine whether a payer can be identified. However, each one of these roughly 360,000 payments (the total over six years) would have to be checked, individually. Just to review payments made during 2020 and 2019 it is estimated that one person, fully dedicated, without any vacation, would need almost 14 years to reconstruct payments on each account (15,697 accounts multiplied by 1 hour and 50 minutes per account). *See Aff. of T. Glenn, Ex. D hereto.*

i. In fact, maybe the best example of the extent of the degree of difficulty here is Plaintiff himself. He has, perversely, refused to provide proof of payment of his own utility bills over the years, leaving the City to search for those on its own; the City has been unable to determine who made payments on the account associated with Plaintiff's address during the entire relevant time period. *See Plaintiffs Discovery Responses, Ex. C, hereto, and the Aff. of T. Glenn, Ex. D, hereto.* Basically, we do not even know that Plaintiff would get a refund

in this case.

j. It appears that Plaintiff is at this point asserting a $13 million aggregate overcharge (see page 2 of Plaintiff's motion). As explained above, Plaintiff will not be able to show *any* sort of overcharge, but even if he could, that breaks down to an extremely small amount for people like Plaintiff. Using Plaintiff's assumption of the number of payers (23,009, on page 19 of Plaintiff Brief in Support) but eliminating payments made by the top 100 payers (who make up 13.4% of all payers and who would receive on average $17,420 each from a $13 million refund to rate payers as shown in *Ex. D)*, the named Plaintiff and the residential customers who during 2020 represented 57.8% of the total average yearly billing actually would on average only receive $328 each (57.8% X $13 million divided by 22,900). And that is assuming they could prove they made payments for the entirety of the class period. But unfortunately for Plaintiff, the more likely provable scenario only includes the last two years of payments, because that is as far back as the City can go to try to ascertain who made payments (even if it would take 14 years to do so).

k. Again this is an exercise in futility, since according to the City's CFO, Carl Johnson, the amount charged by the City for water and sanitary sewer service as of June 30, 2014 has been insufficient to cover the costs of service. *See Ex. B hereto.* So, there has been no overcharge during any of the relevant period—in fact, there actually has not been *enough* of a charge to cover costs, and the proposed class would be entitled to no refund.

l. Finally, during the relevant time period, ownership of 7,154 real property parcels in the City has changed hands. *See Aff. of M. Lohmeier, Ex. F.* The City does not maintain forwarding address records of former real property owners who no longer pay utility bills. See *Ex. D.* As a result, a substantial portion of the proposed putative class quite possibly cannot be properly identified and/or located.

4. Plaintiff's Motion for Class Certification should be denied because:

a. Plaintiff has not shown or otherwise proven that he, himself, in fact paid the water and sewer bills complained of such that he is capable of maintaining the cause of action even for himself, so he is certainly not qualified to represent the proposed class;

b. Plaintiff will not fairly and adequately assert and protect the interests of the class where his claims are *de minimis* as compared to the top 100 commercial and industrial users that are much larger consumers, and *where his claims are contrary to the best interests of other rate payers who will be required to make the same contribution to the system again in addition to paying Plaintiff and his attorneys if Plaintiff is successful, given the anticipated deficit in the water and sewer fund following the expected and planned improvements*;

c. The class has not been sufficiently well-defined, and the members not sufficiently well-identified, such that a reasonable estimate of the number of members can be determined where Plaintiff has failed to demonstrate that non-owner utility customers (such as tenants, non-owner family members, and trusts) are capable of identification, or that the over 7000 former real property owners can be located; and

d. Plaintiff has not established that a sizeable number of class members have suffered an actual injury, as the rates being charged going back to 2014 have been insufficient to cover the operating expenses of the system, and therefore there has been no overcharge as alleged by Plaintiff. Nor are the City's current reserves, which Plaintiff seeks to have refunded, unreasonable given that the current replacement value of the City's water and sanitary sewer system is approximately $950 Million Dollars, and further given that over the next five years approximately $60.8 Million will be spent to maintain, improve, and run the systems, and the fund currently holds only $58 Million in cash and investments as explained above.

5. Essentially, Plaintiff's complaint amounts to nothing more than a difference of opinion with

the City as to how the City should plan and charge for capital improvements. That is not an actionable claim and is not properly before this Court. *See* opinions from similar cases where the dismissals were upheld by the Court of Appeals, attached as Ex. I hereto.

WHEREFORE, Defendant prays the Court will deny the Motion for Class Certification, and that the Court issue such other Orders as it deems necessary including a reasonable amount for attorney fees so wrongfully sustained in responding to Plaintiff's Motion.

BRIEF IN SUPPORT

Plaintiff spends a substantial portion of his Brief in Support defending the basis for his suit against the City. This is understandable, because if there is no valid underlying cause of action, then there is no basis on which to certify the class, and the motion for class certification should be denied. *Zine v Chrysler Corp,* 236 Mich App 261, 287; 600 NW2d 384 (1999). Also important is whether the objective criteria by which class membership is to be determined have been met by the evidence. *Michigan Ass'n of Chiropractors v Blue Care Network of Michigan, Inc.*, 300 Mich App 577, 590; 834 NW2d 138 (2013). In this case, not only is there no valid underlying cause of action, but Plaintiff himself is a prime example of the fact that there is no objective basis upon which class membership can be determined.

The City acknowledges that the "court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Henry v Dow Chemical Co.,* 484 Mich 483, 488; 772 NW2d 301 (2009). Therefore, the City will not waste the Court's time by responding, point by point, to the multitude of misstatements or misrepresentations of fact, or to the lack of full disclosure and candor to the Court contained in Plaintiff's Brief in Support, except as absolutely necessary. So, in the interest of saving time and for issue preservation purposes only, due to non-compliance with MCR 2.109(E)(5), the City requests the Court strike Plaintiff's motion and order such other sanctions as permitted by MCR

2.109(E)(6). The City also objects to the consideration of all of Plaintiff's factual assertions to the extent they are misstatements and/or taken out of context and/or present an inaccurate depiction of the facts and/or are improperly documented.

As to what the real issue before the Court, class certification, the City avers that Plaintiff's Motion for Class Certification should be denied because Plaintiff is not capable of maintaining the cause of action as an individual because there is no indication that he can prove *he* has paid the water or sewer bills that are the sole focus of the Complaint for the entirety of the class period. Further, as a residential property owner, his claim is *de minimis* as compared to the larger users of the system. Additionally, Plaintiff has no apparent plan or ability to identify members of the class who may or may not be property owners, which factors against his fitness to represent their interests.

These are all fundamental failings in Plaintiff's position before the Court even considers that Plaintiff's claims must eventually fail because there is no actual injury where the rates complained of are presumed valid, and where Plaintiff will not be able to prove otherwise—especially where the reserve amounts at issue are exceeded by needed capital improvements and maintenance. For the same reason, any claim by Plaintiff that the rates charged were in excess of the amounts required to operate the system will fail. This is not a case worthy of class certification, and Plaintiff's motion should be denied.

1. *Plaintiff is unqualified to represent the purported class, and therefore his motion for class certification must fail.*

Before getting to whether Plaintiff has met the applicable court rule requirements for maintaining a class action, the Court must consider whether or not Plaintiff, on his own, can maintain an individual cause of action. If he cannot, he is "unqualified to represent the purported class". *McGill v Automobile Ass'n of Michigan,* 207 Mich App 402, 408; 526 NW2d 12 (1994).

In this case, Plaintiff has failed to come forward, despite the City's quite reasonable

request that he do so (see Ex. C - Responses to Discovery Requests), with proof that he actually paid the utility fees about which he complains. The City's receipt records only go back two years. Without such proof, Plaintiff has no proof that potential recoverable damages for the entire proposed class period. Just like the *McGill* plaintiffs who claimed the potential for harm (but no actual harm) because they were "afraid" of being sued but had not actually been sued, Plaintiff here has not shown he has suffered an actual damage relating to the actual payment of the utility bills for the class period. Like the *McGill* Court, this Court should find that a plaintiff who cannot or will not establish his own injury is unqualified to represent the purported class and should deny his motion to certify the class.

The fact that Plaintiff cannot or will not prove that he himself has paid all the utility charges about which he complains is also a tell-tale sign of another problem with class certification in this case: the lack of evidence needed to satisfy the objective criteria by which the class is defined. Hypothetically speaking, and given Plaintiff's particular scenario, the class could extend to any third person or entity that has a legal interest in a form of payment (bank account, credit card) utilized by another person or entity to pay a utility bill—even where the third person or entity has no legal obligation to pay the utility bill and no legal interest in the property being served by the utility for which the bill was issued. Think, for example, of a **landlord** whose tenant is responsible for the utility bills, or the **mother/property owner** whose utility bills have been paid by the adult children who still live with her, or the adult child whose **parent's** name still appears as co-owner of the checking account from which utility bills have been paid even though the adult child is the only individual contributing to the account. Surely, the intent is not to include as a potential injured party and as a part of the class the landlord, mother/property owner, or parent who has not been specifically injured by paying a utility bill for water and sanitary sewer service. And yet, in this case, unfortunately, Plaintiff would have the Court do just that, expanding the class to

include those individuals and entities even if they cannot prove they paid a utility bill. This should not be permitted.

2. Class certification should be denied because Plaintiff will also not be able satisfy all of the enumerated MCR 3.501(A)(1) requirements.

Plaintiff also will not be able to satisfy all the requirements for class certification enumerated in MCR 3.501(A)(1). *A & M Supply Co. v Microsoft Corp.*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002). The five factors from MCR 3.501(A)(1) are:

> (a) The class is so numerous that joinder of all members is impracticable;
> (b) There are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) The representative parties will fairly and adequately assert and protect the interests of the class; **and**
> (e) The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [Emphasis added].

These conditions are often referred to as "numerosity, commonality, typicality, adequacy, and superiority." *Henry v Dow Chem. Co.*, 484 Mich 483, 488; 772 NW2d 301 (2009). Please note because of the use of the word "and", *all* the factors must be satisfied.

a. <u>Numerosity</u>

There is no particular number of members necessary, nor need the number be known with precision, "as long as general knowledge and common sense indicate that the class is large." *Zine v Chrysler Corp.,* 236 Mich App 261, 288; 600 NW2d 384 (1999). However, the class must be sufficiently well-defined and the members sufficiently well-identified that a reasonable estimate of the number of members can be determined. *Id.* **The plaintiff must also establish "that a sizeable number of class members have suffered an actual injury."** *Duskin v Department of Human Services*, 304 Mich App 645, 653; 848 NW2d 455 (2014).

This case deals with utility rate payers in the City. Obviously, there are a lot of those—

although, ironically, Plaintiff is being shy about proving that he is one of them—so the number is not the issue. The issue is the lack of any injury, since none of those rate payers have been paying a utility rate that is actually sufficient to cover yearly operational costs, and/or the expected maintenance and capital improvement costs, thereby obviating the claim that somehow the rate payers have been overcharged (or subject to an illegal tax). Because—regardless of their number—there can be no reasonable basis under these circumstances to suggest that the proposed class members have suffered an actual injury, the motion for class certification should be denied.

b. Commonality

The second factor, a common question of fact or law that applies to the entire class, does not require all issues in the litigation to be common; it merely requires the common issue or issues to predominate over those that require individual proof. *A & M Supply Co.*, *supra* at 599. This also relates to "the fifth factor [superiority] in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action." *Zine*, *supra* at 289. The amount of damage need not be uniform as long as the trial court has some basis for concluding "that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A & M Supply Co.*, *supra* at 600.

In *Hill v City of Warren*, 276 Mich App 299, 302; 740 NW2d 706 (2007), a class action was initiated after the City planted silver maple trees that quickly began to encroach into plaintiffs' adjacent private property. The roots obstructed sewer pipes, made sidewalks uneven and dangerous, and destroyed the surface of plaintiffs' lawns. *Id.* When challenging class certification, defendant City asserted that the homeowners sustained a wide variety of damages to their properties and, therefore, there was no common question of fact or law. *Id.* at 311. The Court

disagreed, finding that class certification was appropriate, reasoning that the "individualized fact-finding would concern the *amount* of damage, not the *existence* of damage." *Id.* at 312. The Court further found that since the trees were the cause of the common injury, the amount of damage from that injury need not be uniform. *Id.*

This case is not like *Hill*, in that the existence of damage is very much individualized to each proposed class member. Plaintiff has suggested that the "common" fact is that the proposed class members have paid utility bills. But even as to payers who could prove that they have paid utility bills, there will be serious and varying issues of proof of any damage on an individual basis, given the fact that more than 7,000 properties in the City have changed ownership, and the City cannot go back farther than two years to determine who paid a bill. Just based upon the number of transfers of ownership, it should be expected that the amount of alleged overcharge can vary wildly. And if the claim is "everyone" was overcharged, no member of the proposed class is going to be able to show any sort of injury during the relevant time frame. During the last seven (7) years, the rates charged have been insufficient to cover on-going costs of the system, so every rate payer is going to have a problem showing the "*existence* of damage". For this reason, the class certification motion should be denied.

c. <u>Typicality</u>

Under the third factor, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." MCR 3.501(A)(1)(c). Factual differences between the class members' claims are not inherently fatal to certification, but their claims must share a legal theory and "core of allegation". *Neal v James*, 252 Mich App 12, 21, 651 NW2d 181 (2009), *rev'd on other grounds, Henry v Dow Chemical Co.*, 484 Mich 483 (2009). As explained in *Neal*, typicality:

> directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual

> differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation". [Citations omitted].

This case is much different from the *Hill v City of Warren*, *supra*. at 313, where the representative plaintiff and the class members all shared the same legal claims of trespass-nuisance, negligence, and governmental taking without due process. When looking at this third factor, the Court should first consider that the Plaintiff in this case is refusing to provide basic information to prove he has an actionable claim and presumably would not be a typical putative class claimant seeking redress. He does not have a "common 'core of allegation'" with the proposed class and is, therefore, not like the representative plaintiff in *Hill.* The proposed representative Plaintiff has a distinct and separate hurdle that he has to overcome—proving that he in fact has an actual injury.

The Court should also take notice that under the City's practice – with a bill being addressed to "Occupant" in most cases, and no obligation on the actual property owner to pay the utility bill – there are an unidentifiable number of persons and/or entities who are in Plaintiff's proposed class and who never actually paid a utility bill, and therefore cannot make the same core allegations as those non-owner persons or entities who did pay a utility bill. Plaintiff's motion to certify a class with an unknown number of non-typical litigants should fail.

d. <u>Adequacy</u>

The fourth factor requires the trial court to scrutinize whether the representative parties will fairly and adequately assert and protect the interests of the class. *A & M Supply Co., supra* at 601. To prove this factor, a plaintiff must show two components. First, the class representative must share common issues and interests with the unnamed members. *Northview Const. Co. v. City of St. Clair Shores*, 395 Mich 497, 509; 236 NW2d 396 (1975). Second, the court must be assured that the representative will vigorously prosecute and protect the rights of the class

through qualified counsel. *Id.* The adequacy of representation requirement is fulfilled by a representative who has an interest in a claim that is typical of the remaining class claims. *Id.*

In *Northview*, the Court found that the representative plaintiffs possessed claims typical of the class of those persons required to pay excess building permit fees under the illegal amendments to the City's Building Code. *Id.* at 509-510. The Court reasoned that each claim "raises a common issue concerning the legality of the building permit fees and each claim can be satisfied by a monetary refund." *Id.* at 510. The Court further held that "(a)fter the merits are resolved the court should be able to set up a simple procedure for determining the eligibility and individual amount of relief due each class member." *Id.*

In this case, however, there is an issue as to whether the Plaintiff can prove he has even paid a water or sewer bill. Because of this, his claims would not be typical of other class members, and the motion should be denied. Additionally, the Plaintiff has no factual evidence supporting his claim of adequacy of representation, except an erroneous, self-serving affidavit by the non-fact witness attorney of record in this case, which is of questionable propriety given MRPC 3.7. The attorney of record's alleged experience (per the affidavit) is based on non-binding, non-precedential trial court level decisions in other cases which are distinguishable because they do not address the issues in, problems with, and legal arguments regarding class certification being raised by the City *in this case.*

Further, attached as Exhibit J is a decision in the matter of *Greenfield v Farmington Hills,* where similar issues to the issues raised in this response were decided upon by the Court, with the Court *denying* class certification. The Plaintiff's position as a proper plaintiff is unproven, and he should not be deemed as even remotely acting in a manner that gives reasonable assurance that he will protect the interests of the class.

e. <u>Superiority</u>

The final factor asks "whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action," the primary concern being that of practicality and manageability. 3.501(A)(1)(e). Under MCR 3.501(A)(2), the trial court is explicitly required to consider a number of subfactors in making its determination regarding the fifth factor. The Michigan Supreme Court has explained that this fifth factor is "essentially the same" as the "convenient administration of justice" consideration required under former GCR 1963, 208, and it is essentially a practicability test. *Dix v American Bankers Life Assurance Co. of Florida*, 429 Mich 410, 413-414; 415 NW2d 206 (1987). Furthermore, because "almost all claims will involve disparate issues of law and fact to some degree, the relevant concern here is whether the issues are so disparate as to make a class action unmanageable." *Id.* at 419.

In addition, there are other factors to consider which were set forth in *A & M Supply Co. v Microsoft Corp.,* 252 Mich App 580, 602–03; 654 NW2d 572 (2002):

> To determine whether a class action is a superior form of action, a trial court must consider:
> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> (ii) adjudication with respect to individual members of the class that 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 interests;
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
> (c) whether the action will be manageable as a class action;
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions. [footnote omitted]

In this case, sub-factors (c), (e) and (f) should be especially considered.

Even if Plaintiff manages to show facts in support of an actual injury in this case, this Court should determine that *the potential injury to putative class members is not large enough in relation to the expense and effort of administering this case as a class action.* This is particularly true when, as in this case, the water and sewer system has been operating at a loss during the proposed class period and it is impossible to identify all payers of the City's public water and sanitary sewer bills.

In *A & M Supply Co. v Microsoft Corp.*, 252 Mich App at 641-642, the Court reversed the decision of the trial court to grant class certification, explained how variations between members of a class can make a class action inappropriate:

> The class, if certified, would likely be immense, numbering in the hundreds of thousands. While the size of the class and other factors certainly suggest that joinder would be impracticable and that a number of the factors favoring certification in MCR 3.501(A)(2) exist, the paradox we have discussed makes the many variations between class members problematic when it comes to proving actual damages. . . . MCR 3.501(A)(2)(c) suggests that *when a proposed class action is unmanageable, a trial court should deny class certification*. [Emphasis added].

The numbers of potential claims in this case are just as immense. City received 59,400 payments just during calendar year 2020. *See,* Aff. of T. Glenn, Ex. D. Assuming and multiplying similar numbers of payments for each of the six years claimed by Plaintiff, and then factoring in determinations of the identity of the actual payers on each account and the work necessary to determine what percentage, if any, each payer would be entitled to recover from any potential total award, the result is a staggering and unmanageable undertaking, and the associated cost is unjustifiable.

The *A & M Supply* Court also discussed the problems when the proposed class is "fluid" like the proposed class in the present case. Similar to the situation that Plaintiff proposes here,

where the class would be comprised of all rate payers in the City, the *A & M Supply* Court analyzed the unmanageability of a case where the proposed class would have included all residents in the State. This Court in *A & M Supply*, 252 Mich. App. at 623-624, astutely recognized and explained:

> First, the trial court found that the proposed class was a "fluid group," making it virtually impossible to determine who actually was in the class.[Footnote Omitted] For example, though the plaintiff claimed that proving and quantifying residency during the period defined for the class would be possible, the trial court questioned how the parties could account for people who had lived in the state but had moved, people who worked in this state but lived elsewhere, and the myriad other situations a proposed class of that size posed. [Footnote Omitted] As the trial court put it, dealing with the paperwork would be "staggering." [Footnote Omitted]
> . . .
>
> Consequently, the trial court denied the motion for class certification, resting its decision on the difficulty of defining the class and proving damages.

Ascertaining the group of water and sewer rate payers in the City over a six-year period would be just as difficult as accounting for everyone who lived in the State even though the City's population is less. This is because the proposed class is just as fluid, but with two less "guarantors" of proper identification. The City has experienced a substantial number of transfers of ownership of property since 2014, and even residency or property ownership does not or would not guarantee that *any particular person* paid a water or sanitary sewer bill. Plaintiff has made no proposal to ascertain and identify who paid each of the water and sewer bills each quarter during this time-period, because there is no real way to do so.

Even if there was a way to ascertain who sold and purchased property in the City during the six years at issue in this case, and where those who sold had moved to and are presently located, these efforts still will neither reveal who has *paid the bills* in situations where tenants or other parties did so for one reason or another, nor where those rate payers are currently located for purposes of class action notices and awards, if any.

This raises another issue because, even if there were a way to create a list of payers within a reasonable amount of time (keeping in mind it is estimated that it will take one person

14 years to go through two year's worth of bills per the T. Glenn Affidavit, Ex. D hereto), Plaintiff has not proposed or even suggested a methodology to mete out any recovery. This is another reason supporting this Court's denial of class certification in this case, as the Court explained in the *A & M Supply* case, when it wrote:

> Nevertheless, the flaw in the plaintiff's calculations boiled down to the variations in the behavior of the direct purchasers, that is, the infant formula retailers. With so many different retailers, each with individual economic constraints and interests, the plaintiff's expert learned that there was no consistent pass-on rate, even at the same retailer over time. Even if the expert could have calculated the pass-on rate for the individual retailers, that enormous task would have destroyed the efficiency a class action otherwise provides.

A & M Supply, 252 Mich App at 630.

In the present case, both the differences in how much one rate payer may have paid versus another based on the amount of usage (think elementary school vs. household on 2 acres with 5 teenagers vs. 90-year old widower in an apartment vs. 50 tenant office building vs. industrial property that uses water in its operations) and the potential differing time periods (ranging from 1 quarterly bill to 24 quarterly bills, and anywhere in between) significantly affect the amount of damages that would have to be calculated on an individual basis, and as such these factors give rise to the type of "enormous task [that] would . . . destroy [ ] the efficiency a class action otherwise provides" that the Court described in the *A & M Supply* case.

Also, while Plaintiff has alleged that the individual class members may be entitled to $565 per claim (before fees and costs) on page 19 of his Brief, this number is overly simplistic and demonstrably false. Even if one accepts the claimed amount of overcharge (which the City does not), Plaintiff bases this number on 23,009 rate payers,[1] which when accounting for the 100 largest rate payers means that the remaining 22,909 payers would receive substantially less than alleged, and also wrongly assumes that there has been absolutely no change in who has been

[1]$13,000,000 divided 23,009 equals $565.

paying the rates for each property over the claimed six-year period.

It also wrongly assumes that every rate payer has used the same amount of water and sanitary sewer capacity such that each rate payer's bill is exactly the same. Plaintiff's calculations essentially and falsely assume that once a person or business moves into the City, that person lives forever, the business never fails, and no one ever moves out, and also every user's bill has been the exact same amount as everyone else's bill for every quarter that they have lived or operated their business in the City. Further, while Plaintiff would have the Court believe that everyone will get something, the reality is that the larger users (e.g. the schools and large commercial/industrial property owners) would get the majority – making the time and money spent to calculate out the refund to an individual household owner (and the majority of claimants) ludicrous. In *A & M Supply*, 252 Mich App at 641-642, the Court concluded by holding:

> . . . the many variations between class members [is] problematic when it comes to proving actual damages. In short, this case has all the hallmarks of being unmanageable. . . . MCR 3.501(A)(2)(c) suggests that when a proposed class action is unmanageable, a trial court should deny class certification. Though the trial court was willing to accept the task of handling a case this large and complex, we are left with the definite feeling that it made a mistake when it concluded that the plaintiffs had a satisfactory method of demonstrating that a class action was the superior form of adjudicating this dispute.

Similarly, in this case, "the many variations between class members [is] problematic when it comes to proving actual damages." *Id.*

In short, Plaintiff's recovery calculations are based upon the false assumption that every rate payer has paid the same amount over the same amount of time, and never moves or dies. Moreover, as reflected in the T. Glenn Affidavit, it is estimated that it would take one person approximately 14 years to review the accounts for the last two years to ascertain which rate payers, and the City is without the ability to identify the payers before that. Even if identifying all the payers could be accomplished, Plaintiff has failed to address the expenses and unmanageability of ascertaining the differentials between rate payers based upon usage and

period of usage, and figuring out the amount of any award which should be delved out based upon those differentials.

CONCLUSION AND REQUEST FOR RELIEF

Plaintiff has failed to meet the requirements for certification of the proposed class. His claims are contrary to the known fact that the City's Water and Sewer proprietary fund has been operating at a loss since and including 2014. The City's utility rates are not taxes, they do not exceed the costs of operation of the system, and they have been established fairly and in order to pay for expected and necessary maintenance of the water and sanitary sewer systems and capital improvements thereto. And while Plaintiff has taken great pains to list *ad nauseam* a plethora of other class action cases where certification has been granted, those cases are dissimilar in nature to cases that have been recently held properly dismissed and most likely did not involve a proposed representative Plaintiff like this one, who refuses to provide proof he paid the utility bills during the class period.

Further, there is no reasonable ability to identify the proposed members of the class where the City's utility accounts are associated with addresses and over 7000 properties in the City have changed hands since 2014. The time and expense it would take to identify payers far outweighs any potential recovery. And while Plaintiff argues that only service addresses are necessary, this ignores the fact that a substantial number of rate payers no longer live in the City or own property in the City, or that the person who receives the notice at an address may not actually be the person who pays the utility bills. And all of this assumes that Plaintiff has a viable cause of action, which he does not. The Plaintiff's Motion for Class Certification should be denied.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

DATED: February 26, 2021

/s/ Stephanie Simon Morita
Attorney for Defendant
27555 Executive Drive, Ste. 250

Farmington Hills, MI 48331
(248) 489-4100
smorita@rsjalaw.com
(P53864)

PROOF OF SERVICE

I certify that on February 26, 2021, the foregoing document was served on all parties or their counsel of record through the Court's Efile system.

/s/ Dawn Hallman

EXHIBIT LIST

A. Affidavit of B. Croy

B. Affidavitt of C. Johnson

C. Plaintiff's Discovery Responses

D. Affidavit of T. Glenn

E. Top 100 Customers and Billed Usage

F. Affidavit of M. Lohmeier

G. *[Intentionally Omitted]*

H. *[Intentionally Omitted]*

I. Opinions from Court of Appeals

J. Order Denying Motion for Class Certification in *Greenfield v Farmington Hills*

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
GREGORY D. HANLEY (P 51204)
EDWARD F. KICKHAM, JR. (P 70332)
Attorneys for Plaintiff and the Class
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(248) 544-1500

RANDAL TOMA & ASSOCIATES, PC
RANDAL S. TOMA (P 56166)
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ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
STEPHANIE SIMON MORITA (P 53864)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
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AFFIDAVIT OF BENJAMIN L. CROY

STATE OF MICHIGAN)
)
COUNTY OF Oakland)

I, Benjamin L. Croy, depose and state as follows:

1. I am a 1996 graduate of the University of Michigan, with a Bachelor of Science in Civil and Environmental Engineering.

2. Continuously since and including 2001, I have been a licensed Professional Engineer in the State of Michigan.
3. I have over nineteen years of experience in the water and sewer industry and am currently the City Engineer for the City of Novi.
4. In my position as the City Engineer, I am responsible for the sanitary sewer disposal systems and the water distribution system.
5. In my position, I am responsible for the asset management of City of Novi assets which the City owns or operates in the City of Novi, which includes horizontal assets (e.g., water mains and sanitary sewers) and vertical assets (e.g., water tower and sewage retention basin).
6. The horizontal assets located in the City of Novi consists of more than 361 miles of water mains, more than 289 miles of sanitary sewers.
7. The vertical assets located in the City of Novi includes a water storage tank with 1.5 million gallons of storage capacity and a one-million-gallon underground sewage retention basin.
8. That the total replacement value of the horizontal water and sanitary sewer system assets exceeds $900 Million.
9. That the total replacement value of the vertical water and sanitary sewer system assets exceeds $50 Million.
10. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 20 years at the desired level of service is more than $26 Million.
11. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 10 years at the desired level of service is more than $20 Million.
12. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 5 years at the desired level of service is more than $15 Million.

FURTHER, AFFIANT SAYETH NOT.

BENJAMIN L. CROY

Subscribed and sworn to before me on
this 23 day of February, 2021

Lisa De Meo

Notary Public, Wayne Co, MI
My Commission Expires: 1-10-2022

LISA DE MEO
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jan 10, 2022
ACTING IN COUNTY OF Oakland

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
GREGORY D. HANLEY (P 51204)
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ROSATI, SCHULTZ, JOPPICH
& AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
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(248) 489-4100

AFFIDAVIT OF CARL JOHNSON

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I, Carl Johnson, depose and state as follows:

1. The information in this Affidavit is based on my personal knowledge and review of materials. I am competent and able to testify regarding the information in this Affidavit. I declare

under the penalties of perjury that this Affidavit has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

2. I am a 1988 graduate of Michigan State University, with a Bachelor of Arts in Accounting.

3. Continuously since and including December 3, 1991, I have been a licensed Certified Public Accountant in the State of Michigan.

4. I have over 32 years' experience in governmental accounting and am currently the City of Novi CFO/Finance Director/Treasurer, a position I have held since January 2014.

5. In my position as the City of Novi CFO/Finance Director/Treasurer, I am responsible for preparing the City's budgets and capital improvement plans.

6. The City's Water and Sewer Proprietary Fund has had operating losses for every year as of June 30 going back to 2014 as follows:

2014	$1,312,668
2015	$2,919,253
2016	$2,602,133
2017	$1,376,493
2018	$2,211,978
2019	$1,348,032
2020	$3,279,232

The losses have been offset by capital contributions from developers and investment value increases (the market went up) which allowed the City to maintain the same level of service and continue its CIP even though it was not charging enough in rates to cover the cost of operations.

7. The water and sewer variable unit rates per 1,000 gallons charged by the City for the years (effective August 2) at issue were:

	Water	Sewer
2013	$3.86	$4.25
2014	$4.13	$4.30
2015	$3.05	$3.40
2016	$3.20	$3.60

2017	$3.20	$3.60
2018	$3.26	$3.89
2019	$3.33	$4.01
2020	$3.40	$4.29

8. According to the City's 2020/2021 Capital Improvement Plan, within the next five (5) years approximately $11.6 Million will be needed for water distribution capital replacements and $10.7 Million will be needed for sanitary sewer capital replacements, for an approximate total of $22.3 Million which is in addition to maintenance needs. In addition to the 22.3 million, there is another approximately $18.5 million (balance remaining on projects) of capital replacements budgeted in fiscal year 2019/2020 that were not completed and will be completed in 2020/2021.

9. The 2020/2021 Budget, and as it relates to Water and Sewer Fund Expenses, shows total 2020/2021 operating expenses of $23.9 million, transfers out of $0, Depreciation $0 and capital expenditures of $3.8 million (City of Novi budgets on cash flow basis which means capital expenditures are budgeted and depreciation is not). The cash-flow budget shows a net use of cash in the Water and Sewer Fund of $1.1 million.

10. For the 2020/2021 fiscal year, necessary reserves of 21% of Total Water and Sewer Fund Expenses plus Transfers-Out, less Depreciation equates to $5 million, and are held in reserves to fund daily operational costs according to governmental accounting standards.

11. The current historical cost of the City's Water and Sanitary Sewer Systems is more than $240 million dollars, and the systems are 43.1% depreciated, representing a roughly $98 million dollar overall potential need, and the reserves on June 30, 2020, in the City's Water and Sewer Fund only total $58.8 million (total cash and investments).

12. The unrestricted net position noted in the June 30, 2020 Comprehensive Annual Financial Report for the Water and Sewer Fund of $68,522,700 does not represent the amount of reserves available in number 9 above, it simply represents the balance of the total net position in the Water and Sewer Fund that is not associated with net historical capital assets.

13. Under the circumstances, the City of Novi reserves as of June 30, 2020 are insufficient to cover the cost of known capital improvement requirements over the next five years, along with required maintenance needs and necessary reserves to fund daily operational needs.

FURTHER, AFFIANT SAYETH NOT.

CARL JOHNSON

Subscribed and sworn to before me on
this 25 day of February, 2021

Lisa De Meo

Notary Public, Wayne Co, MI
My Commission Expires: 1-10-2022

LISA DE MEO
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jan 10, 2022
ACTING IN COUNTY OF Oakland

EXHIBIT C

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

Case No. 2020-183155-CZ
Hon. Nanci Grant

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Edward F. Kickham Jr. (P70332)
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Attorneys for Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED TO PLAINTIFF WILLIAM NOFAR

Plaintiff, by his attorneys, Kickham Hanley PLLC, states as follows for his Responses to Defendant's First Set of Interrogatories and Request for Production of Documents Directed to Plaintiff William Nofar:

GENERAL OBJECTIONS

1. Plaintiff prepared his responses in accordance with the instructions contained in

loan would be "beneficial to both funds." The City's FY 2019 financial statements, p. 46, show that the W&S Fund made "Advances to other funds" in the amount of $3,000,000. Persons having knowledge of this allegation include, but are not limited to, the City's own elected and non-elected officials and employees, and Plaintiff's expert witnesses.

20. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 11 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact.

Subject to his objections, Plaintiff states that Paragraph 4 of the Complaint provides as follows:

> Plaintiff has received water service ("Water Service") from the City and paid the Water Rates imposed by the City. State building codes, incorporated into state and local law, require structures which have access to a municipal water supply system to utilize that system.

This allegation has two parts. The part related to Plaintiff having received Water Service and paid the Water Rates is based on documents including, but not limited to, the City's own billing and payment records and bank records. Persons having knowledge of this allegation include, but are not limited to, Plaintiff and the City's own elected and non-elected officials and employees. The part related to structures being required to utilize a municipal water supply system is based on state building codes, state statutes, and City ordinances, including, but not limited to, the following:

The City requires all dwellings to be connected to the public sewer system and, by virtue of that connection, to pay the City's charges for sewer services. As an initial matter, MCL 333.12753(1) provides that "Structures in which sanitary sewage originates lying within the limits of a city, village

or township shall be connected to an available public sanitary sewer in the city, village or township if required by the city, village or township." Pursuant to MCL 333.12753(1), the City requires Plaintiff to utilize the City's sewer system (see City Ordinance Section 34-127) and, by virtue of that connection, requires Plaintiff to pay the Sewer Rates imposed by the City. *See* City Ordinance Section 34-147 (regarding enforcement of payment for sewer service through liens).

The same is true for the City's water system. State law imposes a uniform construction code that applies throughout the State and incorporates the international residential code, the international building code, the international mechanical code, and the international plumbing code.. *See* MCL 125.1504; MCL 125.1508a. The Michigan Residential Code explicitly requires all residential structures to connect to an available public water supply and sanitary sewer system:

> P2602.1 General. The water-distribution and drainage system of any building or premises where plumbing fixtures are installed **shall be connected to a public water supply or sewer system, respectively, if available.** [emphasis added

See also City Ordinance Section 34-21 (regarding enforcement of payment for sewer service through liens).

The Court of Appeals has held that where a person is required to connect to a public sewer, payment of sewer-related charges is not voluntary for purposes of determining whether the charges are "taxes" under the Headlee Amendment. *See, e.g., Meadows Valley, LLC v. Village of Reese*, 2013 Mich. App. LEXIS 1009 (2013) ("We agree that the charge is not voluntary, to the extent that one may not own property in the Village of Reese and not connect to the public sewer system. The ordinance requires all owners of 'houses, buildings, or properties used for human occupancy . . . ' to connect to the public sewer system. There is '[a]bsolutely no element of volition" involved."'). As Justice (then Judge) Markman observed in his dissent that ultimately was adopted by the *Bolt* Supreme Court majority:

> **City ordinances mandate that all property owners connect to the sanitary sewer** and it does not seem unreasonable to assume that Ordinance 925 will

> eventually be amended to impose the same requirement with respect to the newly separated storm sewer system. **The use of such indispensable services cannot be considered a matter of choice when there is a municipal monopoly and mandate over them.** The property owner wishing not to use the service, or to use another service, has no alternatives. **The charge is effectively compulsory.** [221 Mich. App. at 97 (emphasis added)][1]

21. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 14 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

22. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 15 of the Complaint.

---

[1] In *Shaw v. City of Dearborn*, the court held that the City of Dearborn's charges for water and sewer services were voluntary because "each user of the city's water and sewer system can control how much water they use." However, the *Shaw* court did not consider whether Dearborn had an ordinance mandating the use of its water and sewer system. Here, City Ordinance Section 34-127 mandates that property owners connect to the sewer system. Moreover, *Shaw*'s holding conflicts with the Michigan Supreme Court's binding decision in *Bolt*, where the court adopted Judge (now Justice) Markman's dissent, which the Supreme Court effectively adopted, that water and sewer are "indispensable" services and their use cannot be considered voluntary. *Bolt*, 221 Mich. App. at 97.

30. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 45 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

31. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 63 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

REQUESTS TO PRODUCE

1. Please provide all documents identified in the responses to interrogatories 1 through 31 of Defendant's First Set of Interrogatories Directed to Plaintiff William Nofar.

Response:

Plaintiff objects to this request because it is overbroad, unduly burdensome, harassing (as to documents related to Plaintiff's ownership of property outside of the City of Novi and Plaintiff's involvement in past litigation), and seeks documents that were created by the City or its agents, are in the City's possession or control, or are of public record.

Plaintiff declines to produce documents related to harassing interrogatories. Plaintiff will make copies of water and sewer rate making manuals available for review at Plaintiff's counsel's office. Upon information and belief, other responsive documents were created by the City or its agents, or are in the City's possession or control.

2. Please provide copies of all bank records since January 2010 showing payment to Defendant for water service and sanitary sewer service charges by Plaintiff William Nofar.

Response:

Plaintiff objects to this request because it is overbroad, unduly burdensome, and harassing. Plaintiff further objects because records of Plaintiff's payment for water and sewer service are already in the City's possession, and are available from its BS&A software and/or the City's own bank records. Plaintiff declines to produce documents in response to this request.

As to objections and legal matters only,

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

Date: February 18, 2021
KH166954

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021 I electronically served the foregoing document using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

VERIFICATION

I declare, under oath, that I have reviewed Plaintiffs' Responses to Interrogatories Nos. 2, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, and 17 of Defendant's First Set of Interrogatories, and that, based upon my own personal knowledge, the answers contained therein are true to the best of my knowledge, information and belief.

I further declare that my counsel has advised me that the information and statements in Plaintiff's Responses to the remainder of Defendant's First Set of Interrogatories are based upon documents authored by the City or its representatives, and are true and accurate. Many of these statements are of a highly technical nature. I do not represent that I have acquired expertise in water and sewer rate-making methodologies. Based upon the representations of counsel, I believe that the responses are true and accurate.

William Nofar

Dated: 2-17-21

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
GREGORY D. HANLEY (P 51204)
EDWARD F. KICKHAM, JR. (P 70332)
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ROSATI, SCHULTZ, JOPPICH
& AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
STEPHANIE SIMON MORITA (P 53864)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

AFFIDAVIT OF TINA GLENN

State of Michigan)
)
County of Oakland)

Tina Glenn, being first duly sworn, deposes and says:

1. I am the Assistant Treasurer for the City of Novi.

2. The City had the following number of utility accounts (water and/or sanitary sewer) and number of payments on utility bills as follows:

Calendar Year	# of accounts	# of payments
2014	15,103	59,166
2015	15,279	60,618
2016	15,428	59,373
2017	15,563	59,248
2018	15,664	59,088
2019	15,488	59,294
2020	15,697	59,400

3. A utility billing account is associated with an address and not a person.

4. If there has been a transfer of ownership and/or a change in tenancy, the billing department is not notified and the transferor or former tenant does not provide the City's utility billing department with a forwarding address.

5. Similarly, the receipting department who processes payments on utility bills does not track who pays the bills, and can only state whether a bill has been paid on an account.

6. Eighty-four percent of the billings are addressed to "Occupant" and not to an individual.

7. The City does not track who pays utility bills.

8. The City does not have restrictions on who can pay a utility bill.

9. Additionally, payments are made on accounts by someone other than the owner, such as a tenant or a non-profit company on behalf of an occupant (in cases of charitable payments).

10. I tried to ascertain the billing history on the named Plaintiff's utility account, and after spending one (1) hour and 50 minutes researching the account, could only ascertain who made 9 payments of the relevant 28 payments.

11. Information as to who made a payment prior to two years ago is not electronically available.

12. Multiplied by 15,697 accounts, I estimate is would take one person 28,778 hours (or 13.8 years assuming a 40-hour work week with no vacation time) just to reconstruct and/or confirm who made the payments on the accounts for the last two years.

13. The top 100 users of the City's water and sanitary sewer system accounted for 13.7 percent of the utility billing for 2020, or $3,407,634.53 of $24,937,059.35.

14. Of the 15,697 current utility customers, 13,214 are residential customers who during the calendar year of 2020 paid $14,410,775.53.

Further deponent saith not.

Tina Glenn
TINA GLENN

Subscribed and sworn to before
me in this 25th day of February, 2021.

Patricia Deering
Patricia Deering, Notary Public
Wayne County, State of Michigan
My Commission expires: 4/5/2025

PATRICIA DEERING
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Apr 5, 2025
ACTING IN COUNTY OF Oakland

EXHIBIT E

Top 100 Billed Customers
Friday, February 12, 2021
Period 01/01/20 - 12/31/20

Account Number	Customer Name	Service Address	Amount Billed	%
0031-30005-00-0	FOX RUN	41100 FOX RUN RD	$402,887.83	1.6%
0030-62553-00-0	FS ISLAND OAKLAND GLENS PROPERTY LL	42000 CAROUSEL DR	$242,259.34	1.0%
0027-00001-00-0	NOVI MEADOWS	26250 VIRGINIA AVE	$196,585.32	0.8%
0024-50320-00-0	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$104,118.23	0.4%
0027-00002-00-1	OLD DUTCH FARMS II LLC	27000 NAPIER RD	$103,967.67	0.4%
0024-50319-00-0	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$93,100.33	0.4%
0012-50004-00-0	HIGHLAND HILLS MOBILE PK	25600 SEELEY RD	$66,567.83	0.3%
0032-00027-00-0	LIFETIME FITNESS INC SITE 113	40000 HIGH POINTE BLVD	$63,278.94	0.3%
0014-00144-00-0	12 OAKS MALL MNGT OFFICE	27500 NOVI RD	$59,038.83	0.2%
0032-00003-00-1	SHERATON NOVI	21111 HAGGERTY RD	$49,689.06	0.2%
0011-39001-00-0	WALTONWOOD OF NOVI	27475 HURON CIR	$47,395.97	0.2%
0011-20058-00-1	TRILOGY HEALTH SERVICES, MS#9	41795 TWELVE MILE RD	$43,234.67	0.2%
0024-50158-00-1	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$40,913.46	0.2%
0030-62542-00-1	LINDSEY PROPERTIES LLC	45077 W PONTIAC TRL	$39,154.47	0.2%
0012-01011-00-0	GRANITE REIT AMERICA	39600 LEWIS DR	$38,786.83	0.2%
0012-00054-00-0	COUNTRY COUSINS MOBILE HOME	26855 HAGGERTY RD	$38,247.62	0.2%
0030-62568-00-1	BROOKDALE SENIOR LIVING #00784	45182 WEST PARK DR	$36,866.49	0.1%
0011-48000-00-1	NOVI OAKS HOTEL LLC	27000 S KAREVICH DR	$35,609.02	0.1%
0014-00043-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, S.E. 70018241	$35,189.34	0.1%
0014-00091-00-1	HOTEL BARONETTE	27790 NOVI RD	$34,958.07	0.1%
0011-20030-00-0	NOVI 39450 MEDICAL PROPERTIES LLC	39450 TWELVE MILE RD	$34,742.99	0.1%
0032-00015-00-0	ESA MANAGEMENT SITE #0680	21555 HAGGERTY RD	$34,532.28	0.1%
0013-00005-00-1	RHEMA NOVI INC	24500 MEADOWBROOK RD	$32,220.74	0.1%
0021-10088-00-1	MEDILODGE OF NOVI	48300 ELEVEN MILE RD	$31,564.80	0.1%
0012-03001-00-0	ITC TRANSMISSION	27175 ENERGY WAY	$31,448.60	0.1%
0013-00028-00-0	MEADOWBROOK MEDICAL BLDG LLC	25500 MEADOWBROOK RD	$31,397.49	0.1%
0011-20027-00-0	BCORE SELECT RAVEN 1 TRS LLC	27477 CABARET DR	$31,218.99	0.1%
0012-00031-00-0	RESEARCH PARK OF NOVI I LLC	27175 HAGGERTY RD	$31,062.20	0.1%
0012-01040-00-1	HCP LAND LLC	30001 CABOT DR	$30,155.66	0.1%
0031-30014-00-0	RYDER SCS	39550 THIRTEEN MILE RD	$29,689.73	0.1%
0022-22001-00-1	OCCIDENTAL DEVELOPMENT, LLC	47400 HERITAGE DR	$27,214.16	0.1%
0011-20062-00-1	A123 SYSTEMS, LLC	27101 CABARET DR DR	$26,773.80	0.1%
0014-50192-00-1	LUNA PROPERTIES NOVI LLC	42875 GRAND RIVER AVE	$26,745.72	0.1%
0011-45020-00-0	TWELVE MILE CROSSING, LLC	44325 TWELVE MILE RD	$26,325.55	0.1%
0032-00042-00-1	NOVI INN & SUITES	21625 HAGGERTY RD	$24,936.43	0.1%
0011-20033-00-0	GA HC REIT II KEYSTONE MEDICAL	46325 TWELVE MILE RD	$24,597.62	0.1%
0021-49030-00-1	DOUBLE TREE NOVI	42100 CRESCENT BLVD	$23,768.34	0.1%
0031-00063-00-0	NOVI COMMUNITY SCHOOL DIST	24062 TAFT RD	$23,623.10	0.1%
0014-00040-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, N.W. 8400-884	$23,615.95	0.1%
0032-25006-00-1	CRYSTAL GLEN OFFICE CENTER	39555 ORCHARD HILL PL	$23,477.45	0.1%
0014-00145-00-0	NORDSTROM INC 235	27640 NOVI RD	$22,970.43	0.1%
0032-00025-00-1	RSM DEVELOPMENT & MANAGEMENT	39500 HIGH POINTE BLVD	$22,792.87	0.1%

Account Number	Customer Name	Service Address	Amount Billed	%
0024-50305-00-1	BOCO ENTERPRISES INC	46100 GRAND RIVER AVE	$22,359.80	0.1%
0024-50185-00-1	VARSITY LINCOLN INC	49251 GRAND RIVER AVE	$22,027.55	0.1%
0011-53001-00-0	MEADOWBROOK COMMONS	25075 MEADOWBROOK RD	$21,914.16	0.1%
0011-20044-00-0	NOVI HOSPITALITY	39675 TWELVE MILE RD	$21,844.18	0.1%
0024-02001-00-0	MAINSTREET PARTNERSHIP LLC	43155 MAIN ST BLDG 200\300	$21,646.83	0.1%
0024-50315-00-0	JW HOTELS NOVI LLC	27000 PROVIDENCE PKWY	$21,341.02	0.1%
0034-00152-00-0	MAPLE MANOR REHABILITATION CENTER	31215 NOVI RD	$21,244.78	0.1%
0021-49070-00-1	STELLER HOSPITALITY NOVI, LLC	26150 TOWN CENTER DR	$21,007.82	0.1%
0011-45022-00-0	TWELVE MILE CROSSING, LLC	44175 TWELVE MILE RD	$20,880.50	0.1%
0026-50005-00-0	TARGET STORES T-1465	27100 WIXOM RD	$20,874.06	0.1%
0021-49040-00-1	DARDEN RESTAURANTS 1330	43300 CRESCENT BLVD	$20,384.76	0.1%
0012-00043-00-0	EBERSPAECHER NORTH AMERICA	29101 HAGGERTY RD	$20,354.42	0.1%
0011-20061-00-1	HINO	45501 TWELVE MILE RD	$19,706.53	0.1%
0014-00051-00-1	U-WASH, INC	26100 NOVI RD	$19,636.32	0.1%
0030-72001-00-1	SOUTH POINTE CONDO ASSOC	1127 SOUTH LAKE DR	$19,265.46	0.1%
0011-20063-00-1	OCCUPANT - Anthology of Novi Senior Housing	42400 TWELVE MILE RD	$18,967.51	0.1%
0012-01042-00-1	MAGNA SEATING OF AMERICA	30020 CABOT DR	$18,859.26	0.1%
0011-45016-00-0	TWELVE MILE CROSSING, LLC	44125 TWELVE MILE RD	$18,746.44	0.1%
0024-03002-00-1	SPORTS CLUB OF NOVI	42500 NICK LIDSTROM DR	$18,405.22	0.1%
0024-50265-00-0	WEST MARKET SQUARE	47840 GRAND RIVER AVE	$18,353.49	0.1%
0013-00060-00-1	ATI ELECTRONICS	26999 MEADOWBROOK RD	$18,313.15	0.1%
0032-25004-00-1	JFK INVESTMENT CO LLC	39500 ORCHARD HILL PL	$18,271.00	0.1%
0011-20043-00-0	BURTON ENERGY GROUP	27355 CABARET DR	$18,195.40	0.1%
0024-03001-00-1	CITY OF NOVI ICE ARENA	42400 NICK LIDSTROM DR	$17,849.01	0.1%
0034-00066-00-1	WASHME PROPERTIES	21510 NOVI RD	$17,837.55	0.1%
0026-50010-00-0	CATHOLIC CENTRAL HIGH SCHOOL	27225 WIXOM RD	$17,805.82	0.1%
0032-25008-00-0	ESA MANAGEMENT SITE #4058	39640 ORCHARD HILL PL	$17,503.99	0.1%
0011-45010-00-1	TWELVE MILE CROSSING, LLC	44225 TWELVE MILE RD	$17,486.33	0.1%
0014-50064-00-1	MARTY FELDMAN CHEVROLET	42355 GRAND RIVER AVE	$17,347.02	0.1%
0024-20009-00-1	HIROSAWA AUTOMOTIVE	43500 GEN-MAR	$17,309.65	0.1%
0032-17999-00-1	GATE HOUSE/LANDSCAPING WALL	25000 BROOKTOWN BLVD	$17,216.89	0.1%
0034-00064-00-1	GUERNSEY FARMS DAIRY	21300 NOVI RD	$16,843.58	0.1%
0032-16999-00-1	KTM47-13343	23938 RIDGEVIEW BLVD	$16,779.72	0.1%
0014-00041-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, N.E. 70018246	$16,634.91	0.1%
0011-45018-00-0	TWELVE MILE CROSSING, LLC	44375 TWELVE MILE RD	$16,468.31	0.1%
0032-04004-00-1	HCP LAND LLC	39675 MACKENZIE DR	$16,399.92	0.1%
0014-00042-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, S.W. 84068156	$16,399.47	0.1%
0021-49002-00-1	JFK INVESTMENT CO LLC	26200 TOWN CENTER DR	$16,324.78	0.1%
0014-00070-00-1	RED LOBSTER HOSPITALITY LLC	27760 NOVI RD	$16,276.66	0.1%
0011-50022-00-1	OUTBACK STEAKHOUSE INC	43455 WEST OAKS DR	$16,200.52	0.1%
0021-49025-00-1	NOVI TOWN CENTER	26060 INGERSOL DR	$15,905.19	0.1%
0024-00116-00-1	CITY CENTER PLAZA LP	25875 NOVI RD	$15,764.59	0.1%
0014-00044-00-0	MACY'S / FEDERATED DEPT STORES	27550 NOVI RD	$15,660.60	0.1%
0010-23002-00-1	METRO GROUP MANAGEMENT	43000 TWELVE OAKS CRESCENT	$15,644.67	0.1%
0031-41003-00-1	MAPLE PLACE SHOPPING CENTER	31190 NOVI RD	$15,626.09	0.1%
0021-83999-00-1	LIBERTY PARK	DECLARATION & 12 MILE SPK	$15,300.38	0.1%

Account Number	Customer Name	Service Address	Amount Billed	%
0021-10056-00-0	MARRIOTT CFRST STORE 311QM	42700 ELEVEN MILE RD	$15,224.81	0.1%
0024-50310-00-0	WELLTOWER OM GROUP LLC	26750 PROVIDENCE PKWY	$15,102.35	0.1%
0032-04001-00-1	HCP LAND LLC	39525 MACKENZIE DR	$15,045.71	0.1%
0012-01005-00-0	HCP LAND LLC	28001 CABOT DR	$14,982.45	0.1%
0021-49044-00-1	BLUE RIBBON RESTAURANT NOVI	43350 CRESCENT BLVD	$14,751.54	0.1%
0026-50013-00-0	WAL-MART STORES E LP 6657	27300 WIXOM RD	$14,619.55	0.1%
0014-00057-00-1	CHICK-FIL-A, INC	27750 NOVI RD	$14,522.33	0.1%
0012-23999-00-1	OCCUPANT - Dunhill park irrigation	20735 DUNHILL DR	$14,508.31	0.1%
0031-00071-00-1	CITY OF NOVI FINANCE DEPT	45175 TEN MILE RD	$14,471.59	0.1%
0021-49063-00-0	WAL-MART STORES EAST LP #5893	26090 INGERSOL DR	$14,287.17	0.1%
0011-62003-00-1	MAIN STREET VILLAGE APT II	25393 PENNSYLVANIA AVE	$14,119.96	0.1%
0024-50309-00-0	HEALTHCARE TRUST OF AMERICA #146201	26850 PROVIDENCE PKWY	$14,089.23	0.1%
				13.7%
			$3,407,634.53	13.7%

Total Billed 01.01.20 to 12.31.20 $24,937,059.35

EXHIBIT F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
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EDWARD F. KICKHAM, JR. (P 70332)
Attorneys for Plaintiff and the Class
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ROSATI, SCHULTZ, JOPPICH
& AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
STEPHANIE SIMON MORITA (P 53864)
Attorneys for Defendant
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Farmington Hills, MI 48331-3550
(248) 489-4100

AFFIDAVIT OF MICHEAL LOHMEIER

State of Michigan)
)
County of Oakland)

Micheal Lohmeier, being first duly sworn, deposes and says:

1. I am the City of Novi Assessor.

2. As the City of Novi Assessor I am responsible for tracking transfers of ownership of real property parcels within the City of Novi.

3. The City has 19,334 real property parcels.

4. For the calendar year 2014 through 2020, there were 7154 transfers of ownership of real property parcels on record with the City of Novi.

Further deponent saith not.

MICHEAL LOHMEIER

Subscribed and sworn to before
me in this 22 day of February, 2021.

PATRICIA DEERING
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Apr 5, 2025
ACTING IN COUNTY OF Oakland

Patricia Deering, Notary Public
Wayne County, State of Michigan
My Commission expires: 4/5/2025

EXHIBIT I

STATE OF MICHIGAN

COURT OF APPEALS

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and WOODVIEW CONDOMINIUM ASSOCIATION, Individually and as Representatives of a Class of Similarly Situated Persons and Entities,

Plaintiffs-Appellants,

v

CITY OF WESTLAND,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339143
Wayne Circuit Court
LC No. 15-006473-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates violated several provisions of law including MCL 123.141(1) and Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition. For the reasons set forth below, we affirm.[1]

[1] Because the trial court considered materials outside the pleadings, we will review the trial court's grant of summary disposition to defendant under MCR 2.116(C)(10). A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the

II. BACKGROUND

Defendant City of Westland (the City) operates and maintains a water and sewer system. By law, the rates charged to users of the system must be based on the water and sewer department's (the department) actual costs of providing those services to its inhabitants. Among the department's expenses is the amount it transfers to the City's general fund to cover its proportional share of the City's administrative costs.[2] Plaintiffs agree that the City may make such transfers to the general fund in order to compensate the City's other departments for the goods and services they render to the water and sewer department. However, plaintiffs maintain that the City has "grossly inflated" the costs of those goods and services by allocating a disproportionate amount of the City's administrative costs to the department. Plaintiffs allege that doing so violates the Headlee Amendment as well as MCL 123.141(3), common law ratemaking rules, and the City's Charter. Accordingly, plaintiffs seek a refund of what they deem to be overcharges paid in the previous six years, in addition to declaratory and injunctive relief.

Plaintiffs' claim rests largely on the testimony of their expert witness, James R. Olson, an analyst for MGT of America Consulting Group. MGT specializes in "indirect cost allocation" and primarily works with municipalities to identify "overhead" costs that can be allocated to specific departments. Olson reviewed the City's cost allocation sheet, the deposition testimony of City officials, and the City's balance sheet and budget. He took issue with the City's allocation methodology, asserting that it is not based on "actual cost data." For example, he pointed out that the City allocates 30% of its annual attorney fees to the department, but could not provide documentary support for that allocation. Similarly, Olson opined that the City improperly allocates 50% of the rent for the City's DPS garage to the water and sewer department and that the allocation should instead be based on the building's depreciation expense.

The City responds that Olson's testimony, while criticizing some individual allocations, failed to address, let alone establish, that the final rate charged was inconsistent with the department's *total* expenses. The City points out that Olson conceded that he did not perform a "full cost allocation study," meaning that, while Olson looked at certain individual categories of the City's cost allocation, he did not perform a complete analysis of the goods, services, and facilities provided by the City's general departments to the water and sewer department. Thus, Olson did not have an opinion as to whether the total amount of administrative costs allocated to

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> moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

[2] For instance, the City transfers water and sewer funds to the City's general fund to pay for a percentage of the operation of the City's IT Department, which provides services to the department.

the water and sewer department was reasonable. Nor did Olson perform a "rate study," which would have required him to identify all the department's expenses and identify the revenue necessary to operate the utility in a sound financial manner. Thus, Olson did not express an opinion on whether the actual rates were unreasonable in relation to the necessary revenue. In addition, he conceded that a 10 to 15% variation between budgeted costs and actual costs is reasonable.

Plaintiffs also claim that the City's calculation of water and sewer rates is improper because it includes an expense of $500,000 per year for future capital improvements and repairs. Plaintiffs do not dispute that the department's budgeting must include amounts to finance *current* capital improvements, but they assert that it is improper for the City to include sums for future, as yet unspecified capital improvements in its revenue requirements.

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

In June 2017, the trial court issued an opinion and order granting the City's motion for summary disposition, denying plaintiffs' motions for summary disposition, and denying plaintiffs' motion in limine. The trial court determined that plaintiffs failed to overcome the presumption that the City's rates were reasonable. The trial court also rejected plaintiffs' argument that the City's rates constituted a tax that was imposed in violation of the Headlee Amendment and MCL 141.91. Further, the trial court ruled that plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations set forth in MCL 600.308a(3). In denying plaintiffs' motion for in limine, the court stated that plaintiffs could move for an order compelling production of Peck's analysis, which would be a more appropriate remedy than striking the evidence. The court also determined that Beauchamp's analysis was reliable and that his explanation of methods used by the City would assist the trier of fact. The court concluded that both Peck and Beauchamp could serve as rebuttal witnesses to Olson.

III. ANALYSIS

A. REASONABLENESS OF RATES

MCL 123.141, *et seq.*, governs the sale of water outside territorial limits. Because the City purchases its water from the Great Lakes Water Authority,[3] it is a "contractual customer" under MCL 123.141(2). Accordingly, the City's water ratemaking[4] must comply with MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." However,

> MCL 123.141 does not alter the general standard of reasonableness applied by courts when reviewing utility rates. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. Accordingly, while a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. [*Trahey v Inkster*, 311 Mich App 582, 597; 876 NW2d 582 (2015) (citations omitted).]

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Id.* at 594. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi v Detroit*, 433 Mich 414, 427; 446 NW2d 118 (1989). "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Id.* at 431. "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

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[3] MCL 123.141(1) provides that "[a] municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants." The City has historically purchased its water from the city of Detroit; the GLWA was formed during the city of Detroit's bankruptcy proceedings.

[4] MCL 123.141 only applies to sale of water and therefore it does not govern the City's sewer ratemaking. However, the City's Charter requires reasonable sewer rates. Specifically, "[t]he City may fix and collect charges for such disposal services, tap-in fees and connection fees, the proceeds of which shall be exclusively used for the purpose of the sewage disposal system." Westland Charter, § 16.10. Further, "The Council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public utility services as the City may provide." Westland Charter, § 17.3.

As noted, plaintiffs argue that the City allocated too great a portion of certain administrative costs to the water and sewer department. Viewing the evidence in a light most favorable to plaintiffs, we agree that there is a question of fact regarding those particular allocations. Indeed, the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study.

We disagree with plaintiffs' contention, however, that questions regarding particular administrative costs, by themselves, precludes summary disposition. It is plaintiffs' burden to establish the unreasonableness of the City's rates, and they have failed to present evidence that the City's overall allocation of administrative costs to the water and sewer department is unreasonable. Specifically, Olson testified that he did not prepare a full cost allocation plan in analyzing the administrative expenses allocated to the water and sewer department. He also admitted that other municipal departments could have provided more services to the water and sewer department than reflected in the budget and that a full cost allocation plan could indicate that the cost allocation should be higher than the amount that the City allocated in its budget. Olson further acknowledged that rates are set prospectively, that such prospective budgeting cannot be conducted with mathematical certainty, and that it would be reasonable if the budgeted amount of a cost allocation was off by about 15%.[5]

Most significantly, plaintiffs failed to analyze the reasonableness of the City's overall rates by conducting a rate study. Olson agreed that if the rates cover the actual revenue requirements of the water and sewer department, then the rates are valid and customers will have suffered no damages. Yet Olson was not asked to review the overall expenditures of the water and sewer department, and he held no opinion overall concerning whether the total expenditures of the water and sewer department were reasonable. Thus, plaintiffs made no attempt to analyze the City's rates in lights of the department's revenue requirements. Nor have plaintiffs explained how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable.

In sum, plaintiffs argue that their claims may proceed solely on the basis of certain selected individual expense components that they have chosen to address without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the rates. Given the lack of a more universal analysis, plaintiffs have failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable.

Plaintiffs also fail to cite any authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses of a municipal utility that a plaintiff chooses to challenge without respect to whether

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[5] This testimony is consistent with established legal principles, including that "ratemaking is a prospective operation," *Trahey*, 311 Mich App at 597, and that "mathematic precision is not required" when a court assesses whether a utility fee is "reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged," *id.*

the overall cost allocation is reasonably accurate and without respect to whether the actual water and sewer rates are reasonable. Plaintiffs' argument is at odds with the limited role of the judiciary in reviewing municipal utility rates. See *Novi*, 433 Mich at 425-426, 428, 430. Nor have plaintiffs cited any authority for their implicit contention that they are entitled to the correction of every expense allocated to the water and sewer department that was allegedly overestimated.

Plaintiffs also argue that the City's rates are unreasonable because the City uses a portion of its revenue to create a reserve fund for future unspecified infrastructure improvements to its water and sewer systems. Plaintiffs fail to provide any legal authority to establish that this is an improper ratemaking procedure. To the contrary, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). According to the affidavit of Steven Smith, the City's finance director, the City's water and sewer systems are comprised of nearly 674 miles of infrastructure and have a replacement cost of approximately $674 million (i.e., it costs approximately $1 million to rebuild each mile of infrastructure). The City has existed for 50 years, its infrastructure has an expected life of 50 to 70 years, and it experiences an average of 160 water main breaks a year. Given this unrebutted evidence, plaintiffs do not overcome the presumption that a $500,000 annual addition to the City's cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

In affirming the trial court, we are not relying on the proposed testimony of Beauchamp or Peck regarding the City's revised allocation study. Even if the trial court properly considered those affidavits, the evidence must be viewed in a light most favorable to plaintiff, and there is clearly a question of fact regarding certain aspects of the City's administrative cost allocation. But Olson's own testimony establishes the necessity of an overarching analysis of the water and sewer department's revenue requirements. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that some improper expenses have caused the rates to become excessive or unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact regarding whether the City's rates were unreasonable. And because we do not rely on Beauchamp's or Peck's proposed testimony, we need not address whether the trial court erred in denying plaintiffs' motion in limine. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues.").

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to

the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. [*Bolt*, 459 Mich at 162, quoting *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954).]

Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61.[6] The trial court aptly noted: "Those who use water and sewer services

[6] Westland Ordinances, § 102-61 provides, in relevant part:

> The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user."

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's water and sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing water and sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its water and sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would most benefit from the construction. *Id.* Further, the cost of this project was $176 million over 30 years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. Here, the City's reserve fund will be used for future capital projects that will benefits all users of the water and sewer services. Those users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the City ensures that the users will pay a fee proportionate to the necessary costs of service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's water and sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[7] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10). Given our ruling, we decline to address whether plaintiffs' claims are barred by the applicable statute of limitations.

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[7] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

STATE OF MICHIGAN

COURT OF APPEALS

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities,

Plaintiff-Appellant,

v

CITY OF TAYLOR,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339306
Wayne Circuit Court
LC No. 15-013727-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates were unreasonable and that they constituted disguised taxes in violation of the Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). For the reasons set forth below, we affirm.[1]

[1] A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.

I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over $10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

[*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

II. ANALYSIS

A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide. . . ." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

> The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015). "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Novi v Detroit*, 433 Mich 414, 431; 446 NW2d 118 (1989). "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." *Plymouth v Detroit*, 423 Mich 106, 115; 377 NW2d 689 (1985). Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal

or improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See 64 Am Jur 2d, Public Utilities, § 125, p 516. Further, it is permissible to include a capital investment component in utility rates. See *Bolt v Lansing*, 459 Mich 152, 160, 164-165; 587 NW2d 264 (1998).

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There

was also testimony that the City's reserves are insufficient to meet its infrastructure renewal needs.

Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the

unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was $176 million over 30

years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

> The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

The users of the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax; particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[2] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10).

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[2] MCL 141.91 provides:

C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides in relevant part:

> The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays $44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of MCL 141.118(1)[3] by not paying for public fire protection costs.

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

[3] MCL 141.118(1) provides:

> Except as provided in subsection (2) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

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public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement.

STATE OF MICHIGAN

COURT OF APPEALS

KICKHAM HANLEY PLLC, as Trustee for a Certified Class of Persons and All Others Similarly Situated,

Plaintiff-Appellant,

v

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant-Appellee.

UNPUBLISHED
January 14, 2021

No. 351317
Oakland Circuit Court
LC No. 2019-172077-CZ

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

Plaintiff, assignee of the City of Oak Park and trustee for a certified class of persons defined in the final order approving a class settlement in Lower Court No. 15-149751-CZ, appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant. We affirm.

I. BACKGROUND FACTS

Defendant is a drainage district, which is an independent corporate entity that has powers conferred upon it by law.[1] Drainage districts are governed by drainage boards.[2] Defendant maintains and operates the George W. Kuhn Drain (the drain), which operates in an area that includes Oak Park.

Oak Park has a combined sewer system that collects both sanitary sewage and stormwater. That sewer system flows to the system operated by defendant. Generally, defendant diverts all of the stormwater flow from Oak Park and the other communities within the operational area of the drain to two water treatment plants respectively operated by the Detroit Water and Sewerage

[1] See MCL 280.5.

[2] See MCL 280.464.

Department and the Great Lakes Water Authority. All of the subject stormwater flow travels through Detroit's Dequindre Interceptor, and there the flow is measured by a meter. Accordingly, the water treatment plants charge defendant an annual flat rate to dispose of stormwater based on the measured flow, and defendant allocates that charge among the communities within the operational area of the drain.

In February 2005, defendant's drainage board tentatively established an apportionment of the costs of the drain for stormwater disposal for the communities within the operational area of the drain. As part of the apportionment, the drainage board made an allocation on the basis of an assumption that all water purchased from the Detroit Water and Sewerage Department would be returned as sanitary flow, and so only the difference between the purchased water and the "Master Meter Charges" would be considered stormwater flow. Thus, under the apportionment, two rates would be charged to the communities within the drain's operational area, one for the cost of sanitary sewage flow into the drain, and the other for stormwater flow, which would be apportioned among the communities on the basis of an engineering study that determined each community's contribution of stormwater.

In April 2005, the drainage board resolved to adopt the tentative apportionment of costs it established in February 2005. On the same day, the drainage board entered a Final Order of Apportionment that provided an apportionment of costs between the communities within the operational areas of the drain.

In February 2019, in Lower Court No. 2015-149951-CZ, the trial court entered a final judgment and order approving a class settlement between the plaintiffs, two persons acting as individuals and as representatives of a class of similarly situated persons (the class action plaintiffs), and the defendant, Oak Park.[3] The instant trial court took specific notice of the assignment provisions of that settlement agreement according to which any claims Oak Park possessed against Oakland County or its agencies—including defendant—for storm water management services relating to overcharges for stormwater management services would be assigned to the class action plaintiffs "or for their benefit." Additionally, plaintiff was appointed trustee of a litigation trust to pursue the claims against defendant on behalf of the plaintiffs, and was also appointed counsel for the litigation trust.

The trial court also noted that the class action plaintiffs and other members of the class who did not ask to be excluded from the class would be deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment and a period of time thereafter. Subsequently, Oak Park executed an assignment of claims to plaintiff.

Plaintiff filed its complaint against defendant on the basis of the assignment of Oak Park's claims to plaintiff as a trustee for the class action plaintiffs. In its complaint, plaintiff alleged that defendant charged Oak Park approximately $3 million dollars per year for the disposal of storm-water. It further alleged that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon

[3] These class action plaintiffs were legally represented by plaintiff.

the City by [defendant] on an annual basis." According to the complaint, the amount defendant charged Oak Park for stormwater disposal should have been the same amount defendant was charged by the water treatment plants for stormwater disposal.

Plaintiff alleged that defendant charged Oak Park "substantially more than the amount" charged by the water treatment plants for the disposal of Oak Park's stormwater since at least 2011. According to the complaint, defendant improperly reallocated the sanitary sewage disposal costs imposed by the water treatment plants to stormwater disposal costs, and as a result defendant overcharged Oak Park. Thus, plaintiff raised claims of breach of contract, assumpsit, and unjust enrichment against defendant. The trial court ultimately granted defendant's motion for summary disposition and dismissed plaintiff's claims.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). The trial court granted defendant's motion under MCR 2.116(C)(8). "A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.' A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (alteration in original), quoting *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

"Generally, this Court reviews de novo '[t]he interpretation of statutes and court rules.' " *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 513; 912 NW2d 216 (2018) (alteration in original), quoting *Estes v Titus*, 481 Mich 573, 578; 751 NW2d 493 (2008). "[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance . . . ." *Bonner v City of Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). This Court reviews equity cases "de novo on the record on appeal." *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010). "Whether a claim for unjust enrichment can be maintained is a question of law that we review de novo." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22; 831 NW2d 897 (2012).

B. BREACH OF CONTRACT

Plaintiff first argues that the trial court erred when it ruled that plaintiff failed to state a breach-of-contract claim. We disagree.

"A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2013) (quotation marks and citation omitted). "The party seeking to enforce a contract bears the burden of proving that the contract exists." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). "Michigan courts will not lightly presume the existence of an enforceable contract because, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 508; 853 NW2d 481 (2014) (quotation marks and citation omitted). There is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). Thus, "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* at 662 (quotation marks and citations omitted).

The elements required to create a valid contract are "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). "In order for consideration to exist, there must be a bargained-for exchange—a benefit on one side, or a detriment suffered, or service done on the other." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 101; 878 NW2d 816 (2016) (quotation marks and citation omitted). "Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise." *AFT*, 497 Mich at 235-236 (citations omitted). " 'Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed.' " *Kloian*, 273 Mich App at 452, quoting *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "A basic requirement of contract formation is that the parties mutually assent to be bound." *Rood v Gen Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). In other words, "the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington*, 305 Mich App at 508. Courts determine if there was a meeting of the minds by reviewing objective evidence such as "the expressed words of the parties and their visible acts." *Id.* (quotation marks and citation omitted).

Plaintiff alleged in its complaint that the April 2005 resolution of the drainage board and the Final Order of Apportionment created a contract between defendant and Oak Park, and that defendant breached that contract when it overcharged Oak Park for stormwater disposal. The trial court ruled that those documents did not satisfy the elements of contract formation because they did not contain "any offer or promises or promises made by either party to the other that require[d] acceptance . . . ."

In its brief on appeal, plaintiff does not explain how the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, and instead argues that the April 2005 resolution was binding on defendant whether or not it was a contract. However, in its reply brief, plaintiff addressed for the first time whether the Final Order of Apportionment and the April 2005 resolution satisfied the elements of contract formation, arguing that the consideration between Oak Park and defendant consisted of defendant's promise to charge Oak Park "a particular allocated percentage of the total cost of stormwater disposal."

"Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). Further, "[a] party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, or give issues cursory treatment with little or no citation of supporting authority." *Wolfe v Wayne-Westland Community Sch*, 267 Mich App 130, 139; 703 NW2d 480 (2005) (quotation marks and citation omitted). "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *MOSES, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006).

Plaintiff did not raise any challenges regarding the elements of contract formation in its brief on appeal, and may not do so in its reply brief. Given that plaintiff failed to adequately brief this argument, we deem it abandoned. And even if plaintiff had properly presented its arguments regarding consideration, plaintiff failed to address the other elements of contract formation therefore plaintiff would have otherwise failed to expose error on the part of the trial court.

Regardless, even if plaintiff had properly argued that the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, a brief review of the relevant portions of the Drain Code reveals that such an argument would have been meritless. Plaintiff is the assignee of Oak Park, and Oak Park is a public corporation that benefits from the drain that is operated and maintained by defendant. Under MCL 280.468, the drainage board was required to apportion the costs for the drain on the basis of the benefits accrued to each benefiting public corporation, and under MCL 280.478(1) and MCL 280.478(2) the drainage board was required to make an apportionment of costs for any necessary expenses incurred in the operation and maintenance of the drain. As a benefiting public corporation, Oak Park had the opportunity to object to the drainage board's apportionment of costs. See MCL 280.469.

Plaintiff's complaint did not raise any claim that the drainage board failed to comply with the Drain Code when it entered the Final Order of Apportionment, MCL 280.460, and plaintiff explicitly abandoned any such challenge in its brief on appeal. Given the requirements set by the Drain Code, the drainage board was in no way engaged in bargaining with Oak Park or any of the other benefiting public corporations when it entered the Final Order of Apportionment pursuant to its statutory obligations. The drainage board made no offer to Oak Park, there was no bargained-for exchange, or meeting of the minds, between Oak Park and defendant before the Final Order of Apportionment was entered, and none was required. Therefore, plaintiff has failed to overcome the strong presumption that the Final Order of Apportionment did not create a contract. See *Studier*, 472 Mich at 661. And while the Drain Code authorizes a drainage board to enter into contracts with public corporations, MCL 280.471, plaintiff did not allege that Oak Park had a separate contract with defendant.

Plaintiff also briefly contends that municipal resolutions are enforceable by their beneficiaries, citing our Supreme Court's holding in *Hardaway v Wayne Co*, 494 Mich 423; 835 NW2d 336 (2013). In that decision, the Court held that this Court improperly applied the last antecedent rule when it interpreted a municipal resolution pertaining to the entitlement of retirement benefits, and reinstated the trial court's grant of summary disposition of the plaintiff's declaratory judgment claim in favor of the defendant. *Id.* at 425, 427-429. Given that *Hardaway* concerned a declaratory judgment claim disposed of by way of summary disposition, rather than a

breach-of-contract claim premised on a municipal resolution, it is unclear why plaintiff relies on *Hardaway*.

C. ASSUMPSIT & UNJUST ENRICHMENT

Plaintiff next asserts that the trial court erred when it ruled that plaintiff failed to allege any damages in support of its assumpsit and unjust enrichment claims. We disagree.

The Michigan Supreme Court explained actions of assumpsit as follows:

> "We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action." [*Trevor v Fuhrmann*, 338 Mich 219, 223-224; 61 NW2d 49 (1953), quoting *Moore v Mandlebaum*, 8 Mich 433, 448 (1860).]

"Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law." *Kristoffy v Iwanski*, 255 Mich 25, 28; 237 NW 33 (1931). "The right to bring this action exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909). "The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citation omitted).

Unjust enrichment is "the equitable counterpart of a legal claim for breach of contract." *AFT Mich v Michigan*, 303 Mich App 651, 677; 846 NW2d 583 (2014). A party may raise a claim of unjust enrichment "only if there is no express contract covering the same subject matter." *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 734; 832 NW2d 401 (2013) (quotation marks and citation omitted). The complaining party must establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus*, 300 Mich App at 22-23. Unjust enrichment "describes the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Id.* at 23 (quotation marks and citation omitted).

In its complaint, plaintiff alleged that, even if there was no contract between Oak Park and defendant, defendant overcharged Oak Park for stormwater disposal by way of the Final Order of Apportionment. Plaintiff thus raised claims in assumpsit and unjust enrichment against defendant.

The trial court granted summary disposition of those claims because it ruled that plaintiff "failed to show that Oak Park suffered any damages." At the outset, plaintiff contends that the trial court erred when it dismissed plaintiff's claims in assumpsit and unjust enrichment, and it notes that those claims are essentially indistinguishable. We agree with the latter proposition and so will consider plaintiff's arguments regarding its unjust enrichment and assumpsit claims together.

Following its recitation of why it believes that claims of unjust enrichment and assumpsit against defendant were proper if there was no contract between defendant and Oak Park, plaintiff does not directly address the trial court's ruling that plaintiff failed to show that Oak Park was damaged by the stormwater disposal overcharges. Instead, plaintiff contends that Oak Park was the only entity that had standing to bring these claims against defendant, because the class action plaintiffs (i.e., Oak Park's ratepayers) did not directly pay the assessed stormwater disposal costs to defendant. However, the trial court did not reach the issue of plaintiff's standing by virtue of the assignment[4] it received from Oak Park, having disposed of the case on the ground that plaintiff failed to demonstrate that Oak Park was damaged by the stormwater disposal overcharges.

While the trial court did not explain the basis for its ruling, plaintiff alleged in its complaint that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon the City by [defendant] on an annual basis." Plaintiff attached a copy of the final judgment of the class action lawsuit to its complaint, in which the trial court for that case noted that, per the settlement agreement between Oak Park and the class action plaintiffs, the class action plaintiffs were deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment, as well as a period of time for future claims. And plaintiff concedes in its reply brief that the class action plaintiffs released their claims against Oak Park.

Given the foregoing, we surmise that the trial court ruled that plaintiff failed to establish that Oak Park was harmed by the stormwater disposal overcharges because Oak Park directly passed on that cost to the class action plaintiffs, who in turn released any claims they had against Oak Park. Because the actual ratepayers of the alleged overcharge (i.e., the class action plaintiffs) released their claims against Oak Park, plaintiff cannot show that defendant either retained money that in "good conscience, belongs, or ought to be paid, to the plaintiff," *Trevor*, 338 Mich at 223 (quotation marks and citation omitted), or that Oak Park suffered an inequity, *Karaus*, 300 Mich App at 22-23, because the money at issue belonged to Oak Park's ratepayers as opposed to Oak Park itself.

Plaintiff argues that any ruling that Oak Park was not harmed by the stormwater disposal overcharges because it passed through the overcharges to the class action plaintiffs runs afoul of a general rejection of "pass-through" defenses in all jurisdictions where such a defense has been

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[4] "Under general contract law, rights can be assigned unless the assignment is clearly restricted," and an "assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004).

raised. In support of its argument, plaintiff relies on a miscellany of decisions from a number of different contexts.

The earliest decision upon which plaintiff relies, *Southern Pacific Co v Darnell-Taenzer Lumber Co*, 245 US 531, 533-535; 38 S Ct 186; 62 L Ed 451 (1918), arose from a judgment obtained against a number of railroad defendants (i.e., common carriers) after the Interstate Commerce Commission found that the rate they charged for transporting hardwood lumber was excessive, and where the United States Supreme Court held that the plaintiffs were permitted to collect a judgment against the defendants even if the plaintiffs may have passed on the excessive charge to their own customers. The Court explained that a common "carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum," because "of the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.* Thus, that holding pertained to proceedings involving a decision by the Interstate Commerce Commission, and commercial transactions where it would be difficult to ascertain how the excessive rate affected the prices paid by customers of the affected businesses. Given that plaintiff readily alleged in its complaint that Oak Park passed the overcharges on to its ratepayers, and has not shown that there would be any particular complexity in determining how the overcharge directly affected the fees paid by Oak Park's ratepayers, plaintiff's reliance on *Southern Pacific Co* is inapt.

Plaintiff also relies on decisions with similar holdings that pertain to claims based on federal antitrust violations: *Hanover Shoe, Inc v United Shoe Machinery Corp*, 392 US 481, 488-489, 493-494; 88 S Ct 2224; 20 L Ed 2d 1231 (1968) (rejecting a "passing-on" defense while recognizing that a buyer who was charged an illegally high price for materials used for the buyer's business had established a prima facie case under federal antitrust law); *Oakland Co v Detroit*, 866 F2d 839, 844-846 (CA 6, 1989)[5] (holding that the county plaintiffs would have standing to bring claims under federal antitrust and racketeering law and could demonstrate an injury even if they recouped the illegal overcharges by passing it on to their own customers). However, those decisions pertain to claims based on violations of specific federal statutes rather than claims in assumpsit or unjust enrichment. Because the rationale for their disavowal of a "pass-through" or "passing-on" defense is based on considerations directly related to the aforementioned federal statutes, those cases do not militate in favor of adopting those holdings in the wholly distinct context of claims in assumpsit or unjust enrichment. Moreover, plaintiff, by virtue of its representation of the class action plaintiffs, fully demonstrated that a class action claim could be brought against Oak Park by its ratepayers, even if that litigation ended with the class action plaintiffs agreeing to release their claims against Oak Park.

Plaintiff also cites *Northern Arizona Gas Serv, Inc v Petrolane Transp, Inc*, 145 Ariz 467, 476; 702 P2d 696 (Ariz App, 1984), where the Arizona Court of Appeals held that the plaintiff's "waiver of its claim for lost profits did not constitute an admission that none resulted from [the defendant's] activities," because "it was based on the complexity of issues of proof—the very reason for the supreme court's rejection of the passing-on defense in *Hanover Shoe*." And the

[5] "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *People v Patton*, 325 Mich App 425, 435 n 1; 925 NW2d 901 (2018).

Arizona court also noted that the plaintiff was "the only party that can recover the overcharge from" the defendant. *Id.* Plaintiff has not shown that there is any complexity with issues of proof regarding the effect of the overcharges, and, as discussed above, Oak Park's rate-payers were entitled to recover the overcharges from Oak Park but they released those claims. Therefore, plaintiff's reliance on this decision is inapt.

For these reasons, plaintiff has failed to show that the trial court erred in concluding as a matter of law that Oak Park did not incur any damages in this matter.

Plaintiff also argues that the trial court erred when it granted defendant's motion for summary disposition because plaintiff's allegation that defendant charged Oak Park an unreasonable rate for stormwater disposal presented a question of fact. Again, we are not persuaded.

In its complaint, plaintiff supported its second claim in assumpsit and its claim of unjust enrichment by alleging that defendant's charge for stormwater disposal was unreasonable because it exceeded the costs set by the Final Order of Apportionment. The trial court did not specifically address that allegation in its ruling, having disposed of the case on the ground of the lack of damages suffered by Oak Park. Because we affirm the result below on that ground, we need not consider the question of reasonableness of the stormwater disposal charge.

Nonetheless, plaintiff fails to show that defendant was under some general duty of reasonableness in connection with its stormwater disposal charges. Plaintiff relies on *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412; 671 NW2d 572 (2003). The discussion of reasonableness in that decision was limited to whether a "tap-in fee" for connecting to a municipal water system was reasonable under the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, where a municipality is permitted to set the rates for services falling under that act provided that those rates are reasonable. *Id.* at 417-418.[6] But plaintiff provides no argument or explanation regarding how the RBA might be applicable in this situation.

And plaintiff did not raise an independent claim in its complaint that defendant charged unreasonable rates; rather, its allegation that the rates were unreasonable merely supported a claim in assumpsit and a claim of unjust enrichment. Given that plaintiff has failed to cite legal authorities that establish defendant was required to charge a reasonable rate, or otherwise adequately brief how the trial court erred, plaintiff has abandoned this argument on appeal. See *MOSES, Inc*, 270 Mich App at, 417; *Wolfe*, 267 Mich App at 139.

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[6] Plaintiff also cites two other decisions that do not show that defendant was required to charge a reasonable rate. See *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015) (where the city defendant challenged the trial court's finding that its water and sewer rates were unreasonable under the defendant's own city charter, which required the defendant's city council to set "just and reasonable rates" for public utility services provided by the defendant); *Plymouth v Detroit*, 423 Mich 106, 111; 377 NW2d 689 (1985) (a breach of contract action where the municipal water contract between the parties required the defendant to set rates for the water that was reasonable in relation to the costs incurred by the defendant).

Plaintiff also briefly contends that defendant asserts that Oak Park released its claims against defendant during the class action suit. There is no indication that defendant actually raised this argument in the trial court. Because the trial court never considered any such contention, we decline to consider it.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Jonathan Tukel

STATE OF MICHIGAN

COURT OF APPEALS

KICKHAM HANLEY PLLC,

Plaintiff-Appellant,

v

OAKLAND COUNTY MICHIGAN,

Defendant,

and

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant-Appellee.

UNPUBLISHED
May 2, 2019

No. 341076
Oakland Circuit Court
LC No. 2017-159351-CZ

Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

PER CURIAM.

Plaintiff, Kickham Hanley PLLC, appeals as of right the trial court's order granting summary disposition of its claims under MCR 2.116(C)(7) and (8) and denying its motion for leave to amend its complaint. We affirm.

I. BACKGROUND

Plaintiff commenced this action against defendants[1] after the settlement of a class action lawsuit brought by a water and sewer ratepayer against Royal Oak, Michigan. The class representative alleged Headlee Amendment violations, Const 1963, art 9, § 31, and challenged Royal Oak's mandatory debt service charge and mandatory stormwater disposal charge to users of its water and sanitary disposal services. The circuit court in that action dismissed both counts of the complaint and the class representative moved for reconsideration. While that motion

[1] The trial court dismissed Oakland County based upon a stipulation of the parties.

pended, the parties settled. The circuit court approved the settlement and entered a final judgment.

During the class action litigation, the class representative came to believe that defendant, the George W. Kuhn Drainage District (GWKDD), inflated Detroit Water and Sewerage Department (DWSD) charges for stormwater disposal and overcharged for several years Royal Oak which passed on the charges to users. As part of the settlement in the class action lawsuit, Royal Oak paid a settlement to the class and assigned any claims it may have had for refund of the overcharges to plaintiff, as the trustee for a litigation trust. In its assignment, Royal Oak made no warranty or representation that it, in fact, imposed any overcharges or that any refunds were owed. The class members in turn released Royal Oak from any and all claims they had against Royal Oak concerning the city's rates and charges. The circuit court entered a final judgment and order approving the settlement and appointing plaintiff as the trustee of a litigation trust established for the benefit of the class members. The order authorized plaintiff to pursue a claim for refund of the GWKDD's alleged overcharges and ordered that any monetary recovery be distributed to the class members.

In its complaint, plaintiff alleged that Royal Oak's combined sewer system flows through the George W. Kuhn Drain, which is owned and maintained by Oakland County. The GWKDD is a component unit of Oakland County, comprised of several municipalities in the area, including Royal Oak, whose stormwater and sewerage flow into the Kuhn Drain. The GWKDD's stormwater flow is conveyed for ultimate disposal by Oakland County to a treatment plant operated by DWSD or the Great Lakes Water Authority (GLWA) for ultimate disposal. The DWSD charges the GWKDD a flat annual rate for stormwater disposal based on a formula tied to the amount of rainfall and the volume of surface water that enters the county's system for disposal. The GWKDD, in turn, proportionately allocates DWSD's stormwater charges among the municipalities in the district and charges each municipality that has a combined sewer system, including Royal Oak, a flat rate per month for stormwater disposal based on an apportionment formula stated in a resolution approved and adopted by the Drainage Board for the George W. Kuhn Drain at a public meeting held on April 19, 2005, and specified in the Drainage Board's Final Order of Apportionment issued April 19, 2005, pursuant to the board's resolution. The Final Order of Apportionment provided for the apportionment of the costs of administration, operations, and maintenance of the George W. Kuhn Drain. The Drainage Board allocated 29.7915% of the costs to Royal Oak.

Royal Oak, in turn, passed through the charges imposed by the GWKDD to its ratepayers by incorporating the charges into its water and sewer rates to recover the entire amount of the GWKDD's charge. The Drainage Board's Final Order of Apportionment provided that the charges to the municipalities, including Royal Oak, were comprised of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total stormwater flow and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System.

Plaintiff, as Royal Oak's assignee, filed a two count complaint against Oakland County and the GWKDD alleging a breach of contract claim and an equitable claim in assumpsit for money had and received. Plaintiff alleged that the GWKDD charged Royal Oak in excess of the amount DWSD charged for disposal of the stormwater and that the Drainage Board's resolution

contractually obligated the GWKDD to charge Royal Oak only its proportionate share of the DWSD's actual charges to the GWKDD. Plaintiff claimed that, by overcharging Royal Oak, the GWKDD breached the contract causing Royal Oak breach of contract damages. Alternatively, plaintiff alleged that, if no express contract existed, based on Royal Oak's assignment of its claims, plaintiff had entitlement to recover the GWKDD's overcharges through an action in assumpsit. The GWKDD, in lieu of filing an answer, moved for summary disposition under MCR 2.116(C)(7) and (8). The GWKDD asserted that the Drainage Board's resolution that formed the basis of plaintiff's breach of contract claim did not constitute a contract. The GWKDD also asserted that plaintiff's claims in actuality alleged tort liability from which the GWKDD had governmental immunity. Regarding the assumpsit count, the GWKDD asserted that plaintiff stood in the shoes of Royal Oak as its assignee and had no right to any damages from the alleged overcharges because the city passed through the overcharges to the ratepayers and suffered no compensable loss.

While the GWKDD's summary disposition motion pended, plaintiff filed an amended complaint that added an unjust enrichment claim. Defendant moved to strike plaintiff's amended complaint and the trial court granted the motion prompting plaintiff to file a motion for leave to amend. At the conclusion of a hearing on the parties' motions, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), denied plaintiff's motion for leave to amend, and dismissed plaintiff's lawsuit with prejudice.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

We review de novo the trial court's grant of summary disposition under MCR 2.116(C)(8) to determine whether the opposing party failed to state a claim upon which relief can be granted. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). In *Dalley*, this Court explained:

> A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the moving party. A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id.* at 304-305 (quotation marks and citations omitted).

In a contract action the trial court may examine the contract attached to the complaint. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Further, whether an equitable claim can be maintained presents a question of law subject to de novo review. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

B. BREACH OF CONTRACT

Plaintiff first claims that the trial court erred by granting summary disposition of its breach of contract claim. We disagree.

The party claiming a breach of contract must establish by a preponderance of the evidence (1) the existence of a contract, (2) the other party's breach, and (3) damages to the party claiming breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). An express contract is "an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language either orally or in writing." *Benson v Dep't of Mgt and Budget*, 168 Mich App 302, 307; 424 NW2d 40 (1988) (quotation marks and citation omitted). In *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015), our Supreme Court summarized the principles of contract formation as follows:

> A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The party seeking to enforce a contract bears the burden of proving that the contract exists. Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise. [Citations omitted.]

Further, to create a contract, there must be an offer and acceptance by the parties signifying their unambiguous mutual assent or meeting of the minds on the essential terms. *Kloian*, 273 Mich App at 452-253 (citations omitted).

In this case, plaintiff alleged one count of breach of contract based on the resolution adopted by the Drainage Board. It argued to the trial court that the resolution coupled with the Drainage Board's Final Order of Apportionment constituted an express contract that the GWKDD breached. The record reflects that plaintiff attached the resolution and the Final Order of Apportionment to its complaint as exhibits making them part of its pleadings and relied on those documents to allege the existence of a contract between the GWKDD and Royal Oak. Therefore, the trial court could properly consider those documents for determination of defendant's summary disposition motion under MCR 2.116(C)(8). *Liggett*, 260 Mich App at 133.

Plaintiff argues as it did to the trial court that the resolution and the Final Order of Apportionment constituted a binding express contract between the GWKDD and Royal Oak that the GWKDD breached. We disagree.

The language of the Drainage Board's resolution and its Final Order of Apportionment plainly establish that these two documents neither individually, nor combined, constituted a binding contract between the GWKDD and Royal Oak. The documents expressed no offer or promises made by either party to the other that required acceptance. Nor did the documents express the five elements necessary for the creation of a valid contract in Michigan.

The Drainage Board's resolution and its Final Order of Apportionment expressed independent determinations made by the Drainage Board, as statutorily required under Chapter

20 of Michigan's drain code of 1956, MCL 280.461 *et seq*. which governs intracounty drains. The GWKDD is a drainage district, a governmental body with powers conferred upon it by law. See MCL 280.5. The drain code authorizes recovery of the costs of county drains necessary for the public health, MCL 280.462, and makes drainage boards responsible for the operation and maintenance of such drains, MCL 280.478.[2] Under the drain code, drainage boards must establish percentages to apportion the costs of operating and maintaining drains to the public corporations assessed for the costs of the drain, considering the benefits that accrue to each public corporation and the extent to which each public corporation contributes to the conditions which make the drain necessary. See MCL 280.468; MCL 280.469; MCL 280.478. Drainage boards are statutorily required to determine, after notice and a hearing, the apportionment of the costs and confirm their determinations by issuance of a final order of apportionment. See MCL 280.469; MCL 280.478. The drain code, however, nowhere provides that a final order of apportionment issued by a drainage board constitutes a contract with the municipal entities to which the order applies. Nor does the drain code grant a right of action to such entities for an alleged breach of a final order of apportionment.

The resolution and Final Order of Apportionment at issue in this case, therefore, constituted a statutorily required determination that apportioned the costs of stormwater disposal and treatment by the DWSD, and allocated to the municipalities in the GWKDD their proportionate share. Neither the resolution nor the Final Order of Apportionment, nor those documents combined constituted contracts on which Royal Oak could base a breach of contract claim. Plaintiff, therefore, failed and could not meet its burden of establishing the existence of a contract. Accordingly, the trial court properly granted summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8).[3]

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[2] MCL 280.462 provides: "County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations." MCL 280.478 provides, in part: "Any necessary expenses incurred in the administration and in the operation and maintenance of the drain and not covered by contract shall be paid by the several public corporations assessed for the cost of the drain."

[3] Defendant also argues that, because plaintiff's claims were premised on the resolution and Final Order of Apportionment, the claims challenged the propriety of the Final Order of Apportionment and the legality of apportioning the costs to Royal Oak. Defendant contends that plaintiff's claims were barred by the limitations period prescribed under MCL 280.483 which governs challenges to orders of apportionment. We find no merit to defendant's argument because plaintiff's complaint plainly did not challenge the apportionment decision. Further, we decline to review this issue because it is not necessary for the disposition of this case. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549-550; 599 NW2d 489 (1999).

C. ASSUMPSIT

Plaintiff next argues that the trial court erred by granting defendant summary disposition because, in the absence of an express contract, it could recover the overcharges on equitable grounds in assumpsit for money had and received. We disagree.

A claim in assumpsit is "an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff." *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909) (quotation marks and citation omitted). The right to bring an action in assumpsit "exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Id.* at 626 (citation and emphasis omitted); see also *Trevor v Fuhrmann*, 338 Mich 219, 223-224; 61 NW2d 49 (1953). As our Supreme Court explained in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> We understand the law to be well settled that an action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover; and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

"The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225.

In this case, plaintiff alleged a claim in assumpsit for money had and received on the ground that the GWKDD improperly overcharged Royal Oak contrary to the Drainage Board's resolution. Plaintiff based that alternative claim on its position as Royal Oak's assignee. Plaintiff did not dispute that Royal Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard.

Under Michigan law, an assignee stands in the shoes of the assignor and acquires only the same rights as the assignor and remains subject to the same defenses as the assignor. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mortg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2012). Therefore, as Royal Oak's assignee, plaintiff acquired no more rights than Royal Oak had at the time of the assignment and it remained subject to the same defenses as Royal Oak. In this case, plaintiff sought a refund of the alleged overcharges as Royal Oak's assignee. Royal Oak, however, passed through to its water and sewer ratepayers the GWKDD's charges by incorporating them into the water and sewer rates. Royal Oak suffered no loss because the funds it paid to the GWKDD were recovered from its ratepayers who paid their water and sewer bills. The record reflects that plaintiff conceded at the hearing that Royal Oak did nothing wrong and had authority to charge its ratepayers whatever amount the GWKDD charged Royal Oak,

including the alleged overcharges, because Royal Oak was "purely a pass-through." Thus, if the GWKDD overcharged and collected fees from Royal Oak for stormwater disposal, plaintiff can claim no right to recover from the GWKDD because Royal Oak suffered no loss from its payment of the alleged overcharges. Royal Oak passed on the charges and passed on the ratepayers' payments. Royal Oak recouped any excess payments from its water and sewer ratepayers. Royal Oak had no claim against the GWKDD that it had in its possession money which in equity and good conscience belonged to Royal Oak. Royal Oak, therefore, occasioned no compensable loss. *Trevor*, 338 Mich at 224-225; *Hoyt*, 158 Mich at 626. The trial court correctly discerned that Royal Oak had no claim in assumpsit. Consequently, plaintiff failed and could not state a claim in assumpsit.

Plaintiff argues that federal antitrust law principles articulated in the United States Court of Appeals for the Sixth Circuit's decision in *Oakland Co v Detroit*, 866 F2d 839 (CA 6, 1989) and the Supreme Court's decision in *Illinois Brick Co v Illinois*, 431 US 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977) should be considered and applied in this case. Both of those cases, however, are distinguishable because in *Oakland Co*, the Sixth Circuit addressed whether counties had standing to bring a federal antitrust action and seek treble damages under the Racketeering Influence and Corrupt Organizations Act (RICO), and in *Illinois Brick*, the Supreme Court addressed who could seek recovery under the Clayton Act in an antitrust action. The courts considered who constituted an injured party within the meanings of RICO and the Clayton Act for federal antitrust violation claim purposes. The courts based their decisions on concerns that holding otherwise would lead to the filing of numerous antitrust actions and unmanageable antitrust class actions that presented enormous evidentiary complexities and uncertainties. We do not find the rationale for the courts' decisions applicable in this case. Further, neither case involved an equitable action in assumpsit. Accordingly, we decline to apply federal antitrust law principles in this case.

Although the ratepayers may have had viable claims against a government entity for the overcharges they allegedly paid,[4] the class members settled and released Royal Oak from any and all liability for refunds of their alleged overpayments. Under *Hoyt*, the right to bring an action for assumpsit must be held by the plaintiff who can establish that the defendant has in its possession money which, in equity and good conscience, belonged to the plaintiff. In this case, plaintiff sued as Royal Oak's assignee for recovery of money paid to the GWKDD. The money plaintiff sought did not belong to Royal Oak, its assignor, but to the ratepayers. Therefore, the

[4] See *Bond v Public Schools of Ann Arbor*, 383 Mich 693; 178 NW2d 484 (1970).

trial court did not err by granting the GWKDD summary disposition of plaintiff's claim in assumpsit.[5]

III. GOVERNMENTAL IMMUNITY

Defendant argues that, in the absence of a contract, plaintiff's claims constituted negligence claims subject to government immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. Plaintiff counters by asserting that the trial court correctly decided that government immunity did not apply in this case. We agree that the trial court correctly determined this issue.

Under MCR 2.116(C)(7), "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Dybata v Wayne Co*, 287 Mich App 635, 637; 791 NW2d 499 (2010). "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id.* (citations omitted). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id.* at 637. Further, this Court reviews de novo the application of governmental immunity. *Id.* at 638.

"The [GTLA] provides 'broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function.' " *Milot v DOT*, 318 Mich App 272, 276; 897 NW2d 248 (2016), quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). There is no dispute that the GWKDD, a unit of Oakland County, a political subdivision of the state of Michigan, is a governmental entity generally immune from tort liability under MCL 691.1407(1). *Milot*, 318 Mich App at 276. This Court explained in *Yellow Freight Sys, Inc v State of Michigan*, 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds 464 Mich 21 (2001), rev'd 537 US 36; 123 S Ct 371; 154 L Ed 2d 377 (2002), that "[a]n action in assumpsit for money had and received is not an action in tort." "Therefore, governmental immunity from tort liability under MCL 691.1407 . . . does not apply." *Id.* Accordingly, we find no merit to defendant's argument that, in the absence of a contract, plaintiff's assumpsit claim should have been construed as a negligence claim barred by governmental immunity. We hold that the trial court did not err in concluding that governmental immunity did not apply in this case.

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[5] Defendant also argues that this action improperly imposed against it a certified class from the earlier settled action despite the fact that defendant was not a party to that action. Although defendant raised this issue before the trial court, the trial court did not decide the issue. Therefore, the issue was not preserved for review by this Court and we decline to review it. Further, the issue is not necessary for the disposition of this case. *Fast Air, Inc*, 235 Mich App at 549-550.

IV. AMENDED COMPLAINT

Plaintiff also argues that the trial court erred by granting defendant's motion to strike its first amended complaint and by denying its motion for leave to amend under MCR 2.118(A)(2) based on futility. We disagree.

We review for an abuse of discretion a trial court's decision to strike a pleading. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). We also review for an abuse of discretion a trial court's decision regarding a motion for leave to file an amended complaint. *Kostadinovski v Harrington*, 321 Mich App 736, 742-743; 909 NW2d 907 (2017). An abuse of discretion occurs when the court's decision results in an outcome outside the range of principled outcomes. *Decker v Trux R US, Inc*, 307 Mich App 472, 478; 861 NW2d 59 (2014). A trial court abuses its discretion when it makes an error of law. *Kostadinovski*, 321 Mich App at 743. We review de novo a trial court's interpretation of a court rule. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 348; 852 NW2d 22 (2014). "[W]hether a claim for unjust enrichment can be maintained is a question of law" subject to de novo review. *Morris Pumps*, 273 Mich App at 193.

"The principles of statutory construction apply to the interpretation of the Michigan Court Rules." *Decker*, 307 Mich App at 479. We look to " 'the plain language of the court rule in order to ascertain its meaning' and the 'intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.' " *Id.*, quoting *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). " 'If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written.' " *Decker*, 307 Mich App at 479, quoting *Jenson v Puste*, 290 Mich App 338, 342; 801 NW2d 639 (2010).

In this case, plaintiff filed the complaint on June 20, 2017. In lieu of answering, on August 18, 2017, the GWKDD moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Before responding to the GWKDD's summary disposition motion, plaintiff filed an amended complaint. That prompted the GWKDD to move to strike plaintiff's amended complaint under MCR 2.115(B) on the ground that its filing of a motion for summary disposition precluded plaintiff from filing an amended complaint without first obtaining leave from the trial court under MCR 2.118(B)(2). At the hearing on the GWKDD's motion to strike, the trial court held in abeyance its ruling. Nevertheless, the trial court later entered an order granting the GWKDD's motion and striking plaintiff's amended complaint.

MCR 2.118 governs amendment of a party's pleadings. *Ligons v Crittenton Hosp*, 490 Mich 61, 80; 803 NW2d 271 (2011). MCR 2.118(A) provides, in pertinent part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

MCR 2.118(A)(1) permits a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party[.]" *Ligons*, 490 Mich at 80 (quotation marks and citation omitted). MCR 2.110(A) specifies that the term "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer, and a reply to an answer, and states that "[no] other pleading is allowed." "[W]hen a court rule specifically defines a given term, that definition alone controls." *Ligons*, 490 Mich at 81 (quotation marks and citation omitted). The GWKDD's motion for summary disposition, therefore, was not a responsive pleading. *Huntington Woods v Ajax Paving Indus, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989). Accordingly, plaintiff's right as a matter of course to amend its complaint under MCR 2.118(A)(1) was not triggered by GWKDD filing of its motion for summary disposition of plaintiff's claims in its original complaint. Plaintiff's filing without leave to amend did not comport with the requirements of MCR 2.118(A)(1). The trial court, therefore, did not abuse its discretion by striking plaintiff's improperly filed amended complaint.

The record reflects that plaintiff then moved for leave to amend its complaint to state two claims in assumpsit and to assert a new count for unjust enrichment. Under MCR 2.118(A)(2), "[a] court should freely grant leave to amend a complaint when justice so requires." *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998). In *Lane*, this Court explained:

> Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.
>
> * * *
>
> An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. [*Id.* at 697 (citations omitted).]

In this case, the record reflects that the trial court considered plaintiff's proposed amended complaint and determined that the amended allegations and proposed unjust enrichment claim failed to overcome plaintiff's original complaint's deficiencies and failed to state a claim upon which relief could be granted. The trial court concluded that plaintiff's new unjust enrichment claim was futile for the same reasons that plaintiff's assumpsit claim failed.

The equitable right of restitution exists when a person has been unjustly enriched at another person's expense. *Morris Pumps*, 273 Mich App at 193. The law will imply a contract "to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Id.* at 194; see also *Belle Isle Grill*, 256 Mich App at 478. To sustain a claim of unjust enrichment, "a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195. "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

In this case, plaintiff stood in the shoes of Royal Oak as its assignee. It alleged in its proposed amended complaint that the GWKDD was unjustly enriched by overcharging Royal Oak for the costs of stormwater disposal. Although plaintiff alleged that the GWKDD received a benefit and asserted that it would be unjust for the GWKDD to retain the alleged overcharges, plaintiff cannot establish any inequity resulting to Royal Oak from the GWKDD's retention of the overcharges because Royal Oak passed through to ratepayers the alleged overcharges and recouped from them the amount it allegedly overpaid. While the retention of the alleged overcharges collected by the GWKDD may have resulted in an inequity to the ratepayers, Royal Oak suffered no loss. The record reflects that plaintiff did not specifically allege in its proposed amended complaint that any inequity resulted to Royal Oak. Royal Oak could not state a claim for unjust enrichment under the circumstances presented in this case. Therefore, plaintiff, as Royal Oak's assignee, could not state a claim for unjust enrichment. Because Royal Oak admittedly passed through the charges to its water and sewer ratepayers, the GWKDD was not unjustly enriched at the expense of Royal Oak. *Id.* at 195. Accordingly, plaintiff's proposed unjust enrichment claim suffered from the same defect as its assumpsit claim and the trial court could properly deny plaintiff's motion to amend on the ground of futility. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend its complaint.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ James Robert Redford

EXHIBIT J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOAN GREENFIELD, Individually and as Representative of a class of similarly situated Persons and entities,
Plaintiff,

v

Case No: 18-169707-CZ
Hon. Denise Langford Morris

FARMINGTON HILLS,
Defendant.
_____/

ORDER DENYING MOTION FOR CLASS CERTIFICATION

This matter was before the Court on Plaintiff's Motion for Class Certification. The Court heard oral arguments and took the matter under advisement. After careful review of the relevant law and pleadings, the Court rules as follows. Class certification must be denied because Plaintiff has failed to satisfy the five factors required pursuant to MCR 3.501(A)(1). Plaintiff has not shown that the proposed class members have suffered any actual injury. In addition, the Court finds that under the facts presented, it is not probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administrating the action to justify a class action.

IT IS HEREBY ORDERED that Plaintiff's Motion for Class Certification is DENIED.

IT IS SO ORDERED.

/s/ Denise Langford Morris

DATED: 12/6/2019

DENISE LANGFORD MORRIS CM
Circuit Court Judge