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. Judge Nanci Grant

HEARING DATE:
July 13, 2022

Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

Randal S. Toma (P56166)
Randal Toma & Associates PC
500 S. Old Woodward Ave., Floor 2
Birmingham, MI 48009
(248) 948-1500
Attorneys for Plaintiff and the Class

Thomas R. Schultz (P42111)
Steven P. Joppich (P46097)
Stephanie Simon Morita (P53864)
Rosati Schultz Joppich & Amtsbuechler PC
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
Attorneys for Defendant

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

The Motion for Summary Disposition filed by the Defendant City of Novi (the "City") is an invitation to error. It asks the Court to completely disregard the standard governing motions filed under MCR 2.116(C)(10) by: (1) viewing the evidence in the light most favorable to the City, (2) disregarding all of Plaintiff's contrary evidence, including the opinions of his well-qualified expert, and (3) ruling **as a matter of law** that that the City's Water and Sewer Rates, "viewed as a whole," have been "reasonable" in that they have **not** been "excessive." *See Youmans v. Bloomfield Township*,

336 Mich. App. 161, 219, 969 N.W.2d 570 (2021). The City seeks this finding even though it is undisputed that, between July 1, 2015 and June 30, 2019, the City increased its cash and investments in the Water and Sewer Fund from $56 million to about $69 million.

The Court should decline the City's improper invitation to ignore the (C)(10) standard. Indeed, the Court already has denied the City's Motion for Summary Disposition based upon MCR 2.116(C)(8)—rejecting every single argument advanced by the City. *See* Order and Opinion dated January 21, 2022 ("Opinion") (Exh. 1 hereto). In doing so, the Court specifically held that "*Youmans* made it clear that to bring a successful unjust enrichment claim in this circumstance, a class of plaintiffs must prove **only** that the municipal entity was 'excessively (and thus unjustly) enriched.'" Opinion at p. 7 (emphasis added). When the Court properly applies the (C)(10) standard, it is clear that Plaintiff's evidence creates genuine issues of material fact as to the "reasonableness" of the City's Water and Sewer Rates and Charges under the *Youmans* standard.

The City's basic defense to all of Plaintiff's claims[1]—seemingly its only serious defense—is that the cash hoard it has accumulated is not "excessive" because prior to 2020 (the year this case was filed) it always planned to use its cash reserves at some unidentified time in the future to pay for yet-unidentified capital improvements to its water and sewer system. But as demonstrated below, Plaintiff has adduced compelling evidence (including admissions by the City) that contradict this defense. The defense is further controverted by Plaintiff's expert, who opines that the City's reserves

---

[1] Plaintiff has brought claims for assumpsit and unjust enrichment seeking a refund of the City's Overcharges under three legal theories: (1) the W&S Rates are unreasonable under the common law because the City has set them at a level that is far greater than what the City requires to furnish water and sewer service to its ratepayers, which allows the City to accumulate excessive cash reserves; (2) the Rate Overcharges constitute unlawful taxes in violation of the Michigan Prohibited Taxes by Cities and Villages Act, MCL 141.91; and (3) the City's Rates violate City Charter § 13.3, which provides in pertinent part that: "The Council shall have the power to fix from time to time such just and reasonable rates as may be deemed advisable for supplying inhabitants of the City and others with such public-utility services as the City may provide."

are excessive given its future capital needs. Even the City's expert, Eric Rothstein, has conceded that if a municipal utility accumulates large amounts of reserves without a specific plan for the use of those reserves, the accumulation could be viewed as "excessive"—*i.e.*, meeting the very standard established by *Youmans*.[2] At a minimum, there are genuine issues of material fact as to whether the City's Rates were unlawful during the relevant time period because they were "excessive."

We start with a brief summary of the evidence adduced by Plaintiff—evidence which the City either deliberately distorts or outright ignores in its own "statement of facts:"

A. As early as 2016, the City itself acknowledged that it had more than enough money in its Water and Sewer Fund and recognized that its future rates should be "cash neutral"– *i.e.*, **not** generate additional cash reserves—yet the City intentionally accumulated over $11 million **more** in the three subsequent years, **after** paying for each and every expense of the Water and Sewer Fund, including capital improvements. *See* discussion in Section II at pp. 6-9.

B. By 2017, the City had so much money in its Water and Sewer Fund that it was able to extend a $17 million line of credit to the City's Capital Improvement Fund, a separate City fund tasked with financing capital improvements unrelated to the City's water and sewer system. The City acknowledges that it had no immediate need for those funds, and that the Capital Improvement Fund could take up to ten years to fully repay any loans it received. *See* discussion in Section II at pp. 9-11. **The fact that the Water and Sewer Fund had the luxury of extending a $17 million line of credit by itself creates a genuine issue of material fact as to whether the City's Water and Sewer Rates have been "excessive."**

C. As late as 2019, the City assured its citizens that it did **not** need to use cash reserves to finance future capital improvements to the Water and Sewer System. *See* discussion in Section II at pp. 11-13. Indeed, as of the time of the filing of this lawsuit, the City's Water and Sewer Fund had no debt, and had funded **all** of its capital improvements through rates, while simultaneously growing its cash reserves by millions of dollars.

D. Unlike older communities, the City's Water and Sewer System is relatively new and in fabulous overall shape. Therefore, the City has no looming infrastructure replacement needs

---

[2] In his deposition in another water and sewer rate case, Rothstein gave the following testimony:

Q. In other words, you can accumulate [cash] but you need to have a plan and a justification for it, correct?
A. Yes.
* * *
Q. . . . according to the manual, it would be considered excessive—and by the way, part of your opinion is based upon that there was a specific justification for the accumulation, correct?
A. Yes.
Q. And therefore, it's not excessive. **But if there wasn't, it could be considered excessive, correct? …**
A. Yes. And if I had hair, I'd take a better picture. [*See* Exhibit 2 hereto at pp. 85-86 (emphasis added).]

that would justify the massive cash reserves it had accumulated by June 2019. *See* discussion in Section II at pp. 13-14.

E. The City's cash hoard dwarfs the reserves maintained by other comparable municipalities. *See* discussion in Section II at p. 14; Plaintiff's Tax Motion at pp. 5-6.

F. Once faced with this lawsuit, the City suddenly became a "drunken sailor," indiscriminately spending down the reserves of the Water and Sewer Fund in an attempt to justify its past overcharges. *See* discussion in Section II at p. 14.

G. For example, in defiance of its own debt policies and in violation of the capital improvement financing limitations imposed by the Supreme Court in *Bolt*, the City cash-funded the entire $10 million+ cost of a major infrastructure improvement to its sewer system. *See* discussion in Section II at pp. 14-15.

H. Moreover, the City's attempt to accrue a "replacement reserve" in its Water and Sewer Fund constitutes an impermissible "double recovery" of capital costs—i.e., a tax—because the City's original water and sewer system was not paid for by the City but instead was financed exclusively by "contributed capital"—*i.e.,* the system was paid for or donated by third parties. *See* discussion in Section III at pp. 22-25.

The three most important governing standards that the Court must apply when addressing the City's motion are:

1. The Court must construe the facts in the light most favorable to the non-moving party—here, the Plaintiff—and draw all reasonable inferences in favor of the Plaintiff. *See Pioneer State Mut Ins Co. v. Dells*, 301 Mich. App. 368, 377; 836 N.W.2d 257 (2013). The Court "is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Id.*;
2. "**The determination of 'reasonableness' [of municipal utility rates] is generally considered by courts to be a question of fact.**" *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015) (emphasis added); and
3. "When experts offer conflicting opinions, it is for the jury to decide which testimony to believe." *People v. Unger*, 278 Mich. App. 210, 230, 749 N.W.2d 272 (2008).

Under these standards, the Court should deny the City's motion pursuant to (C)(10) on the grounds that there are genuine issues of material fact as to Plaintiff's Unreasonable Rate and Ordinance Violation claims which must be resolved by the jury. The Court should also deny the City's motion as it relates to the Tax-Based Claims and should instead render summary disposition in favor of Plaintiff for the reasons set forth in Plaintiff's Motion for Summary Disposition as to the

Tax-Based Claims (sometimes referred to hereinafter as Plaintiff's "Tax Motion") filed on March 10, 2022; Reply Brief in Support filed on May 25, 2022; and Section IV.B, *infra.*

II. COUNTER-STATEMENT OF MATERIAL FACTS

At the outset, it is notable that the City primarily supports its motion with after-the-fact affidavits submitted by various of its employees. This is because, to Plaintiff's knowledge, there are **no** documents created by the City **prior to the filing of this lawsuit** that support its after-the-fact justifications – *i.e.,* that the excessive cash reserves were created for the purpose of being used in the future to fund capital projects. To the contrary, as outlined in detail below, the contemporaneous evidence of the City's conduct and intentions paints a very different picture than the City's affiants state. Indeed, the City's budgets, financial statements, capital improvement plans, and internal memos and communications **all** contradict the City's belated factual narrative.

A. The Accumulation Of Excessive Amounts Of Cash In The City's Water and Sewer Fund Beginning in July 2015

The Class Period in this case begins July 1, 2015. As of June 30, 2015, the City's Water and Sewer Fund had approximately **$56 million** in unrestricted cash and investments. *See* Exh. 3 hereto. Notwithstanding this cash hoard—representing approximately $1000 for each and every resident of Novi and over $3000 for each of the City's approximately 18,000 water and sewer customers—the City planned to keep increasing its cash reserves in the coming years, after paying all of the expenses of the Water and Sewer Fund, including capital improvements and debt service. In this regard, the City's budget for the fiscal year ending June 30, 2016 projected that the revenues of the Water and Sewer Fund would exceed its expenses by (1) $3,449,314 in the fiscal year ending June 30, 2016, (2) $2,729,524 in the fiscal year ending June 30, 2017, and (3) $3,233,800 in the fiscal year ending June 30, 2018. *See* Exh. 4 hereto at p. 74.

As of June 30, 2015, the City's own appraisal of its future capital improvement needs relating

to its water and sewer system was very modest. Indeed, the City's capital improvement plan for the fiscal years beginning July 1, 2015 and ending June 30, 2021, formally approved by the City's Council, contemplated just $9.8 million in total capital improvement expenditures in those six years—an average of about $1.6 million per year. *See* Exh. 4 at pp. 115-116. Moreover, virtually all of the projects were designed to **enhance or extend** the water and sewer system instead of **replacing** aging infrastructure. *Id.* [3]

B. The City Concludes In June 2016 That It Has More Than Enough Money In The Water and Sewer Fund

Just a year later, in June 2016, the City's finance director, Carl Johnson performed an evaluation of the cash reserves of the City's Water and Sewer Fund. In a June 7, 2016 memo to the City Manager, Peter Auger (Exh. 5 hereto), Mr. Johnson stated:

> The Water and Sewer Fund does have cash reserves set aside for projected capital needs as well as for possible significant catastrophic events which would require significant funds in a short period of time. The City's current cash reserves are set aside for the following possible uses:
>
> | | |
> |---|---|
> | Catastrophic events | $3,000,000 - $10,000,000 |
> | CIP over the next 6 years | $15,400,000 |
> | Funding for future SADs | $5,000,000 - $10,000,000[4] |
> | Capacity purchases | $5,000,000 - $10,000,000 |
> | Total Estimate | $30,400,000 - $45,400,000 |

Plaintiff's evidence—through his expert's opinion and otherwise—shows that the $30.4 million to $45.4 million in reserves that the City had allegedly "set aside" were themselves excessive.

---

[3] In this regard, it is important to understand that the City does not operate its own water or sewage treatment plants (which are the most capital-intensive and costly components) of a water and sewer system. Instead, the City is a "wholesale" customer of the Great Lakes Water Authority ("GLWA"), which supplies water to the City through the massive treatment facilities GLWA leases from the City of Detroit. Sewage treatment for the City is provided by Wayne County. As a result, the City's water and sewer infrastructure consists primarily of water and sewer pipes which ferry treated water to, and sanitary sewage from, the City's inhabitants.

[4] This set-aside is wholly unnecessary. Mr. Johnson conceded in his deposition that special assessments are ultimately paid by the citizens especially benefitted by the projects funded through special assessment districts. *See* Johnson Dep. (Exh. 6 hereto) at pp. 21-22. So, to the extent the City initially used money set aside for special assessment district improvement, the City would ultimately recover every penny of that money, with interest. Moreover,

Indeed, the City told the world in 2017 that its "long-term capital reserves" were just $20 million. *See* Exh. 7 hereto. In any event, however, because the City had over $58.5 million in actual cash reserves as of June 30, 2016, it is clear that the City's Water and Sewer Fund at a minimum had $14.1 million and at a maximum had $28.5 million in reserves that had NOT been assigned to any potential use and therefore were totally unnecessary, even if one does not discount the City's outrageously-inflated estimates of necessary reserves. Johnson Dep. (Exh. 6 hereto) at p. 29 (conceding that unrestricted cash and investments of the Water and Sewer Fund were in excess of the range that he gave in his June 7, 2016 memo). Simply, the City had a capital improvement plan governing the expenditure of millions of dollars, **and** it had a $28.5 million slush fund of reserves that were **not** assigned to any particular use under that plan.

Johnson concluded this critical memo by stating:

> The **current cash reserves appear sufficient** based on the information available today and the **future rates are being set to maintain neutral cash flow**[5] as outlined in the three year budget just recently passed by the Mayor and City Council. [Exh. 5 hereto (emphasis and footnote added)]

Thus, the City concluded **in June 2016** that (1) it had enough money in the Water and Sewer Fund for **all** of its needs in the foreseeable future and (2) as a result, the City's Water and Sewer Rates should be set so that the City did **not** accumulate any more money in the Water and Sewer Fund. Indeed, the City's finance director, Mr. Johnson, admitted these critical points in his deposition, where he testified as follows:

> Q: You're saying [in your June 7, 2016 memo, Exh. 5] future rates are being set to maintain neutral cash flow as outlined in the three-year budget just recently passed by the mayor and city council.
> A: Okay. The rates were being set not to increase the cash and investment reserve

---

the City has not even created any special assessment districts since 2016. *Id.* at p. 22.

[5] "Neutral cash flow" means: "Money coming in equals money going out. Any entity has a neutral cash flow if the periodic expenses equals the periodic income to the penny." Black's Law Dictionary.

balance.
Q: Because it was your judgment, communicated to others, that those cash and investment reserves were sufficient, at least as of this time?
A: Yes. [Johnson Dep. (Personal Capacity) at p. 30 (Exhibit 6 hereto)].

C. In 2016, the City Planned To Increase Its Cash Reserves Through June 2019 Even After Paying For All Water and Sewer Capital Improvements During That Time.

Contrary to Carl Johnson's June 7, 2016 memo, however, the City did not adopt budgets that would set Water and Sewer Rates at a "neutral cash flow" level in the ensuing fiscal years but, instead, inexplicably planned a massive additional accumulation of unnecessary cash. Indeed, the City's budget for the fiscal year beginning July 1, 2016 (the same budget Johnson's memo provided for "neutral cash flow") forecasted multimillion dollar surpluses through at least the fiscal year ending June 30, 2019. *See* Exh. 8 hereto at p. 79. The City's budget for the fiscal year ending June 30, 2017 projected that the revenues of the Water and Sewer Fund would exceed its expenses by (1) $5,729,340 in the fiscal year ending June 30, 2017, (2) $4,288,919 in the fiscal year ending June 30, 2018 and (3) $4,102,752 in the fiscal year ending June 30, 2019. *Id.* That is, the City planned to accumulate another $13 million under its so-called "neutral cash flow" rates.

D. Consistent With The Plan Reflected In The City's Budget, the City Continued To Needlessly Accumulate Cash For The Next Three Years

To support its motion, the City oddly dismisses its own budgets by arguing that the budgets don't show "rollover" spending—capital improvement expenses budgeted in previous years but not yet paid for. *See* City Motion at p. 7. In this regard, the City represents the following to the Court:

> The alleged "excess" revenue of $3,449,314 projected in the budget for 2016 was based on a planned "original budget" for capital spending in 2016 of $1,561,067 – but the amount of "rollover" spending during FY 2015/2016 still planned from *previous budget years* amount to an additional planned expenditure of $4,208,305. That money is not referred to in the 2015/2016 budget or Plaintiff's Complaint – but it is money that the City still intended to spend on needed water and sewer projects in the City. *So when that "rollover" amount is added to the new budget amount, it totals planned expenditures of $5,769,372 – not a "surplus" for that year at all, but rather a* ***deficit*** *of $758,991.* [*Id.* at p. 7 (emphasis in original)]

On its face, this explanation sounds reasonable, but, in fact, it is simply wrong. If the City's explanation reflected reality, the reserves of the Water and Sewer Fund should have **decreased** in the following few years, but that is not what happened. Instead, the City's **actual cash accumulation** in the Water and Sewer Fund between July 1, 2015 and June 30, 2019 mirrored the plan reflected in the budgets. During the year ending June 30, 2016 (the year the City claims a "deficit of $758,991" due to alleged "rollover" spending), the City actually **increased** its cash reserves in the Water and Sewer Fund from $56 million to $58.5 million. *See* Exh. 9 hereto. By June 30, 2017, the City had $63.9 million in unrestricted cash and investments in the Water and Sewer Fund. *See* Exh. 10 hereto. *See also* Johnson Dep. (Exhibit 6 hereto) at p. 37-38 (conceding the accumulation of over $5 million during fiscal year 2017). One year later, on June 30, 2018, the City's Water and Sewer Fund had reached $66.5 million in unrestricted cash and investments. *See* Exh. 11. And by June 30, 2019, the Fund had accumulated a total of over **$69 million** in cash and investments. *See* Exh. 12 hereto. This $11 million accumulation of cash between July 1, 2016 and June 30, 2019 was fully consistent with the projections in the 2015-16 budget, proving that it was not inadvertent but rather intentional. This accumulation also rebuts the City's argument regarding alleged "rollover" spending. If there was "rollover" spending, it certainly did not prevent the City from adding over $13 million to its coffers between July 1, 2015 and June 30, 2019.

E. In 2017, the City Decided To "Advance" The Excessive Cash In The Water and Sewer Fund To Other City Funds

By June 2017, the Water and Sewer Fund had accumulated so much excess and unnecessary cash that the City authorized the Water and Sewer Fund to establish a **$17 million** line of credit for the benefit of another City fund—the Capital Improvement Fund—to finance capital improvements **unrelated** to the City's water and sewer system. *See* Exh. 13 hereto. *See also* Johnson Dep. (Exh. 6 hereto) at p. 42 (conceding loans would be used "for purposes unrelated to the water and sewer

infrastructure"). The resolution authorizing these "advances" (as the City called them) contemplated that the Capital Improvement Fund may take up to ten years to repay the advances. Exh. 13 at p. 2 ("principal payments on the outstanding loan will be straight-line over the 10-year period beginning in July 2017 and ending July 2027"). Thus, the City wouldn't necessarily get back all the money it advanced until ten years after the advances were made. Johnson Dep. at p. 46.

These "advances" were possible because there were at least $17 million of reserves in the Water and Sewer Fund that were not needed anytime in the immediate future. *See* Exh. 13 at p. 1 ("the City has identified long-term capital reserves in the Water and Sewer Fund that would be available for advance to the Capital Improvement Fund **without impacting the operations or rates charged to customers**") (emphasis added). *See also* Exh. 14 ("The City reviewed its available cash reserves and determined that there were sufficient reserves to fund this agreement, specifically in the Water and Sewer Fund"). The City's finance director conceded that the $17 million of cash reserves set aside for loans to the Capital Improvement Fund were "not immediately needed by the water and sewer fund to support its operations." Johnson Dep. (Exh. 6 hereto) at pp. 46-47.[6]

Moreover, at the time the City approved the $17 million in advances in June 2017, the Water and Sewer Fund had about $64 million in cash and investments. *See* Exh. 10. At that time, the City effectively acknowledged that its reserves were excessive by stating that its needed "long term capital reserves" were only approximately **$20 million**. *See* Exh. 14 ("The Water and Sewer Fund has approximately $40 million in cash reserves, with approximately half of that amount set aside for

---

[6] In its previous (C)(8) motion, the City argued that its transfers to the Capital Improvement Fund were authorized by the Michigan Department of Treasury's Uniform Chart of Accounts, which the City contends states that "money that accumulates as unrestricted net position of this fund may be transferred to another fund if authorized by the governing body." However, the City's reliance was misplaced because it cited an earlier version of the Uniform Chart that was completely superseded by a revised Uniform Chart in 2020. *See* Exhibit 17 hereto (stating that the new version is a "full revision of the entire chart of accounts. All previous versions are now obsolete and should be destroyed"). Notably, the statement purporting to authorize transfers from water and sewer funds to other funds has been deleted

long-term capital reserves"). Therefore, as of June 2017, the City maintained cash and investments that were approximately $44 million more than the City itself determined were necessary to fund the future capital obligations of the Water and Sewer Fund. As of June 2019, those excessive reserves had increased to approximately $49 million ($69 million in total cash and investments minus $20 million in "capital reserves" set aside by the City).

In the fiscal year ending June 30, 2019, the Water and Sewer Fund advanced $3,000,000 of the authorized $17 million to the City's Capital Improvement Fund to finance capital improvements in the City. *See* Exh. 12 hereto. In the fiscal year ending June 30, 2020, the Water and Sewer Fund advanced another $7,710,000 to the City's Capital Improvement Fund. As of June 30, 2020, the entire $10,710,000 advanced remained outstanding, confirming that the Capital Improvement Fund had not repaid any of the principal amounts advanced. *See* Exh. 16 hereto.

F. As Late As 2019, The City Continued To Assure Its Citizens That It Did Not Need To Use Reserves To Finance Future Capital Improvements.

Even after committing $17 million of its reserves to the unrelated Capital Improvement Fund, as late as 2019 the City still had adequate reserves and no plan to draw down those reserves to pay for capital improvements to its Water and Sewer system in the future. In an April 1, 2019 Budget Message to City residents (Exh. 18 at p. 11), the City Manager stated:

> The City of Novi continues to invest significantly in **water and sewer** infrastructure on an annual basis to ensure the transmission and distribution systems are adequate now and into the future. **More than $10.6 million in water and sewer capital improvements are planned over the next three years; all being paid from current rates** and not having to issue debt while keeping annual rate increases very low compared to other communities. [emphasis added]

Internally, by 2019, the City's annual efforts to justify its cash hoard became downright

---

from the new version. *See Id.* at pp. 104-105.

laughable. On July 16, 2019, Mr. Johnson sent a memo to Mr. Auger which stated:

> Currently, the Water and Sewer Fund has approximately $68 million of reserves at June 30, 2019. Estimated cash reserve **needed** for the following items:
>
> | | |
> |---|---|
> | Catastrophic Event | $6,000,000 - $10,000,000 |
> | CIP FY 2020-2025 | $43,000,000 |
> | Future SAD's | $5,000,000 |
> | Future Capacity | $5,000,000 - $10,000,000 |
> | Total Estimate | $59,000,000 - $73,000,000 [Exh. 19 hereto (emphasis added)]. |

Only by including amounts necessary to cover the City's entire purported water and sewer capital improvement plan through 2025 was the City able to roughly correlate its "needed" reserves with the $68 million+ that was sitting in the Water and Sewer Fund. The $43 million "set aside" for the 2020-25 CIP was completely improper because, as Mr. Auger represented in his April 2019 "Budget Message," the City planned to finance its entire CIP "from current rates" and therefore had no intention of using the $43 million in purported CIP reserves to actually pay for future capital improvements.

But the reality is far worse, because instead of calling for $43 million in water and sewer infrastructure improvement projects in fiscal years 2020 through 2025, the City's actual capital improvement plan for those years called for just $21.2 million. *See* Exh. 18 hereto at p. 114. Ratemaking is prospective—and the City's after-the-fact justifications today cannot supersede what the City planned to do when it adopted its capital improvement plan in 2015. Indeed, even though it is totally inappropriate for a municipal utility to hold reserves equivalent to the municipality's entire six-year water and sewer capital improvement (Plaintiff's Expert Report at pp. 3, 15 (Exhibit A to Exhibit 21)), when one uses the actual capital improvement expenditures of $21.2 million instead of the inflated $43 million, or even (from the City's perspective) the "needed" reserves of $37 million to $51 million, these numbers are far less than the ***actual*** reserves of $69 million

maintained by the City in the Water and Sewer Fund as of June 2019.[7]

G. The City's Water and Sewer System Is Relatively New, In Fabulous Overall Shape, And The City Has No Looming Infrastructure Replacement Needs That Would Justify The Massive Cash Reserves The City Had Accumulated By June 2019.

There is a very good reason Mr. Auger assured the City's residents as late as 2019 that the City did not have to exhaust its accumulated reserves or issue debt to finance its future water and sewer capital improvements: the City's water and sewer system was in excellent overall condition, and therefore the City did not anticipate that it would have to perform any significant replacements of the water and sewer infrastructure at any time in the near future.

That same year, the City's engineer, Ben Croy bragged to a resident about the condition of the City's water and sewer system:

> Jim Nash [the Oakland County Water Resources Commissioner] is correct that our water system is in pretty good shape. **Novi's infrastructure is relatively new compared to many surrounding communities, and we've been able to keep it maintained.** Novi's economy is doing very well, and yes we have been able to adequately fund the required water and sewer maintenance needs, both short-term, and looking long-term as well. We are very fortunate to be in strong financial shape. [Exh. 24 at p. 189 (emphasis added)].

Consistent with Mr. Croy's assurances to a City resident, the City's water and sewer capital improvement plan for FY 2020 and beyond (approved shortly after Mr. Croy's communication) called for just $21.2 million in water and sewer infrastructure projects for the ensuing six years—an

---

[7] The City additionally notes that "it regularly collects connection charges from new users who have joined the system," and "those charges are not at issue in this case" because Plaintiff didn't pay a connection charge and he "has not challenged the City's connection charge." City Motion at p. 3. The City never explicitly explains the claimed significance of the connection charges, but if the City is arguing that its excessive reserves were funded solely by connection charges and not usage charges, the City is simply wrong. By the City's own admission, the connection charges are earmarked for "expansion of the system" and "water and sewer line addition(s)." *See* Exhibit 22 hereto. We know that, between 2015 and 2020, the City paid for all of the water and sewer capital improvements while still growing the Water and Sewer Fund cash reserves. The City collected about $10.7 million in connection fees during that time period (see Exhibit 20) and spent $14.7 million in capital improvement expense during that time period. *See* Exh. 23. As a result, if the connection fees were used for capital improvements, the additional reserves between 2015 and 2020 necessarily were created by usage charges. This is simple math, apparently lost on the City. This also demonstrates that the City's $10+ million in expenditures on the Retention Facility in FY 2021 were financed by usage charges.

average of just $3.5 million per year. *See* Exh. 18 at p. 114. Significantly, only $1.3 million of replacements of water and sewer lines was contemplated all the way through June 2025. Even more significantly, **that capital improvement plan identified just $4 million in total water and sewer infrastructure projects for the entire 11-year time period from July 1, 2024 through June 30, 2035**. All of these facts directly contradict the City's basic factual defense in this case.

H. The City's Cash Hoard Dwarfs The Reserves Maintained By Other Comparable Municipalities

For the sake of brevity and the avoidance of duplication, Plaintiff incorporates by reference the discussion set forth in Section II(B) of Plaintiff's Tax Motion. The evidence shows that the City's cash hoard of $69 million as of June 30, 2019 was approximately 5 times the average cash reserves of $13.6 million maintained by 6 comparable communities at that time.

I. Faced With The Lawsuit, the City Becomes a "Drunken Sailor," Indiscriminately Spending Down The Reserves Of The Water and Sewer Fund In An Attempt To Create The Perception That The Reserves Were Created To Pay For Imminent Capital Improvements.

The City is now in the midst of a belated effort to justify its gross accumulation of unnecessary cash in the Water and Sewer Fund by accelerating its capital improvement plan and associated spending. In January 2021, the City's engineer, Ben Croy, stated the following to the City's outside consultants:

> **We are intentionally trying to spend down some of the fund balance** now that we have some of our large cost projects under control now. So, once we get to the targeted fund balance, it will no longer show a reduction year to year. [Exh. 25 (emphasis added)]

J. In Defiance Of Its Own Debt Policies, The City Cash Funded The Entire $11+ Million Cost Of A Major Infrastructure Improvement To Its Sewer System.

These actions by the City are fully described in Section II(C) of Plaintiff's Tax Motion. Plaintiff incorporates that discussion and the associated evidence here.

K. The Opinions Of Plaintiff's Expert, John Damico

Plaintiff has supported his claim through the expert opinion testimony of John Damico, who has issued a Report setting forth his findings and opinions. *See* Exhibit A to Exhibit 21 hereto.[8] Mr. Damico is the President of Environmental Rate Consultants, Inc. (ERC), with over 37 years of water resource, financial and rate setting, and expert witness testimony projects.

Based upon Mr. Damico's review of the materials provided and his complete study of the City's water and sewer reserve accounts, its rate-structure, and all of its components, Mr. Damico has reached a number of opinions concerning the propriety of the City's Rates and Charges which are fully set forth in his Report, and include the following:

- During the period from July 1, 2015, through June 30, 2020, the City's Rates, viewed as a whole, have been excessive.
- During the period from July 1, 2015, through June 30, 2020, the City's Rates have been excessive primarily because they have been set at a level that allowed the City to accumulate and maintain inappropriate excessive unnecessary cash reserves as compared to industry standards, guidelines, and accepted practices and the City's own needs.
- The City of Novi maintains four reserve accounts according to City documents. Each of the four reserve accounts maintained and administered by the City of Novi is excessive, unnecessary, and invalid and does not follow industry standard, accepted practices for establishing, maintaining, and administering reserve accounts. During the period from July 1, 2015, through June 30, 2020, the City overcharged its water and sanitary sewer customer rate payers by establishing, maintaining, and administering the over funding of these four reserve accounts. The four reserve accounts are excessively over-funded as compared to industry standards, resulting in a cumulative and total unnecessary, inappropriate, and unjustified reserve amount totals ranging from $36,611,038 to $49,611,038.
- Based upon the information currently available, it is Damico's opinion that the City overcharged its water and sewer customers by a minimum of $36,611,038, and a maximum of $49,611,038 between July 1, 2015 and June 30, 2020.

---

[8] Mr. Damico has submitted an affidavit authenticating his report and adopting the statements and opinions in his report as his sworn testimony in this matter (Exh. 21 hereto).

III. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE CITY'S WATER AND SEWER RATES AND CHARGES, "VIEWED AS A WHOLE," HAVE BEEN "UNREASONABLE" IN THAT THEY HAVE BEEN "EXCESSIVE."

A. This Court's Prior Order Confirms Plaintiff's Burden Of Proof As To The Unreasonable Rate Claims

The Michigan courts enforce the common law requirement that municipal utility charges be "reasonable." *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003). In *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015), the Court of Appeals recently reiterated the role of the courts in evaluating the reasonableness of municipal utility rates. There, the Court affirmed the following principles:

1. "[M]unicipal utility rates are presumptively reasonable." 311 Mich. App. at 594;
2. The "presumption of reasonableness may be overcome by a proper showing of evidence." *Id*;
3. Plaintiff meets its burden of proof by showing that "any given rate **or** ratemaking practice is unreasonable." *Id*; and
4. Plaintiff meets its burden of proof by providing "**clear evidence of illegal or improper expenses included in a municipal utility's rates**." *Id.* at p. 595.

Although the City repeatedly asserts a "presumption" that its Rates are reasonable, "this presumption is just that – a presumption – and it can be overcome by the plaintiff with a showing of sufficient evidence to the contrary." *Shaw v. City of Dearborn*, 329 Mich. App. 640, 654-55; 944 N.W.2d 153 (2019). More recently, in *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021), the Court clarified the standard a plaintiff must meet in order to demonstrate that a municipal utility's rates and charges have been unreasonable:

> **Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper.** [*Youmans*, 336 Mich. App. at 219 (emphasis added).]

This standard is consistent with the "reasonableness" standard applied to municipal charges by the Michigan Supreme Court. Indeed, as that Court recently observed in assessing the

"reasonableness" of certain building permit fees imposed by the City of Troy:

> "**[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect.**" [*Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 220; 934 N.W.2d 713, 722 (2019) (quoting *Mich. Ass'n of Home Builders v. City of Troy*, No. 331708, 2017 Mich. App. LEXIS 1521 (2017)).][9]

The *Troy* case confirms that, at the very least, the reasonableness of the City's Rates is "suspect." Plaintiff has amply demonstrated that there are genuine issues of material fact on this point and presented evidence sufficient to rebut the presumption of reasonableness. Indeed, the $1 million Troy accumulated (a 20-25% surplus) pales in comparison to the king's ransom the City is stockpiling here. Indeed, the City's accumulated $69+ million "surplus" as of June 30, 2019 is equivalent to almost three times the City's annual water and sewer operating expenses. *See* Ex. 12.

In denying the City's (C)(8) motion, this Court observed: "The *Youmans* Court made it clear that to bring a successful unjust enrichment claim in this circumstance, a class of plaintiff must prove only that the municipal entity was 'excessively (and thus unjustly) enriched.'" Opinion at p. 7 (emphasis added). Given the *Youmans* standard, the question before the Court is this: **has Plaintiff adduced sufficient evidence to create a genuine issue of material fact as to whether the City's water and sewer rates, viewed as a whole, were "excessive" and thus unreasonable?** Applying the standards described above and the standards for determining "reasonableness" and

---

[9] In the *Troy* case, the Supreme Court addressed a state statute which, like the common law principles applicable to municipal water and sewer rates, requires municipal building permit fees to be reasonable. In reversing the Court of Appeals' determination that Troy's fees were reasonable, the Court relied extensively on Judge Jansen's dissent in that case. *See Troy*, 504 Mich. at 215-22. In her dissent (Ex. 26) Judge Jansen specifically stated that Troy's accumulation of an excessive surplus showed that the permit fees were unreasonable:

> **...I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years. This "surplus" is not negligible.** Common sense indicates that it is not incidental. **The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture.** [2017 Mich. App. LEXIS 1521 at *26-27 (emphasis added)].

recognizing the role of expert testimony discussed in Sections III.B and C below, when the Court views the evidence in the light most favorable to the Plaintiff, draws all reasonable inferences in favor of the Plaintiff, and does not weigh credibility, weigh the evidence, or resolve factual disputes, the Court should conclude that Plaintiff adduced sufficient evidence at the summary disposition stage. *Pioneer State Mut Ins Co. v. Dells*, 301 Mich. App. 368, 377; 836 N.W.2d 257 (2013).

B. Whether The Rates Have Been Unreasonable Because They Were Excessive Presents A Classic Question Of Fact That Must Be Submitted To The Jury

Given that the ultimate standard is "reasonableness" which is dependent upon whether the rates and charges have been "excessive," factual questions abound. First and foremost, "[t]**he determination of 'reasonableness' [of municipal utility rates] is generally considered by courts to be a question of fact.**" *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015) (emphasis added); (citing *City of Novi v. City of Detroit*, 433 Mich. 414, 431, 446 N.W.2d 118 (1989)). *See also City of Plymouth v. City of Detroit*, 423 Mich. 106, 128, 377 N.W.2d 689 (1985) ("The question of what constitutes a reasonable return is one of fact rather than of law. It requires the application of an enlightened judgment to the multiplicity of variables disclosed by the evidence") (quoting *United Gas Pipe Line Co. v. Louisiana Public Service Comm.*, 241 La 687, 130 So.2d 652 (1961)).

Whether a person or entity received "excessive" compensation is a quintessential question of fact. In *Lochinvar Corp. v. Rosen*, 2012 Mich. App. LEXIS 1174 (2012) (Exhibit 27 hereto), the Court reversed a grant of summary disposition in favor of a defendant in a case alleging that the defendants had received "excessive compensation," holding that the determination of whether the compensation was "excessive" should have been left to the jury:

> As our Supreme Court has explained, "**the general rule is that whether a salary is excessive is a question of fact in the determination of which all the circumstances of the case should be considered**..." *Luyckx v R L Aylward Coal Co*, 270 Mich 468, 474; 259 NW 135 (1935); see also *Miller v Magline, Inc*, 76 Mich App 284, 300; 256 NW2d 761 (1977). Accordingly, **inquiry must be made into all**

> **the circumstances of case**, e.g., the number of hours worked, job responsibilities, experience, educational background, and the industry standard for compensation.

As in *Lockinvar*, Plaintiff here claims that the City's Rates and Charges have been "excessive," and thus unreasonable. As a result, an "inquiry must be made into all of the circumstances of the case," and the resolution of that inquiry is for the jury.

C. The Disagreement Among The Parties' Experts By Itself Precludes Summary Disposition As To The Unreasonable Rate Claims.

Further, the existence of competing expert testimony on the "reasonableness" and "excessive" issues further precludes summary disposition in favor of the City. Indeed, the stark disagreement among the parties' experts further highlights the need to have the jury resolve the competing expert opinions. "When experts offer conflicting opinions, it is for the jury to decide which testimony to believe." *People v. Unger*, 278 Mich. App. 210, 230, 749 N.W.2d 272 (2008).

Plaintiff presented competent evidence that the City has engaged in unreasonable rate-making which has resulted in Overcharges. The City has an expert, Mr. Rothstein, who disagrees with Damico's conclusions—but this disagreement **at best** creates issues of fact as to the "reasonableness" of the City's water and sewer rates that must be resolved by the jury at trial.

As the Michigan Court of Appeals observed in *Garcia v. West Shore Med. Center,* 2015 Mich. App. LEXIS 1433 (2015) (Exh. 28 hereto):

> Where competing "experts' opinions are supported by evidence and sound scientific reasoning, the question of who is right is a question for the jury." *Milward v. Acuity Specialty Prods Group, Inc.,* 639 F.3d 11, 23 (CA 1, 2011). "A factual dispute is best settled by a battle of the experts before the fact finder, not by judicial fiat. Where two credible experts disagree, it is the job of the fact finder, not the trial court, to determine which source is more credible and reliable." *City of Pomona v. SQM North America Corp.*, 750 F3d 1036, 1049 (CA 9 2014)

Moreover, a Circuit Court commits reversible error by disregarding the expert opinion of the non-moving party at the summary disposition stage. In *Stamler v. Oakland Physicians Med. Ctr., LLC*, 2016 Mich. App. LEXIS 472 (2016) (Exhibit 29 hereto), the Court held:

> Second, contrary to Dr. Mittal's arguments and the trial court's findings, Stamler's experts did not ignore facts in evidence and we see nothing speculative in their expert opinions. When offering an opinion, experts may not make assumptions that are not in accord with established facts; but, experts are free to disagree regarding the "interpretation" of the facts presented. *Robins*, 276 Mich App at 363. **Such disagreement among experts evinces a question for the jury which should not be resolved by the trial court incident to a motion for summary disposition**. *Id.* See also *Lenawee Co v Wagley*, 301 Mich App 134, 166; 836 NW2d 193 (2013) ("Disagreements pertaining to an expert witness's interpretation of the facts are relevant to the weight of that testimony and not its admissibility"). Consequently, in this case, given the opinions of Stamler's experts, the trial court erred by concluding as a factual matter that Stamler previously benefited from Cipro in December of 2009, such that it could not be the cause of her injuries in February of 2010. In reaching this conclusion, the trial court disregarded the testimony of Stamler's experts, resolved factual questions of causation, and failed to view the record in a light most favorable to Stamler. Likewise, insofar as Mittal argues that Cipro cannot be a cause of Stamler's injuries because she initially improved on Cipro in February, this argument ignores Stamler's expert testimony and fails to view the record in a light most favorable to Stamler. **To the extent there was debate among the doctors regarding the propriety and efficacy of Cipro for Stamler's treatment in February 2010, this issue was one of fact for the jury**. See *Robins*, 276 Mich App at 363. **Mittal is free to present opposing evidence at trial and to disagree with Stamler's experts' interpretation of the facts, but such disagreement at the summary disposition stage merely evinces the existence of a material question of fact.** See *id.*; *Lenawee Co*, 301 Mich App at 166. Because a question of fact remained regarding proximate causation, the trial court erred by granting summary disposition to Mittal. [*Stamler*, pp. 16-17 (emphasis added).]

See also Guerrero v Smith, 280 Mich App 647, 669; 761 NW2d 723 (2008) ("The weight given to the testimony of experts is for the jury to decide, and it is the province of the jury to decide which expert to believe" [quotation marks and citation omitted])[10]

---

[10] The need for the jury to resolve the competing expert testimony is particularly pressing here given that the City's expert, Eric Rothstein, is a classic "hired-gun" expert, whose opinions have a chameleon-like way of adapting to his client's positions, even if he has taken directly contrary positions in other contexts. As noted by the City, its Water and Sewer Fund has zero debt because it has historically cash-funded all of its water and sewer capital improvements. In a prior rate case involving the City of Milwaukee, Mr. Rothstein was retained by certain "wholesale" customers to contest Milwaukee's proposed rates. Rothstein vigorously advocated that the regulatory body require Milwaukee to debt-finance even routine capital improvements, which would result in lower rates to the wholesale customers (because the cost of capital improvements would be paid for over a longer period of time). Rothstein opined that Milwaukee's "capital structure"—which was comprised of 11.33 percent long-term debt—was "clearly atypical," resulted in a debt/equity ratio that was "exceptionally low" and reflected "excessive amounts of equity." *See* Exh. 30 hereto at p. 16, 20; and Exhibit 15. Notably, Rothstein essentially opined that Milwaukee had overcharged is customers by not using debt-financing to pay for its capital improvements in the past:

Further, the mere fact that the City quarrels with Mr. Damico's opinions cannot justify the Court's disregard of those opinions. Any "defect in the expert's testimony goes to its weight, not its admissibility." *Rickwalt v Richfield Lakes Corp*, 246 Mich. App. 450, 458; 633 NW2d 418 (2001). In addition, "an opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility." *Bouverette v Westinghouse Electric Corp*, 245 Mich. App. 391, 401; 628 N.W.2d 86 (2001).[11]

Viewing Mr. Damico's opinions in the light most favorable to Plaintiff—and notwithstanding the contrary opinions proffered by the City's expert, the Court should conclude that there are genuine issues of material fact as to the Unreasonable Rate Claims.

D. Proper Application Of the (C)(10) Standard Compels Denial of the City's Motion As To The Unreasonable Rate Claims.

Plaintiff has adduced evidence that, at a minimum, demonstrates, among other things, that: (1) in 2016, the City concluded that it had more than enough money in its Water and Sewer Fund for all required purposes, including capital improvements, and it therefore should set its rates to be "cash-neutral" going forward, (2) the City nonetheless imposed rates thereafter which generated over $11 million in additional cash over the next three fiscal years, (3) the City had accumulated so much cash by 2017 that it decided to "loan" up to $17 million to an unrelated fund, and could lose access to all of that cash for Water and Sewer purposes for up to 10 years.

Given the standards discussed at length above, the facts adduced by Plaintiff in opposition

---

> MWW's near complete cash financing of long-lived infrastructure – violating principles of intergenerational equity – has meant that all of MWW's customers, both wholesale and retail, have paid rates that supported MWW's accrual of a disproportionately high amount of equity relative to debt. [Exhibit 30 hereto at p. 23]

Here, Novi has **zero** Water and Sewer debt. Yet, Rothstein has no problem with Novi's method of financing capital improvements using 100% cash from current ratepayers. Rothstein Dep. (Exh. 31 hereto) at pp. 10-12; 67-68.

[11] In this regard, the proper vehicle for the City to test the reliability of the conclusions of Plaintiff's expert would have been a *Daubert* challenge, but the City never brought such a challenge. In fact, the City has never challenged the admissibility of the opinions of Mr. Damico or his qualifications.

to the motion, coupled with Mr. Damico's expert opinions, are more than sufficient to create genuine issues of material fact as to the Unreasonable Rate Claims.

IV. PLAINTIFF – NOT THE CITY – IS ENTITLED TO SUMMARY DISPOSITION IN ITS FAVOR AS TO PLAINTIFF'S TAX-BASED CLAIMS.

At the end of the day, the fundamental problem for the City is this: regardless of the reasons the City accumulated the reserves at issue, the City's Rates have been unlawful. If, on the one hand, the City accumulated excessive reserves without a plan for the use of those reserves, this proves that the City's Rates have been "excessive" and thus unreasonable. On the other hand, if it really **did** accumulate the excessive reserves from current ratepayers for the purposes of financing capital improvements that will benefit future users of the system, the City's Rates have constituted unlawful taxes. *See, e.g., Bolt*, 459 Mich. At 164 (in defining the bounds of the "capital investment component" that may be included in municipal utility rates, the Court held that it was impermissible to impose charges to finance capital improvements that would "enable the city to fully recoup its investment, in a period significantly shorter than the actual useful service life of the particular public improvement.")

A. Plaintiff's Pending Motion for Summary Disposition as to his Tax-Based Claims Confirms That The Amounts The City Has Included In The Sewer Rates To Finance The Retention Facility Constitute Unlawful Taxes.

These issues have been fully briefed in Plaintiff's Motion for summary disposition as to his Tax-Based Claims and in the Reply Brief in further support of that Motion. Plaintiff incorporates by reference here each of his arguments and authorities from those prior filings.

B. The City's Charges To Create A "Replacement Reserve" In Its Water and Sewer Fund Constitute Unlawful Taxes Because They Allow The City To Achieve An Impermissible "Double-Recovery" Of Capital Costs.

In addition to its imposition of taxes to finance the Retention Facility, the City's accumulation of additional cash reserves in order to finance other future capital improvements—the

City's sole justification for its cash hoard—also renders its water and sewer charges taxes.

In a recent decision, applying *Bolt*, the Court of Appeals recognized that it is unlawful for a municipal utility to charge current ratepayers to fund a reserve to pay for future capital improvements if the current infrastructure was not paid for by the municipality.

In *Brunet v. Rochester Hills*, COA No. 354110 (2021) (Exh. 32 hereto), the Court held that "a municipality may **not** charge current ratepayers for the costs of constructing the original municipal utility (typically through bonds that must be paid over time) **and** the future costs of replacing that same utility." *Id.* at p. 6 (emphasis added). The Court based this prohibition on *Bolt*, 459 Mich. 152 and *Wolgamood v. Village of Constantine*, 302 Mich 384; 4 N.W.2d 697 (1942). Opinion at p. 7 ("in *Bolt*, the ratepayers were expected to pay for the benefits of the improved system that they would enjoy and pay for the benefits of the improved system that future ratepayers, who would not pay the charges at issue, would enjoy. This constituted a similar 'double charge' as in *Wolgamood*.").

On the other hand, "if the municipality originally constructed its utility through cash and intends to replace the utility in a similar manner, then current ratepayers may properly be charged for accumulating that cash reserve." Opinion at p. 6. Under such circumstances, in the Court's view, "current ratepayers" are only charged "*once* for the cost of the municipal utility." *Id.* The *Brunet* Court ultimately concluded as follows:

> Accordingly, it is not enough for plaintiff to simply show that the water charges at issue are funding a reserve to pay for future capital improvements. Our Supreme Court approved of such a practice in *Highland Park*. Rather, at a minimum, plaintiff must show that current ratepayers are being "double charged" for the water system, contrary to cases such as *Wolgamood* and *Bolt*. [Opinion at p. 7.]

Notably, although *Highland Park* authorized the use of depreciation charges to finance future capital improvements, the Supreme Court there held that that authorization applied only where the utility is **not** also recovering the costs of its past capital improvements through Rates:

> But on a utility basis **where the city is not recovering its capital as part of the expense**, depreciation charges sufficient to rebuild and restore the system over its service are proper items of expense in determining the rate to be charged. [326 Mich. at 98 (emphasis added)].

Under this rationale, the *Brunet* Court recognized that if the evidence showed that the City's water and sewer ratepayers **had** financed the existing water and sewer systems **and** are also being charged to build up a reserve to pay for future capital improvements, Plaintiff would prevail on his tax claims. *See* Opinion at p. 4.

Here, in contrast to *Brunet*, the City's annual financial statements confirm that the City did **not** pay for its "original" water and sewer system, because virtually all of the system was either paid for by the City's water and sewer customers or donated by real estate developers.[12] As a result, the City's actions in also charging its water and sewer customers to build up a reserve to pay for future capital improvements was unlawful under *Bolt*. Below Plaintiff details the information set forth in the financial statements which confirms this impermissible "double charging."

Novi W&S Contributed Capital Analysis[13]

Total W&S Contributed Capital through 6/30/2002 (Exh 33 at Novi Resp. 13891) -- **$124,544,182**
Original cost of all W&S capital assets as of 6/30/2002 (Exh. 33 at 13886) -- **$125,885,504**

Additional Contributed Capital July 1, 2002 through June 30, 2021 (from CAFRs):

Cap charges	**S As[14]**	**Dev. Contribs**	**Debt Service[15]**

---

12 Paying for infrastructure with developer contributions is the same as ratepayer-financing because the developers pass the cost of the contributions on to customers (who are also ratepayers) when they buy their houses. With both ratepayer financing and developer contributions, the City **does not** pay for the initial infrastructure.

13 The City defines "contributed capital" as capital obtained or financed through the following sources: (1) developer contributions, (2) capital charges, (3) special assessments, (4) federal grants, and (5) debt service charges. *See* Exh. 33 (Novi Resp. 13891). "Contributed capital" thus is not in any way paid for by the City.

14 These numbers appear to reflect both principal and interest payments received for special assessments. As a result, the totals may reflect a slight overstatement of the value of the assets financed by special assessments during this time. Given the limited amount of revenues attributable to special assessments during this time period, however, any overstatement is not material.

15 The debt service numbers for this time period are taken from the "reductions" numbers for the W&S debt set forth the "long term debt" notes in the CAFRs but excluding principal on Special Assessment bonds. This represents

Totals	$47,237,072	$5,919,625	$45,896,508	$5,865,000

Grand Total -- $104,918,205 (FY 2003-2021) (See Exh. 34)

Total W&S Assets By Asset Type As Of June 30, 2021 (from Exhibit 35 hereto at Novi Resp. 14133-14149):

Asset Type	**Orig Cost**	**Accum Deprec.**	**Book Value**
Buildings, Land	$10,607,396	$1,119,047	$9,488,348
Machinery, Equip	$1,661,491	$1,197,784	$463,707
Sewer Lines	$110,330,962	$51,079,312	$59,251,649
Water Lines	$83,491,222	$35,541,938	$47,949,283
Vehicles	$1,093,929	$533,528	$560,400
Totals	$207,185,003	$89,471,611	$117,713,391

Total original cost of all W&S Assets through June 30, 2021 -- **$207,185,003**
Total Contributed W&S Assets through June 30, 2021 – **$229,462,387**

The City has received developer contributions and collected revenues from its water and sewer customers that collectively exceed the entire capital costs of its water and sewer system from the inception of the system. Plaintiff has adduced evidence of "double-charging," which renders the charges the City has used to accumulate reserves to replace the system unlawful taxes.

CONCLUSION

The Court should deny the City's Motion for Summary Disposition as to all of Plaintiff's claims. The Court should grant Plaintiff's pending Tax Motion.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff and the Class

Date: July 6, 2022

---

the principal portion of long-term debt recovered through rates and charges.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2022, I served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

4876-9989-0983 v.1