STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

LEONARD S. BOHN, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF TAYLOR, a municipal corporation,

Defendant.

Case No. 15-013727-CZ

Hon. David J. Allen

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Gustav R. Andreasen (P40956)
Michael F. Wais (P45482)
Erick W. Hosner (P78860)
Howard & Howard Attorneys PLLC
450 West Fourth Street
Royal Oak, Michigan 48067
(248) 645-1483
Attorneys for Defendant

Dean C. Robinette (P54197)
Foley & Robinette, P.C.
13349 Reeck Court
Southgate, MI 48195
(734) 283-4000
Co-counsel for Plaintiff

PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff Leonard S. Bohn ("Plaintiff"), by his attorneys, Kickham Hanley PLLC and Foley & Robinette, P.C., individually and on behalf of a class of similarly situated class members, states the following for his First Amended Class Action Complaint against the City of Taylor (the "City"):

INTRODUCTION

1. This is an action challenging certain cost components included in the retail water rates (the "Water Rates") and sewer rates (the "Sewer Rates"), collectively the "Rates", imposed by

the City on citizens who draw water from the City's water supply system and who dispose of their sanitary sewage through the City's sewer system.

2. There are three specific charges incorporated into the City's Water and Sewer Rates which constitute illegal taxes and/or are otherwise unlawful. First, since at least 2009, the City has set its Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing water and sewage disposal services (the "Rate Overcharge"). The Rates during this period were established in contravention of all established water and sewer rate-setting methodologies, and resulted in the creation of cash reserves far in excess of those necessary to support the City's water and sewer function. Indeed, between July 1, 2010 and July 1, 2015, the City increased its unrestricted cash and investments in the Water and Sewer Funds from $9.6 million to over $18 million through its imposition of the Rate Overcharge.

3. Second, in addition to the Rate Overcharge, the City has unlawfully included in its Rates an additional charge (the "General Fund Support Charge") that it has used not to cover the actual expenses of providing water and sewage disposal services to those customers, but rather to fund the City's general governmental obligations. Indeed, under the guise of an "City Services Fee" for services purportedly provided by General Fund departments to the City's Water and Sewer Funds, the City routinely transfers the monies generated by the General Fund Support Charge to the City's General Fund, where those monies are used to supplement the City's General Fund revenues – i.e., to finance governmental functions wholly unrelated to providing water and sanitary sewage disposal services to its citizens. The General Fund Support Charge far exceeds the value of any "services" provided by General Fund Departments to the Water and Sewer Funds.

4. Third, the City includes in its Rates an amount sufficient to cover the costs the City incurs for the public fire protection services provided by the water supply system (the "Public Fire Protection Charge"). Public fire protection is a governmental function wholly separate from the supply of fresh water to City residents and the City's ordinances require the City's General Fund to pay the Water and Sewer Funds for the public fire protection services. Nonetheless, the City

incorporates that cost into the Rates and finances those services through the Public Fire Protection Charge.

5. The Charges constitute "taxes" that have not been authorized by the City's voters in violation of the Headlee Amendment to the Michigan Constitution. Indeed, the Charges are imposed in order (a) to supplement property tax and other General Fund revenues, which have been insufficient to allow the City to finance its core governmental functions, (b) to relieve the General Fund of its obligation to pay for public fire protection, and (c) to create excess cash reserves in the Water and Sewer Fund.

6. The Charges are the type of exaction the Michigan Supreme Court found was an unconstitutional tax in the seminal case of *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998). The Charges are not legitimate user fees but rather constitute unlawful taxes under the *Bolt* decision. The Charges are motivated by a revenue-raising and not a regulatory purpose, the Charges to Plaintiff and the Class are grossly disproportionate to the City's actual costs of providing water and sewer service to Plaintiff and the Class, and payment of the Charges is not voluntary.

7. The Charges are also unlawful because (a) they are arbitrary, capricious and/or unreasonable; (b) they violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91; (c) they violate the MCL 141.118, (d) they violate the Michigan Investment of Surplus Funds of Political Subdivisions Act, and, (e) they violate the City's own Charter and Ordinances.

JURISDICTION AND VENUE

8. Plaintiff is a water and sewer customer of the City. Plaintiff has paid the charges at issue and seeks to act as a class representative for all similarly situated persons.

9. Defendant City of Taylor (the "City") is a municipality located in Wayne County, Michigan. The City maintains a Water Enterprise Fund (the "Water Fund") and a Sewer Enterprise Fund (the "Sewer Fund") and prepares financial statements for those Funds.

10. Venue and jurisdiction are proper with this Court because all parties are present here and the actions which give rise to Plaintiff's claims occurred in this County. Venue and jurisdiction

also are proper with this Court under Article 9, § 31 of the Michigan Constitution of 1963, and MCL 600.308a.

GENERAL ALLEGATIONS CONCERNING THE WATER RATES

11. The City maintains and operates a water supply system (the "Water Supply System") to provide fresh water to inhabitants of the City. The City purchases its water at wholesale from the City of Detroit. Plaintiff has received water service from the City and paid the Water Rates imposed by the City. The City's ordinances require the structures used by its citizens to be connected to the City's Water Supply System.

12. The City of Detroit is authorized to supply wholesale water to local government units in Southeast Michigan, and derives that authority from MCL 123.141(1). The City of Detroit, through its Water and Sewerage Department ("DWSD"), supplies wholesale water to over 100 cities, villages, townships and authorities authorized to provide a water supply for their inhabitants.

13. Local government units which purchase water from the City of Detroit establish their own Water Rates and directly bill end users. However, Michigan state law prohibits a municipality which purchases its water from the City of Detroit and which supplies that water to its residents from charging a retail rate that exceeds the municipality's "actual cost of providing the service."

14. In this regard, MCL 123.141 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." MCL 123.141(3).

15. The City is a "contractual customer" as defined by MCL 123.141(2) and therefore is bound by the provisions of MCL 123.141(3). *See Oneida Charter Township v. Lee*, 485 Mich. 849, 771 N.W.2d 785 (2009) ("MCL 123.141(3) prohibits only 'contractual customers as provided in subsection (2)' from charging retail rates in excess of the actual cost of providing service").

16. The City establishes Water Rates from time to time through enacted ordinances. Relevant portions of City's Water and Sewer Ordinance are attached hereto as **Exhibit A** and incorporated herein by reference.

17. The City has continuously and systematically violated statutes including MCL 123.141(3), MCL 141.118 and MCL 141.91, as well as its own Charter and ordinances, by imposing Water Rates that exceed the City's actual cost of providing water service by millions of dollars.

GENERAL ALLEGATIONS CONCERNING THE SEWER RATES

18. The City maintains and operates a sewer system (the "Sewer System") to provide sewage disposal services to inhabitants of the City. The City purchases its sewer services from Wayne County. Plaintiff has received sewer service from the City and paid the Sewer Rates imposed by the City. The City's ordinances require the structures used by its citizens to be connected to the City's Sewer System.

19. The City establishes Sewer Rates from time to time through enacted ordinances.

20. The City has continuously and systematically violated the Headlee Amendment, MCL 141.91, as well as its own Charter and ordinances, by imposing Sewer Rates that exceed the City's actual cost of providing sewer service by millions of dollars.

THE RATE OVERCHARGE

21. Since at least 2009, the City has set its Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing water and sewage disposal services (the "Rate Overcharge"). The Rates during this period were established in contravention of all established water and sewer rate-setting methodologies, and resulted in the creation of cash reserves far in excess of those necessary to support the City's water and sewer function. Indeed, between July 1, 2009 and July 1, 2015, the City increased its unrestricted cash and investments in the Water and Sewer Funds from $9.6 million to over $18 million through its imposition of the Rate Overcharge.

22. One of the primary reasons the City has generated revenues far in excess of the actual costs of providing water and sewage disposal system is that the City has included in its Rates

purported costs for (1) capital improvements, (2) principal and interest on outstanding debt obligations and (3) depreciation.

23. Including millions of dollars of depreciation costs in the Rates renders the Rates arbitrary, capricious and unreasonable because the City sets its rates according to the "cash basis" approach. WEF Manual of Practice 27, which sets the standards for sewage disposal rates, states: "The cash-basis method differs from conventional financial accounting primarily by excluding depreciation and including principal repayment (and interest) on outstanding debt. The main objective in using the cash basis is to collect revenues to cover cash expenses. Revenues must cover annual expense and reserve needs for capital and operational funds. **Inclusion of depreciation is a common error in developing cash-basis revenue requirements because it amounts to a partial double counting of capital costs covered by the principal component of debt service payments plus a potential portion of routine capital expenditures**." (emphasis added)

24. Similarly, the AWWA M-1 Manual, which sets the standards for water rates, states that the cash-needs approach is generally used by "government-owned utilities (except in the few jurisdictions where regulation requires the use of the utility approach)." (Id. at 5.) The M-1 Manual explains that "[c]ash needs refer to the total revenues required by the utility to meet its cash expenditures." (Id.) The M-1 Manual further states that the components of the cash-needs approach to determining a utility's revenue requirement include "O&M expenses, debt-service payments, contributions to specified reserves, and the cost of capital expenditures that are not debt-financed or contributed. **Depreciation expense is not included**." (Id. (emphasis added)) "The debt-service component of the cash-needs approach usually consists of principal and interest payments on bonds or other debt instruments." (Id.)

25. In addition, to the extent that the City has included a cost component in the Rates designed to allow the City to accumulate cash reserves to finance future improvements to its water

and sewer system, the Rates also are arbitrary, capricious and unreasonable for this additional reason. It is impermissible rate-making to charge current users to create a fund to finance future improvements to the W&S system that will benefit future users. *See Grunow v. Township of Frankenmuth*, 2002 Mich. App. LEXIS 1440 (2002); *In re Foreclosure of Certain Parcels of Property*, 2014 Mich. App. LEXIS 943 (2014). Moreover, the City has not adopted any capital improvement plan that would justify the accumulation of these reserves. These cost components also contribute to the Rate Overcharge.

26. In addition, the City includes in its Rates each year $500,000 purportedly for "OPEB Expenses." Because the City already includes a separate amount of $455,000 in the Rates for **current** retiree health care expenses, the City ostensibly collects these additional amounts to create a reserve for **future** retiree health care costs. The City claims that the OPEB expense "became mandated in 2009 and must be funded and reserved in its own account." But the City does not use the funds derived from the "OPEB Expense" component of the Rates to fund a reserve for future OPEB expense. Indeed, the City's certified financial statements state that the City employs the "pay as you go method" and its 2015 CAFR confirms that the City's future OPEB expenses are 100% unfunded. In other words, the City has not created a reserve for future OPEB expenses but instead has included the "OPEB Expense" component in its Rates to derive additional revenues for other purposes. This OPEB Expense is part of the Rate Overcharge.

27. By virtue of the Rate Overcharge described above, and notwithstanding the millions of dollars transferred to the General Fund by virtue of the General Fund Support Charge and the cost incurred by the Water Fund for public fire protection that the City's General Fund should have paid, but did not pay, the City still has accumulated cash reserves in the Water and Sewer Funds far beyond those necessary to ensure the continued provision of water and sewage disposal service to its residents. As of June 30, 2010, the City's Water and Sewer Fund had **$9.6 million** in cash and investments. By June 30, 2015, the City's Water and Sewer Fund had **$18.7 million** in cash and

investments. As of June 30, 2015, the City's working capital reserve was approximately **$20 million**, an amount far in excess of an appropriate reserve.

28. Under established water and sewer rate-making methodologies, the $9.6 million in cash and investments that the City maintained in the Water and Sewer Funds as of June 30, 2010 was more than a sufficient reserve. Accordingly, there was no justification for including the Rate Overcharge in the subsequent fiscal years in order to increase the amount of those reserves.

29. Because the Rate Overcharge was included in the Water and Sewer Rates imposed by the City, each class member paid the Rate Overcharge when they paid their water and sewer bill.

30. The Rate Overcharges have been so substantial that the City has been able to transform the Water and Sewer Funds into "banks" for the City's cash-strapped General Fund. Beginning in 2012, the City regularly transferred millions of dollars from its Water and Sewer Funds to its General Fund.

31. The amounts transferred from the Water and Sewer Funds to the General Fund were made available for the City to use to pay for the general expenses of the City unrelated to providing water or sanitary sewer services.

32. The City purports to characterize these transfers of excess cash in the Water Fund and Sewer Fund to the General Fund as "loans." The City described the "loans" as "short-term inter-fund cash flow borrowings" which were intended to be repaid during the years in which they were made at an annual interest rate of 1%. *See* City Council Meeting Minutes, attached as **Exhibit B**.

33. During a May 15, 2012 city council meeting, members of the Taylor City Council discussed the "loans" as a strategy for balancing the City's budget. Council members outlined various non-water and sewer purposes for which they intended to use Water and Sewer Fund revenues, including bolstering cash flow, meeting general employee payroll and fringe benefits, payments to DTE, contributions to the police and fire funds and court employees' fund, and

insurance. Some council members expressed concern and doubt that the proposal was lawful, but resistance to the plan broke down on the grounds that the "loans" were an "investment" by the Water Fund and Sewer Fund, for which the funds would receive 1% interest.

34. The City repeatedly has utilized these "loans" to support the General Fund. In fiscal year 2011-2012, the City transferred $4 million from the Water Fund and Sewer Fund to the General Fund. In fiscal year 2012-2013, the City transferred between $7.5 million and $12.2 million from the Water Fund and Sewer Fund to the General Fund. And in fiscal year 2013-2014, the City again transferred $7.5 million from the Water Fund and Sewer Fund to the General Fund.

35. When the "loans" were repaid to the Water and Sewer Funds, the money has almost immediately been transferred back to the General Fund as additional purported "loans".

36. Regardless, none of the proposed uses for the "loaned" money were permissible under the Michigan Investment of Surplus Funds of Political Subdivisions Act or the City's own ordinances.

THE GENERAL FUND SUPPORT CHARGE

37. In addition to the Rate Overcharges described above, the City annually transfers another $1.25 million from the Water and Sewer Funds to the General Fund. These transfers are purportedly made to reimburse the General Fund for "services" provided by General Fund departments to the Water and Sewer Funds. The amounts transferred are included in the General Fund Support Charges in the Rates paid by the City's water and sewer customers.

38. The General Fund Support Charge and the associated transfers cannot be justified as payments for "services" provided to the Water and Sewer Fund by the City's General Fund Departments, because the value of any such services are far less than the amounts transferred. The General Fund Support Charge is particularly pernicious because the City has taken an otherwise appropriate cost allocation methodology and secretly added millions of dollars of phantom expenses in order to transfer millions of dollars to the General Fund. In fact, while certain General Fund departments, such as the Information Technology Department, supply goods, services and/or

facilities to the Water and Sewer Funds, the City has grossly inflated the costs of those services in order to allocate a disproportionate amount of the costs to the Water and Sewer Funds. The City transferred amounts from the Water and Sewer Fund to the General Fund that exceeded the actual value of services the General Fund provided. All amounts in excess of the actual value of services were available and actually used to pay for the general expenses of the City unrelated to providing water or sanitary sewer services.

39. The City's cost allocations violate established methodologies for allocating general fund support costs to the water and sewer function. Established water and sewer rate methodologies allow for such transfers, but prohibit the use of such transfers as a disguised method of utilizing water and sewer funds for purposes unrelated to water and sewer functions. In this regard, the American Water Works Association's M1 Manual "Principles of Water Rates, Fees and Charges," says the following about transfers from water funds to general funds for services provided:

> AWWA's policy statement on Finance, Accounting and Rates that that 'Water utility funds should not be diverted to uses unrelated to water utility services. Reasonable taxes, payments in lieu of taxes, and/or payments for services rendered to the water utility by a local government or other divisions of the owning entity may be included in the water utility's revenue requirements after taking into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity.' **Accordingly, payments made to a municipality's general fund should reimburse the general fund for the necessary cost of goods and/or services required by the water utility to provide water service**.

40. The AWWA policy statement on Finance, Accounting and Rates applies to both water and sewer rates and provides:

> Utilities should account for and maintain their funds in separate accounts from other governmental or owning entity operations. **Water and wastewater utility funds should not be diverted to uses unrelated to water or wastewater utility services**. Reasonable taxes, payments in lieu of taxes, and payments for services rendered to the utility by a local government or other divisions of the owning entity may be included in the utility's revenue requirements after taking into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity.

41. Instead of determining the "**necessary cost of goods and/or services" provided by the** General Fund departments to the City's Water and Sewer function, the City charges the Water and Sewer Fund a grossly inflated amount that has no basis in reality.

42. The City's cost allocation methodology is completely arbitrary because the City does not support its cost allocations by reference to objective and existing actual cost data but instead relies upon alleged "historical" and undocumented allocations, ostensibly updated by the finance directors unsubstantiated cost "estimates." And while the City defends its cost allocations by reference to a 1989 "Central Services Cost Allocation Plan (the "Griffith Plan") completed by David M. Griffith and Associates, the City has not updated this Griffith Plan in 26 years and its current cost allocations are completely untethered from the Griffith Plan itself. Indeed, the City's finance director has never reviewed the Griffith Plan in making the cost allocations.

43. For example, the City currently charges the Water and Sewer Fund over $250,000 per year for "rent" on the facility it occupies. The City's finance director testified that this allocation was based upon his assumption that the Water and Sewer division occupied 50% of the facility and other departments occupied the remaining 50%. Contrary to the finance director's assumptions, however, the Griffith Plan states that the Water and Sewer Division occupies only 20% of the DPS facility. Worse, the City's cost allocations assume that the Water and Sewer facility is a "commercial" building and therefore justify a higher rental rate than if the facility were an industrial building. Contrary to the City's assumptions, however, the Water and Sewer facilities clearly are industrial in nature. This further contributes to the excess cost allocation.

44. The GFOA cost allocations provide that "Governments should also regularly review their internal charge rates against actual experience for appropriate adjustments." *See* GFOA "Pricing Internal Services" (February 2013). The City clearly has not "regularly reviewed" its cost allocations "against actual experience."

45. In 2015, recognizing this deficiency, the City's auditors identified the following as one of the "Identified Areas To Improve Controls:"

> The City's General Fund annually allocates a portion of its administrative costs to other funds that benefit from the associated services they receive. We recommend that the City annual review the costs associated with providing those services including the charges to the other funds to verify they are reasonable, supportable and commensurate with the benefits provided.

46. The City's charges to the Water and Sewer Fund for "City Services" are not reasonable, supportable and commensurate with the benefits provided by the General Fund to the Water and Sewer Funds.

THE PUBLIC FIRE PROTECTION CHARGE

47. Not only does the City annually impose and collect the General Fund Support Charge from the Water and Sewer Funds, but the City's General Fund does not pay for the substantial services the Water and Sewer Fund provides to the General Fund. Instead, the cost of those services is included in the City's Rates and therefore are paid by the City's water and sewer customers. The principal such service is the public fire protection provided by the water supply system, which is a governmental function wholly separate from the supply of fresh water to City residents.

48. Public fire protection service is essentially a standby service that the water utility makes available on demand. Although most fire hydrants are rarely used, a water utility must be ready to provide adequate water quantities and pressures at all times throughout the distribution system.

49. The costs associated with maintaining the supply, treatment, pumping, storage and distribution capacity for fire protection includes a portion of the operating and maintenance costs and capital costs invested in facilities that are sized larger than necessary for non-firefighting

purposes. Public fire protection costs also include the expenses associated with the installation, repair and maintenance of fire hydrants. The City has thousands of fire hydrants in its jurisdiction.

50. The provision of public fire protection services is a governmental function which confers a benefit upon the general public benefit, and not merely the City's water and sewer customers, and therefore must be paid for out of the City's General Fund. *See, e.g., Lane v. City of Seattle*, 164 Wn. 2d 875, 194 P.3d 977 (Wash. 2008). *See also Bolt v City of Lansing,* 221 Mich. App. 79, 91; 561 N.W.2d 423 (1997) (Markman, J. dissenting)[1] ("What properly characterizes most public safety functions, such as core police and fire services, as being beyond the purview of governmental activity that might be subject to a user fee is that the benefits derived from these functions benefit the entire community generally").

51. Even though the City recognizes that the Water and Sewer Fund provides fire protection services, the City does not pay the Water and Sewer Fund for public fire protection services. Instead, the City includes the costs it incurs for public fire protection as a component of the Rates it charges to its water and sewer customers through the Public Fire Protection Charge.

52. The City's inclusion of the Public Fire Protection Charge in its Rates violates the City's own ordinances, which require the City -- not water and sewer customers -- to pay the costs of public fire protection. In this regard, Taylor Ordinance Sec. 50-25 provides in pertinent part:

> (g) 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**. … [Ord. Sec. 50-25(g) (emphasis added)]

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[1] Judge (now Justice) Markman's dissent in the Court of Appeals' Bolt decision ultimately was adopted by the Supreme Court majority. See *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998).

53. In addition to the City's ordinances, the Revenue Bond Act is clear in its prohibition that "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." MCL 141.118(1). Under MCL 141.118(1), "[t]he reasonable cost and value of any service rendered to a public corporation, including the borrower [the City] by a public improvement shall be charged against the 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, …"

54. The "free service" prohibition set forth in MCL 141.118 applies to public fire protection services. *See Farmington Township v. Warrenville State Bank*, 185 F.2d 260, (6th Cir. 1950) (holding that MCL 141.118 required a township to pay the costs associated with public fire hydrants and recognizing that "[f]ire protection is a service which accrues from day to day to the public that is thereby safe-guarded"). The City has violated MCL 141.118 because it does not impose any public fire protection charges upon itself, but instead, imposes the cost of public fire protection upon its water and sewer customers through the Rates.

55. On information and belief, the value of the public fire protection services provided by the Water and Sewer Fund exceeds the amount of the General Fund Support Charge. Thus, the General Fund Support Charge would be unlawful even if it accurately reflected the value of the services provided by the General Fund Service Departments to the Water and Sewer Fund because it does not take "into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity," as required by governing rate-setting methodologies.

56. The fact that the City is able to divert millions of dollars of Water and Sewer Fund revenues for services unrelated to supplying water and sewer services to its inhabitants is proof that the City is charging Water Rates which exceed the "actual cost of providing the service," in violation of MCL 123.141(3).

57. That portion of the Rates, and the revenues obtained by charges for water and sewer service, which exceed the City's actual cost of providing water and sewer services to its residents – i.e., the Rate Overcharges, the General Fund Support Charges and the Public Fire Protection Charges (collectively "the Charges") – further constitute "taxes" in violation of the Headlee Amendment to the Michigan Constitution.

58. In *Bolt,* the Court enforced Headlee and identified "three primary criteria to be considered when distinguishing between a fee and a tax" (459 Mich. at p. 161):

1. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";

2. "[U]ser fees must be proportionate to the necessary costs of the service"; and

3. Payment of the fee is voluntary. [459 Mich. at pp. 161-62]

59. The Charges serve a revenue-raising purpose because they are being used to finance the City's general governmental obligations unrelated to providing water and sanitary sewage disposal services.

60. The Charges are not proportionate to the necessary costs of the City's water supply and sewage disposal services for the reasons set forth above.

61. Payment of the Charges is not voluntary but at the very least is effectively compulsory. The City requires all dwellings in the City to be connected to the public water supply system and the public sewer system and, by virtue of those connections, to pay the City's charges for water supply service and sewage disposal service. Thus, Plaintiff and other class members cannot evade payment of the Charges by eliminating or reducing their water or sewer usage.

62. Unpaid water and sewer bill charges constitute a lien on the property served. *See* City Ordinance Sec. 50-33(i).

63. If water and sewer bill charges go unpaid for 6 months, the unpaid amount shall be transferred to the tax rolls and collected by the county in the manner of real property taxes. *See* City Ordinance Sec. 50-27(g).

CLASS ALLEGATIONS

64. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of all persons or entities which have paid the City for water and sanitary sewer service during the relevant class periods.

65. The members of the Class are so numerous that joinder of all members is impracticable.

66. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff is a member of the Class he seeks to represent, and Plaintiff was injured by the same wrongful conduct that injured the other members of the Class.

67. The City has acted wrongfully in the same basic manner as to the entire class.

68. There are questions of law and fact common to all Class Members that predominate over any questions, which, if they exist, affect only individual Class Members, including:

a. whether the Water Rates violated MCL 123.141(3);

b. whether the Water Rates violated MCL 141.118;

c. whether the Charges imposed by the City are taxes;

d. whether the Charges imposed by the City violate the Headlee Amendment;

e. whether the Charges violate MCL 141.91;

f. Whether the City has been unjustly enriched by collecting the Charges; and

g. Whether the City's "loans" from the Water Fund and Sewer Fund to the

General Fund violate the Investment of Surplus Funds of Political Subdivisions Act, MCL 129.91 *et seq*., and/or the City's Charter and Ordinances.

69. Plaintiff will fairly and adequately protect the interests of the Class, and Plaintiff has no interests antagonistic to those of the Class. Plaintiff is committed to the vigorous prosecution of this action, and has retained competent and experienced counsel to prosecute this action.

70. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. The prosecution of separate actions would create a risk of inconsistent or varying adjudications. Furthermore, the prosecution of separate actions would substantially impair and impede the ability of individual class members to protect their interests. In addition, since individual refunds may be relatively small for most members of the class, the burden and expense of prosecuting litigation of this nature makes it unlikely that members of the class would prosecute individual actions. Plaintiff anticipates no difficulty in the management of this action as a class action.

COUNT I

UNJUST ENRICHMENT - VIOLATION OF MCL 123.141(3)

71. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

72. The City has violated MCL 123.141(3) by selling water to Plaintiff and the Class at a retail rate in excess of the City's actual cost of providing water service (the "Water Rate Overcharges").

73. MCL 123.141(3) was enacted for the purpose of protecting retail consumers of water, like Plaintiff and the Class, from being overcharged for water service.

74. Plaintiff and the Class have been injured as a direct and proximate result of the City's violation of MCL 123.141(3) because they have paid or incurred amounts in excess of the amounts they should have paid for water service had the City established Water Rates that did not exceed the City's actual costs of providing water service.

75. Plaintiff and the Class are entitled to receive a refund corresponding to the total amount of the Water Rate Overcharges imposed or collected by the City during the six year period prior to the filing of this action and during the pendency of this action.

76. The City should be required to disgorge the revenues attributable to the Water Rate Overcharges imposed or collected by the City during the six year period prior to the filing of this action and during the pendency of this action and refund those Overcharges to Plaintiff and the Class.

COUNT II

VIOLATION OF THE HEADLEE AMENDMENT

77. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

78. The City is bound by the Michigan Constitution of 1963, including those portions commonly known as the Headlee Amendment.

79. In particular, the City may not disguise a tax as a fee under Article 9, § 31 of the Michigan Constitution of 1963.

80. The Charges are disguised taxes and intended to avoid the obligations of the Headlee Amendment, including the requirement that the Charges, as taxes, be approved by a majority of the electorate.

81. The Charges have all relevant indicia of a tax:

a. They have no relation to any service or benefit actually received by the taxpayer;

b. The amount of the Charges is disproportionate to the cost incurred by the City in providing water and sewer services;

c. The Charges are designed to generate revenue;

d. The payers of the Charges benefit in no manner distinct from any other taxpayer or the general public;

e. Payment of the Charges is not discretionary, but effectively mandatory;

f. Various other indicia of a tax described in *Bolt v. City of Lansing* are present.[2]

82. As a direct and proximate result of the City's implementation of the Charges, Plaintiff and the Class have been harmed.

83. Plaintiff seeks his attorneys' fees and costs as allowed by Article 9, § 32 of the Michigan Constitution of 1963 and MCL 600.308a.

84. Plaintiff seeks a remedy in the form of a refund of all amounts to which he and the Class are entitled.

COUNT III

UNJUST ENRICHMENT – UNREASONABLE WATER AND SEWER RATES

85. Plaintiff incorporates each of the preceding paragraphs as if fully set forth herein.

86. Even if the Charges are not taxes, the Water and Sewer Rates must still be reasonable. *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412.

87. Because they include the Charges, the Water Rates and Sewer Rates are arbitrary, capricious, and unreasonable.

88. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit upon on the City.

89. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the Charges under the circumstances.

90. The City should be required to disgorge the amounts by which it has been unjustly enriched.

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[2] Pursuant to MCR 2.1112(M), Plaintiff identifies subparts (a) through (f) of Paragraph 81 as "factual questions that are anticipated to require resolution by the Court."

COUNT IV

UNJUST ENRICHMENT – VIOLATION OF MCL 129.91 *et seq.*

91. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

92. The City has violated the Michigan Investment of Surplus Funds of Political Subdivisions Act, MCL 129.91 *et seq.* (the "Surplus Funds Act"), by making "loans" from its Water Fund and Sewer Fund to its General Fund.

93. The Surplus Funds Act sets specific guidelines for the investment of surplus municipal funds. The Surplus Funds Act allows a municipality to invest in conventional investment vehicles such as bonds, certificates of deposit, and savings accounts.

94. The Surplus Funds Act does not permit a municipality to invest surplus funds in loans from one proprietary fund, such as the City's Water Fund or Sewer Fund, to a General Fund or another proprietary fund.

95. Municipalities may not borrow money from a conventional lender (*see* MCL 141.2301). A municipality may borrow money by issuing bonds under the Michigan Revised Municipal Finance Act, MCL 141.2101 *et seq.*

96. Any such issuance of bonds must comport with the Revised Municipal Finance Act. *See* MCL 141.2301.

97. Loans of surplus funds from a proprietary fund are unlawful under the Surplus Funds Act, and even if such loans were lawful, they would have to be made in accordance with the Revised Municipal Finance Act.

98. Accordingly, the City's longstanding practice of "lending" surplus funds from its Water Fund and Sewer Fund to its General Fund is unlawful.

99. Plaintiff and the Class have been injured as a direct and proximate result of the City's violation of the Surplus Funds Act because they have paid or incurred amounts in excess of the amounts they should have paid for water and sewer service had the City collected only the amounts

it needed to provide water and sewer service, and not collected excess amounts which it used to make unlawful intergovernmental "loans".

100. Plaintiff and the Class are entitled to receive a refund corresponding to the total amount of the "loans" from the Water Fund and Sewer Fund to the General Fund made during the six year period prior to the filing of this action.

101. The City should be required to disgorge the total amount of the "loans" from the Water Fund and Sewer Fund to the General Fund made during the six year period prior to the filing of this action and refund those General Fund Support Charges to Plaintiff and the Class.

COUNT V

UNJUST ENRICHMENT – VIOLATION OF MCL 141.91

102. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

103. The Michigan Prohibited Taxes by Cities and Villages Act, MCL 141.91 provides:

> Sec. 1. 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. [emphasis added].

104. The City has violated MCL 141.91 by imposing and collecting the Charges. The Charges are taxes that are not ad valorem property taxes and they were first imposed after January 1, 1964.

105. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit upon on the City.

106. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the Charges under the circumstances.

107. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT VI

UNJUST ENRICHMENT – CHARTER VIOLATION

108. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

109. Section 17.3 of the City's Charter requires that the City establish "just and reasonable rates and other charges" for public services, including water and sewer services.

110. The City has exceeded the authority stated in § 17.3 of its Charter by imposing inequitable Water Rates and Sewer Rates upon Plaintiff and the Class.

111. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit on the City.

112. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the Charges under the circumstances.

113. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT VII

UNJUST ENRICHMENT – ORDINANCE VIOLATION

114. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

115. City Ordinance § 50-24, part of the City's water and sewer ordinances, 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**." [emphasis added].

116. The City has contravened Ordinance § 50-24 by "lending" money from the Water Fund and Sewer Fund to the General Fund or by otherwise commingling surplus funds from the Water Fund and Sewer Fund with General Fund money.

117. The City has also contravened Ordinance § 50-24 by purportedly "lending" Water Fund and Sewer Fund money to the General Fund, which is a purpose other than "the operation and maintenance of the water and sewer divisions", and is therefore expressly prohibited by the City's Ordinances.

118. As a direct and proximate result of the City's improper conduct, the City has collected or transferred to its General Fund millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit on the City.

119. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the General Fund Support Charges under the circumstances.

120. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT VIII

UNJUST ENRICHMENT – ORDINANCE VIOLATION

121. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

122. Taylor Ordinance Sec. 50-25 provides in pertinent part:

> (g) 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**. … [Ord. Sec. 50-25(g) (emphasis added)]

123. The City has contravened Ordinance § 50-24 by not paying the Water Fund for fire hydrant service or any other public fire protection services and instead collecting the costs of those services from its water and sewer customers through the Public Fire Protection Charges.

124. As a direct and proximate result of the City's improper conduct, the City has collected or transferred to its General Fund millions of dollars to which it is not entitled. By paying the Public Fire Protection Charges, Plaintiff and the Class have conferred a benefit on the City.

125. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the Public Fire Protection Charges under the circumstances.

126. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT IX

UNJUST ENRICHMENT – VIOLATION OF MCL 141.118

127. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

128. The Revenue Bond Act is clear in its prohibition that "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." MCL 141.118(1). Under MCL 141.118(1), "[t]he reasonable cost and value of any service rendered to a public corporation, including the borrower [the City] by a public improvement shall be charged against the 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, …"

129. The City has violated MCL 141.118 because it does not impose any public fire protection charges upon itself, but instead, imposes the cost of public fire protection upon its water and sewer customers through the Public Fire Protection Charge.

130. The City is receiving a free service that is prohibited by MCL 141.118 by imposing its public fire protection costs upon its water and sewer customers.

131. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the City's public fire protection expenses through their payment of the Public Fire Protection Charge incorporated into the Rates, Plaintiff and the Class have conferred a benefit upon on the City.

132. The City has been unjustly enriched because it has received water and sewer charges to which it was not entitled, and it would be unfair for the City to retain those monies under these circumstances.

133. Under equitable principles, the City should be required to disgorge the amounts by which it has been unjustly enriched and, pursuant to MCL 141.118, should be forced to impose a charge upon itself for public fire protection services provided by the City's Water and Sewer Fund.

COUNT X

ASSUMPSIT – MONEY HAD AND RECEIVED

134. Plaintiff incorporates each of the preceding paragraphs as if fully set forth herein.

135. A claim to recover amounts paid to a governmental unit in excess of the amount allowed under law is properly filed as an equitable action in assumpsit for money had and received.

136. By virtue of the City's inclusion of the Charges in the Rates, the City has collected amounts in excess of the amounts it was legally entitled to collect. Therefore, Plaintiff is entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g.*, *Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

137. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit upon on the City.

138. The City has been unjustly enriched because it received Charges to which it was not entitled, and it would be unfair for the City to retain the Charges under the circumstances.

139. Under equitable principles, the City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT XI

DECLARATORY JUDGMENT INVALIDATING LIENS

140. Plaintiff incorporates each of its preceding allegations as if fully set forth herein.

141. Pursuant to Michigan law and the City's ordinances, unpaid Charges may become a lien against the property of certain members of the Class. If left unpaid, the Charges are transferred to the tax roll of the property.

142. The City may claim liens against the properties owned by Plaintiff and the Class for unpaid Charges.

143. Because the Charges are unconstitutional and unlawful, the Court should enter an order invalidating any municipal water or sewer liens or associated tax liens which have been imposed, or which may be imposed, against properties arising out of or relating to the Charges.

PRAYER FOR RELIEF

Plaintiff requests that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiff certified as Class Representatives and Kickham Hanley PLLC and Foley & Robinette, P.C. designated Class Counsel;

B. With respect to Count I, define the Class to include all persons or entities which have paid the City for Water Service at any time in the six years preceding the filing of this lawsuit or which pay the City for Water Service during the pendency of this action;

C. With respect to Count II, define the Class to include all persons or entities which have paid the City for Water Service or Sewer Service at any time in the one year preceding the filing of this lawsuit or which pay the City for Water Service or Sewer Service during the pendency of this action;

D. With respect to Counts III through XI, define the Class to include all persons or entities which have paid the City for Water Service or Sewer Service at any time in the six years preceding the filing of this lawsuit or which pay the City for Water Service or Sewer Service during the pendency of this action;

E. With respect to Counts I, II, III, V, VI, VII, VIII, IX, and X, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all General Fund Support Charges collected and to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of General Fund Support Charges to which Plaintiff and the Class are entitled;

F. With respect to Count IV, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all funds "lent" by the Water Fund or Sewer Fund to the City's General Fund, and to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of all such "loans";

G. With respect to Count XI, enter a declaratory judgment extinguishing all liens against property belonging to Plaintiff and the Class arising from or related to the Charges;

H. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;

I. Find and declare that the Charges violate MCL 123.141(3), the Headlee Amendment, MCL 141.91, MCL 141.118, the City's Charter, and the City's ordinances, and permanently enjoin the City from imposing or collecting Water Rates which exceed the City's actual costs of providing water service or Sewer Rates which exceed the City's actual costs of providing Sewer Service;

J. Find and declare that the Charges violate the Headlee Amendment and permanently enjoin the City from imposing or collecting Charges;

K. Find and declare that "loans" from the City's Water Fund or Sewer Fund to its General Fund are unlawful under MCL 129.91 *et seq.* and permanently enjoin the City from making such "loans";

L. Find and declare that all liens against property belonging to Plaintiff and the class arising from or related to the Charges are extinguished;

M. Award Plaintiff and the Class the costs and expenses incurred in this action, including reasonable attorneys', accountants', and experts' fees; and

N. Grant any other appropriate relief.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

FOLEY & ROBINETTE, P.C.

/s/ Dean C. Robinette
Dean C. Robinette (P54197)
13349 Reeck Court
Southgate, MI 48195
(734) 283-4000
Co-counsel for Plaintiff

Date: September 12, 2016
KH145736

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the ***Plaintiff's First Amended Class Action Complaint*** with the Clerk of the Court using the electronic filing system.

/s/ Kim Plets
Kim Plets