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

Dennis Shoner and Barbara Potocki,
individually, and as representatives of
a class of similarly-situated persons and entities,

Plaintiffs,

Case No. 16-29165-CZ
Hon. David J. Reader

v.

Charter Township of Brighton,
a municipal corporation,

Defendant.

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PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

There was a pending civil action arising out of the transaction or occurrence alleged in the complaint filed in the United States District Court, Eastern District of Michigan, Case no: 2:16-cv-12267-AC-DRG. This action is no longer pending.[1]

[1] Plaintiffs file this amended complaint as a matter of right pursuant to MCR 2.118 (A)(1). Defendant has not filed a responsive pleading pursuant to MCR 2.110, but instead has filed a renewed motion to dismiss. A dispositive motion is not considered a responsive pleading. MCR 2.110(A); *City of Huntington Woods v Ajax Paving Indus, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989). Because Defendant never filed a responsive pleading to Plaintiffs' complaint, Plaintiff has the right to file an amended complaint as a matter of course under MCR 2.118(A)(1). *See Carey v. Foley & Lardner, LLP* 2016 Mich. App. LEXIS 1499 (August 9, 2016)(Exhibit 1, hereto),

Plaintiffs Dennis Shoner and Barbara Potocki ("Plaintiffs"), by their attorneys, Kickham Hanley PLLC and Shawn H. Head, individually and on behalf of a class of similarly situated class members, state the following for their First Amended Class Action Complaint against the Charter Township of Brighton (the "Township"):

INTRODUCTION

1. This is an action challenging certain overcharges currently assessed against a specific subset of the Township's residents and used to fund obligations relating to the construction, operation & maintenance of the Township's Sanitary Sewer System (the "Sewer System").

2. The overcharges are included in the sewer rates (the "Sewer Rates"), imposed by the Township on a small subset of its citizens, including Plaintiffs and those similarly situated (hereinafter, "the System Users"), who dispose of their sanitary sewage through the Township's Sewer Drainage District.

3. There are two specific overcharges which are unlawful. First, the Township has set its Sewer Rates at a level far in excess of the rates that are necessary to pay the actual costs of providing sewage disposal services to the System Users (the "O&M Overcharge"). The O&M Overcharge was established in contravention of established sewer rate-setting methodologies, and resulted in the System Users bearing an unreasonable and disproportionate allocation of the costs associated with the operation and maintenance of the Township's Sewer System.

4. Second, in addition to the O&M Overcharge, the Township has unlawfully included in its Sewer Rates an additional capital service charge, (the "Capital Overcharge") that it charges the System Users to cover the "principal, interest, and administrative costs of retiring the debt incurred for

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citing Dean and Longhofer in Michigan Court Rules Practice (4th ed), § 2118.2, p 552: A party may appropriately reply to a motion [to dismiss] with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).

the construction of the Sewer System." The Capital Charge is wholly unlawful as to the System Users because they have already been assessed and paid their portion of the capital cost to construct the Sewer System when they paid their initial connection fee of $12,400.[2]

5. Indeed, the capital expenses that the Township seeks to offset with the Capital Overcharge are associated with the Township's decision to build the Sewer System well over the capacity necessary to service the System Users in the hopes that new users of the system would eventually be added to defray the massive capital costs incurred to build the excessive Sewer System, and to defray the overbuilt Sewer System's substantial operational costs. The Township has failed to connect the number of new users it anticipated to the Sewer System, leaving the System Users to bear the considerable costs of the Township's over-capacitized Sewer System—costs which are completely untethered to the services or benefits received by the System Users via their use of the Township's Sewer System.

6. The O&M Overcharge and the Capital Service Overcharge are collectively referred to herein as the "Overcharges."

7. The Overcharges constitute "taxes" that have not been authorized by the Township's voters in violation of the Headlee Amendment to the Michigan Constitution.

8. The Township has admitted that the Overcharges are taxes. Specifically, the Township filed a motion to dismiss the complaint in a lawsuit that Plaintiffs initially filed in the Eastern District of Michigan. In its motion to dismiss, the Township repeatedly asserted as a defense that the same Overcharges challenged herein are in fact taxes. The Township reasoned that this fact deprived the Eastern District Court of subject matter jurisdiction pursuant to the Tax Injunction Act. *See* Exhibit 2 hereto, the Township's Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)

[2] Most original users of the Sewer System were assessed $12,400; some were assessed $12,664, which included a $264 "design study" charge. The 850 subsequently added users were assessed similar charges, but at varying rates to connect to the Sewer System.

filed in Case No. 2:16-cv-12267. In lieu of litigating that limited issue in Federal Court, Plaintiffs instead voluntarily dismissed the Federal Complaint so that they can pursue all of their claims in this Court; including their claim that the Overcharges violate the Headlee Amendment.

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

10. The Overcharges also violate the Equal Protection Guarantees contained in the United States and Michigan Constitutions (*see* U.S. Constitution Article 14, § 1; Mich. Constitution 1963, Article 1, § 2). Simply, by imposing the entire operational & maintenance and capital costs of the Township's Sewer System—a system which benefits the Township as a whole—upon the System Users, the Township has created an arbitrary class of "payers" from its residents and has extended privileges to an arbitrary and/or unreasonable class which are denied to the System Users.

11. The Township is treating similarly-situated residential property owners differently by imposing the Overcharges only upon the System Users. Here, the Township gerrymandered a special district assessment boundary so as to purposefully eliminate a portion of residents and businesses that should have connected to and used the Sewer System. Indeed, despite the fact that State law and the Township's own ordinances required a property owner to connect with the Sewer System if a structure was located within 200 feet of it, the Township selectively enforced this ordinance, compelling some property owners to connect and arbitrarily exempting others.

12. By allowing certain residents to opt out, but forcing others to connect, the Township has forced the System Users to unilaterally bear virtually the entire cost associated with construction of the over-built Sewer System—including the $9.6 Million (not including interest) bond debt assessment

shortfall now facing the Township. Further, the Township is currently forcing the System Users to bear a disproportionate share of the operational costs of the over-built Sewer System. At a minimum, the Township and other residents and businesses, that are proximately located near the Sewer System and should be connected to it, should have to bear these costs. The System Users are arbitrarily and capriciously being charged differently than similarly situated residents and businesses that were permitted to opt out of connecting to the Sewer System.

13. The Overcharges are also unlawful because they are otherwise arbitrary, capricious and/or unreasonable under Michigan common law standards.

JURISDICTION AND VENUE

14. Plaintiffs are users of the Township's Sewer System. Plaintiffs have paid the Overcharges at issue and seek to act as class representatives for all similarly situated System Users.

15. Defendant, Charter Township of Brighton (the "Township"), is a municipality located in Livingston County, Michigan. The Township maintains a Sewer Enterprise Fund (the "Sewer Fund") and prepares financial statements for this Fund.

16. Venue and jurisdiction are proper in the Livingston County Circuit Court because all parties are present in Livingston County, Michigan and the actions which give rise to Plaintiffs' claims occurred in Livingston County, Michigan. Venue and jurisdiction also are proper in the Livingston County Circuit Court under Article 9, Section 31 of the Michigan Constitution of 1963, and MCL 600.308a.

GENERAL ALLEGATIONS CONCERNING THE OVERCHARGES

17. In late 1999, the Township was well into the planning and development phase for its new Sewer System. At this time a Special Assessment District ("SAD") was formed, whose residents would be required to connect to the Sewer System and pay for the Sewer System's financing and operations. The SAD was initially comprised of a number of separate property areas, including, but not limited to, Fonda Lake, Lake of the Pines, Woodland Lake, Clark Lake, Woodland Lake Estates #4,

School Lake, Hope Lake, Woodland Lake #3, and the Ravines. Notably, the Township permitted Lake of Pines, Clark Lake, Woodland Lake #3, The Ravines and others property areas to drop off the original SAD plan. Other property areas such as Fonda Lake, were forced to remain in the SAD under the Township's threat of a lawsuit.

18. In late 2000, the Township commenced construction of its $28 Million Sanitary Sewer System, which it funded through the sale of sewer bonds backed by Livingston County.

19. The Township currently maintains and operates the Sewer System to provide sewage disposal services to a small portion of the Township's residents. Plaintiffs have received sewer service from the Township and paid the Sewer Rates imposed by the Township. The Township's ordinances require the structures used by its citizens to be connected to the Township's Sewer System where available. *See* Township Ordinance Sec. 22-07.

20. The Township establishes Sewer Rates from time to time through enacted ordinances. *See* Township Ordinance Sec. 22-17.

21. The SAD has a total of 1352 Original REUs and 850 REUs were subsequently added between 2003 and 2016.[3]

22. In 2000, the Township established and assessed a sewer tap charge of $12,400 per Residential Equivalent Unit ("REU") against Plaintiffs (as original users of the Sewer System) which could be paid off over time with interest, or paid off in full at any time during the repayment period (the "Assessment"). The $12,400 Assessment, assessed against the first 1352 REUs, was the original users' contribution to the capital cost of building the Sewer System.

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[3] Specifically, the original users connected to the system by 2003 and were comprised of 1352 REUs. Subsequent users who have hooked up to the Township's Sewer System between 2003 and 2016 paid varying rates assessment rates and were comprised of 850 REUs. Approximately 4000 properties in Brighton Township have not been required to connect to the Sewer System and are not assessed sewer fees.

23. Between 2003 and 2016, the Township imposed the Assessment on the subsequent system users, at varying amounts, but still calculated the Assessment using an artificially high capacity usage estimate.

24. With the expectation of adding new users to the Sewer System, the Township built the Sewer System well over capacity in order to service both Plaintiffs and those similarly situated and the anticipated new users, who the Township expected would contribute to the repayment of the outstanding bond debt as well as absorb the cost of the excess sewer capacity. Unfortunately, the number of new users the Township anticipated never manifested and, even with 850 REUs subsequently added to the Sewer System between 2003 and 2016, to this day the Sewer System only operates at 40% capacity, forcing the System Users to pay for 60% in excess capacity.

25. Moreover, there is an approximate $9.6 Million shortfall of funds to pay the Township's bond debt. Here, because the Township assumed it would collect this difference from new system users, the Assessments against Plaintiffs and those similarly situated only generated approximately $18 Million of the $28 Million bond obligation.[4]

26. Thus, the Overcharges exist because the Township built a Sewer System with excess capacity and now needs to pay for it because the Township cannot collect its costs from new users who did not connect to the Sewer System as anticipated.

27. Worse, at the time that the Sewer System became operational, the Township had a "200 Foot Ordinance" (which the Township recently repealed in 2014) which *required* new users within 200 feet of the Sewer System to connect to it—but for some unknown reason, the Township failed and/or refused to uniformly enforce this ordinance to force all potential new users onto the Sewer System—

[4] Initially, in 2000 the Township determined that there would be 1765 REUs that would pay for the $18 million assessment. However, by 2003, 413 REUs had simply disappeared from the assessment rolls and were not required to connect to the Sewer System. This reduced the original REUs to 1352 with estimated assessments down to below $14 million (plus $16 million interest). Simply, the Township reduced the number of REUs without collecting the original $5 million assessment nor the additional $3 million in interest from these REUs.

yet another reason that the System Users are encumbered with the unfair and unwarranted Overcharges.

28. Each of the System Users are currently being charged for approximately 150 gallons of excess capacity per day, per REU, and are paying the debt financing, maintenance and capital costs for all capacity generated above the Township's requirement of 270,000 gallons per day (the O&M Overcharge). Plaintiffs estimate that the cost to build, finance and maintain the overbuilt portion of the Sewer System is approximately $37 Million over the 20-year life of the bond. Notably, System Users do not receive a benefit from this extra capacity in the Sewer System, did not request it, and did not vote in favor of constructing it.

29. In addition, the Township has included a wholly illegal cost component in the Rates designed to allow the Township to recoup from System Users the amounts necessary to pay back the bonds issued to finance the construction of the entire Sewer System (the "Capital Service Overcharge"). Imposing this separate charge on System Users is unlawful because the System Users were already assessed the $12,400 assessment as their "fair share" of the construction costs of the Sewer System. Accordingly, the Township's actions in forcing System Users to also pay the Capital Service Overcharge results in the System Users paying twice for the capacity allocated to them.

30. Adding insult to injury, and as a new (yet unlawful) component of the Overcharges, the Township has begun to charge the System Users with its fees and costs incurred to defend this lawsuit by increasing the System Users Sewer Rates—thus wrongfully foisting the Township's legal bills upon the same class of personas that have been harmed by the its wrongful imposition of the Overcharges in the first place.

31. The inclusion of the Overcharges renders the Township's Sewer Rates arbitrary, capricious and unreasonable.

32. Moreover, the Township's imposition of these Overcharges upon the System Users—essentially forcing this subset of residents to pay more for the bond debt than originally promised, for a

sewer system the Township purposefully overbuild by 60%—is not just outrageous, but violates Equal Protection guarantees, violates the Township's own ordinances, and contravenes standards governing reasonable rate-making.

33. By imposing Sewer Rates that include the Overcharges, and thus imposing fees that exceed the Township's actual cost of providing sewer service to System Users, the Township has continuously and systematically violated Equal Protection guarantees of the U.S. and Michigan Constitutions as well as State common law principles.

34. Because the Overcharges were included in the Sewer Rates imposed by the Township, each class member paid the Overcharges when they paid their sewer bill.

35. 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]

36. The Overcharges serve a revenue-raising purpose because they are being used to impermissibly finance the Township's debt obligations and exceed reasonable rates to providing sanitary sewage disposal services to the System Users.

37. The Overcharges are not proportionate to the necessary costs of the Township's sewage disposal services to the System Users for the reasons set forth above.

38. Payment of the Overcharges is not voluntary but at the very least is effectively compulsory. The Township requires the System Users to be connected to the Sewer System (*see* Township Ordinance Sec. 22-07) and, by virtue of those connections, to pay the Township's Overcharges for sewage disposal service. Thus, Plaintiffs and other class members cannot evade payment of the Overcharges by eliminating or reducing their sewer usage.

39. Unpaid sewer bill charges constitute a lien on the property served. *See* Township Ordinance Sec. 22-17.

40. If sewer bill charges go unpaid for 3 months, the unpaid amount shall be transferred to the tax rolls and collected by the county in the manner of real property taxes. *See* Township Ordinance Sec. 22-17.

CLASS ALLEGATIONS

41. Plaintiffs bring 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 Township for sanitary sewer service, and thus paid the Overcharges, during the relevant class periods.

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

43. Plaintiffs' claims are typical of the claims of members of the Class. Plaintiffs are a member of the Class they seeks to represent, and Plaintiffs were injured by the same wrongful conduct that injured the other members of the Class.

44. The Township has acted wrongfully in the same basic manner as to the entire class.

45. 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 Overcharges imposed by the Township are taxes;

b. Whether the Overcharges imposed by the Township violate the Headlee Amendment;

c. Whether the Overcharges serve a revenue raising purpose;

d. Whether the Overcharges are proportionate to the necessary costs of the Township's sewage disposal services to the System Users;

e. Whether the Overcharges are voluntary;

f. Whether or not the Overcharges violate Equal Protection Guarantees;

g. Whether the Overcharges imposed by the Township violate the Township's

Ordinances;

h. Whether the Township has been unjustly enriched by collecting the Overcharges; and

i. Whether the Township's Sewer Rates are reasonable.

46. Plaintiffs will fairly and adequately protect the interests of the Class, and Plaintiffs have no interests antagonistic to those of the Class. Plaintiffs are committed to the vigorous prosecution of this action, and have retained competent and experienced counsel to prosecute this action.

47. 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. Plaintiffs anticipate no difficulty in the management of this action as a class action.

COUNT I
VIOLATION OF THE HEADLEE AMENDMENT

48. Plaintiffs incorporate each of his preceding allegations as if fully set forth herein.

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

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

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

52. The Township admits that the Overcharges are in fact taxes. *See* Exhibit 2, hereto. Moreover, the Overcharges 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 Overcharges are disproportionate to the cost incurred by the Township in providing sewer services;

c. The Overcharges are designed to generate revenue;

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

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

f. Various other indicia of a tax described in *Bolt v. Township of Lansing* are present.[5]

53. As a direct and proximate result of the Township's assessment of the Overcharges, Plaintiffs and the Class have been harmed.

54. Plaintiffs seek their attorneys' fees and costs as allowed by Article 9, § 32 of the Michigan Constitution of 1963 and MCL 600.308a.

55. Plaintiffs seek a remedy in the form of a refund of all amounts to which they and the Class are entitled.

COUNT II
VIOLATION OF EQUAL PROTECTION GUARANTEES

56. Plaintiffs incorporate each of its preceding allegations as if fully set forth herein.

57. The Township's practice of imposing the Overcharges only upon System Users is a constitutionally improper classification which violates Federal and State equal protection guarantees in at least two ways. First, there is no natural distinguishing characteristic between System Users paying the Overcharges and those residents that are similarly situated to the Sewer System, but have not been

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[5] Pursuant to MCR 2.112(M), Plaintiffs identifies subparts (a) through (f) of Paragraph 51 as "factual questions that are anticipated to require resolution by the Court."

required to connect to it and are not subject to the Overcharges.[6] Thus, System Users are irrationally being charged differently than the similarly situated residents that are not required to connect to the Sewer System and are not being assessed the Overcharges.

58. The manner in which the Overcharges are imposed unduly burdens System users, and puts all Class members at a distinct financial disadvantage as compared to the owners of other property within the Township which are not being charged in the same manner. System Users have been forced to connect to the Sewer System, while other similarly situated Township Residents have not. Thus, System Users are financing the Township's entire bond debt obligation and entirely paying for Township's development of the Sanitary Sewer System—which benefits the Township as a whole.

59. There is no legitimate governmental purpose being served through the Township charging the Overcharges to System Users.

60. 42 U.S.C § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

61. The Township has violated 42 U.S.C § 1983 by imposing the Overcharges upon Plaintiffs and the Class, as System Users, in violation of their constitutional equal protection guarantees.

62. Plaintiffs and the Class have been financially harmed as a result of the Township's violation of their constitutional equal protection guarantees and 42 U.S.C. § 1983.

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[6] Current Township Ordinance Sec. 22-07 requires connection to the Sewer System when the property is contiguous to the right of way or easement within which the public sewer is located, public sewer and the system have sufficient capacity to reliably treat the additional sewage flows from the connection and, the public sewer pressure will accommodate connection to the system. Notably, in 2014, the Township repealed a former ordinance, that it only selectively enforced, which required all properties within 200 feet of the Sewer System to connect to it.

63. The Township should be required to disgorge the revenues attributable to the Overcharges imposed or collected by the Township for all years prior to the date of the filing of this action and during the pendency of this action, and refund all Overcharges it has collected to Plaintiffs and the Class.

COUNT III
ACTION IN ASSUMPSIT (MONEY HAD AND RECEIVED)
– UNREASONABLE SEWER RATES

64. Plaintiffs incorporate each of the preceding paragraphs as if fully set forth herein.

65. Sewer Rates must be reasonable. *See e.g. Mapleview Estates v. Township of Brown Township*, 258 Mich. App. 412, 671 N.W.2d 572(2003).

66. Because they include the Overcharges, the Sewer Rates are arbitrary, capricious, and unreasonable.

67. As a direct and proximate result of the Township's improper conduct, the Township has collected millions of dollars to which it is not entitled from Plaintiffs and the Class.

68. 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.

69. By virtue of the Township's inclusion of the Overcharges in the Sewer Rates, the Township has collected amounts in excess of the amounts it was legally entitled to collect. Therefore, Plaintiffs are 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).

70. The Township should be required to disgorge the amounts it has illicitly collected through the imposition of the Overcharges.

COUNT IV
ACTION IN ASSUMPSIT (MONEY HAD AND RECEIVED)
--VIOLATION OF TOWNSHIP ORDINANCE § 22-17

71. Plaintiffs incorporate each of its preceding allegations as if fully set forth herein.

72. Township Ordinance Section 22-17 establishes that "fees for the installation and use of the system shall be established by action of the township board to recover the costs of administration, construction, repairs, maintenance and operation of the system **as necessary** to preserve the system in good working order, to provide for the operation and replacement of the system, and to provide for the payment of any debt service obligations of Brighton Township as they become due. The fees shall be made against all users of the system." [Emphasis added.]

73. The Township has exceeded the authority stated in § 22-17 by imposing inequitable Sewer Rates upon Plaintiffs and the Class, that do not comport with the necessary costs of services rendered to Plaintiffs and the Class.

74. As a direct and proximate result of the Township's improper conduct, the Township has collected millions of dollars to which it is not entitled from Plaintiffs and the Class.

75. 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.

76. By virtue of the Township's inclusion of the Overcharges in the Sewer Rates, the Township has collected amounts in excess of the amounts it was legally entitled to collect. Therefore, Plaintiffs are 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).

77. The Township should be required to disgorge the amounts it has illicitly collected through the imposition of the Overcharges.

COUNT V
DECLARATORY JUDGMENT INVALIDATING LIENS

78. Plaintiffs incorporate each of its preceding allegations as if fully set forth herein.

79. Pursuant to Michigan law and the Township's ordinances, unpaid Overcharges may become a lien against the property of certain members of the Class. If left unpaid, the Overcharges are transferred to the tax roll of the property. *See* Township Ordinance Sec. 22-17.

80. The Township may claim liens against the properties owned by Plaintiffs and the Class for unpaid Overcharges.

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

PRAYER FOR RELIEF

Plaintiffs request that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiffs certified as Class Representatives and Kickham Hanley PLLC and Shawn H. Head designated Class Counsel;

B. With respect to Count I, define the Class to include all persons or entities which have paid the Township for Sewer Service at any time during the applicable statutory period of limitations or which pay the Township for Sewer 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 Township for Sewer Service at any time during the applicable statutory period of limitations or which pay the Township for Sewer Service during the pendency of this action;

D. With respect to Counts III, IV, and V, define the Class to include all persons or entities which have paid the Township for Sewer Service at any time during the applicable statutory period of limitations or which pay the Township for Sewer Service during the pendency of this action;

E. Find and declare that the Overcharges violate the Headlee Amendment and permanently enjoin the Township from imposing or collecting Overcharges;

F. Find and declare that the Overcharges violate Equal Protection guarantees, are unreasonable, and permanently enjoin the Township from imposing or collecting Sewer Rates which exceed the Township's actual costs of providing Sewer Service to the Class;

G. Find and declare that the Overcharges are unreasonable or otherwise violate the Township's ordinances and permanently enjoin the Township from imposing or collecting Overcharges;

H. With respect to Counts I-IV, enter judgment in favor of Plaintiffs and the Class and against the Township, and order and direct the Township to disgorge and refund all Overcharges collected and to pay into a common fund for the benefit of Plaintiffs and all other members of the Class the total amount of Overcharges to which Plaintiffs and the Class are entitled;

I. With respect to Count V, find and declare that all liens against property belonging to Plaintiffs and the class arising from or related to the Overcharges are extinguished and enter a declaratory judgment extinguishing all liens against property belonging to Plaintiffs and the Class arising from or related to the Overcharges;

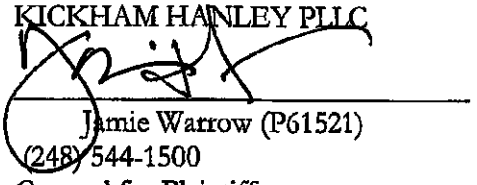
J. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;

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

J. Grant any other appropriate relief.

Respectfully submitted,

KICKHAM HANLEY PLLC



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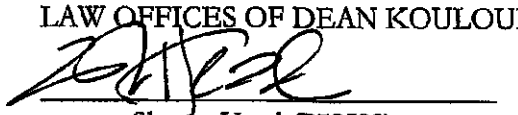
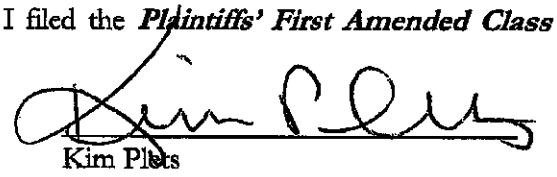


Shawn Head (P72599)
(734) 458.2200
Co-counsel for Plaintiffs

Date: May 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2017, I filed the ***Plaintiffs' First Amended Class Action Complaint*** with the Clerk of the Court.



Kim Pleus

KH150659

EXHIBIT - 1

RAYMOND J. CAREY, Plaintiff-Appellee, v FOLEY & LARDNER, LLP, Defendant-Appellant.

No. 321207

COURT OF APPEALS OF MICHIGAN

2016 Mich. App. LEXIS 1499

August 9, 2016, Decided

SUBSEQUENT HISTORY: Motion granted by *Carey v. Foley & Lardner, 2016 Mich. LEXIS 2090 (Mich., Oct. 12, 2016)*

PRIOR HISTORY: [*1] Wayne Circuit Court. LC No. 13-013005-CK.
Carey v. Foley & Lardner, 2016 Mich. App. LEXIS 539 (Mich. Ct. App., Mar. 15, 2016)

JUDGES: Before: RONAYNE KRAUSE, P.J., and GLEICHER and STEPHENS, JJ.

OPINION

ON RECONSIDERATION

PER CURIAM.

Defendant appeals by leave granted the denial of its motion for summary disposition of the majority of the contract and employment law claims of plaintiff. *Carey v Foley & Lardner, LLP*, unpublished order of the Court of Appeals, entered August 18, 2014 (Docket No. 321207). Plaintiff asserts that throughout his employment, defendant breached his contract by engaging in gender, race and age discrimination in determining his compensation. He further contends he was subject to retaliation by defendant for his complaints to defendant's representatives. Plaintiff alleges he was paid at lower rates than other partners who were younger, female and not of European descent despite his commensurate or better billing levels and generation of income for the partnership. We affirm in part and reverse in part.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd, 298 Mich App 200, 206; 828 NW2d 459 (2012)*. In accordance with *MCR 2.116(C)(7)*, a party may file a motion to dismiss a lawsuit when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of [*2] . . . immunity granted by law [or] statute of limitations. . . ." "When considering a motion brought under *MCR 2.116(C)(7)*, it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim." *Bronson Methodist Hosp v Allstate Ins Co, 286 Mich App 219, 222; 779 NW2d 304 (2009)*, amended *489 Mich 925 (2011)* (citations omitted). "In determining whether a party is entitled to judgment as a matter of law pursuant to *MCR 2.116(C)(7)*, a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Id. at 222-223* (citations omitted).

"A motion under '*MCR 2.116(C)(8)* tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted.'" *Maple Grove Twp, 298 Mich App at 206* (citation omitted). A trial court's grant of summary disposition under *MCR 2.116(C)(8)* is deemed to be proper "'if no factual development could justify the plaintiff's claim for relief.'" *Id.* (citation omitted).

A motion brought pursuant to *MCR 2.116(C)(10)* "tests the factual sufficiency of the complaint." *Cichewicz v Salesin, 306 Mich App 14, 28; 854 NW2d*

901 (2014). "We review a motion brought under *MCR 2.116(C)(10)* by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008)*. Summary disposition is appropriate [*3] when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *MCR 2.116(C)(10)*.

II. BREACH OF CONTRACT CLAIMS

Defendant argues that the trial court erred by failing to find that plaintiff's claims for breach of his employment contract, promissory estoppel, unjust enrichment, and fraudulent misrepresentation were barred by the applicable statutes of limitation. Defendant asserts that plaintiff's claims involve the abrogated continuing wrong doctrine and, thus, should be precluded. Defendant further asserts that the existence of an express contract bars a certain number of plaintiff's claims.

A. STATUTE OF LIMITATIONS

A six-year statute of limitations exists for breach of contract actions. *MCL 600.5807(8)*. Similarly, claims of promissory estoppel and unjust enrichment are also subject to a six-year limitations period. See *Huhtala v Travelers Ins Co, 401 Mich 118, 124-125; 257 NW2d 640 (1977)*; See also *MCL 600.5813* ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."); *MCL 600.5815* ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought...."). A "long [*4] line of Michigan cases [also apply] the six-year period of limitations to fraud actions." *Nat'l Sand, Inc v Nagel Constr, Inc, 182 Mich App 327, 333-334; 451 NW2d 618 (1990)*. The six-year limitation period of *MCL 600.5807(8)* begins to run "when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources, 212 Mich App 144, 153; 536 NW2d 860 (1995)*. In other words, "[f]or a breach of contract action, the limitations period generally begins to run on the date that the breach occurs." *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi, 483 Mich 345, 355; 771 NW2d 411 (2009)*.

Plaintiff's contract required periodic calculations of compensation. Plaintiff argues that each allegedly deficient annual compensation calculation comprises a new or individual breach of the contract. In accordance with *MCL 600.5827*, a breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." Our Supreme Court, in *Twichel v MIC Gen Ins Corp, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004)* (emphasis deleted), quoting *Black's Law Dictionary* (7th ed), defined an installment contract as "'[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted.'" Certain types of contracts that provide for regular or periodic payments have been deemed similar or analogous to installment contracts. *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co, 234 Mich App 550, 562-563; 595 NW2d 176 (1999)*; *Adams v Detroit, 232 Mich App 701, 704-705; 591 NW2d 67 (1998)*; *Harris v Allen Park, 193 Mich App 103, 107; 483 NW2d 434 (1992)*. Under this type of contract, a separate and distinct breach of contract claim is recognized to accrue [*5] with each deficient payment. *H J Tucker, 234 Mich App at 562-563*. "[E]very periodic payment made that is alleged to be less than the amount due . . . constitutes a continuing breach of contract and the limitation period runs from the due date of each payment." *Harris, 193 Mich App at 107*; *H J Tucker, 234 Mich App at 563*. As such, each allegedly deficient compensation payment made by defendant to plaintiff constitutes a separate and distinct breach of the partnership agreement.

Defendant contends that plaintiff's claim is an improper attempt to use the "continuing wrong" doctrine, which was rejected in *Blazer Foods, Inc v Restaurant Props, Inc, 259 Mich App 241, 246; 673 NW2d 805 (2003)*. Under the "continuing wrong" doctrine a claim based on a defendant's wrongful conduct will re-accrue each day that the wrongful conduct is continued, *id. at 246, 248*, and the statute of limitations will not initiate until the wrong is abated, *id. at 246*. In other words, continuous acts must be demonstrated, not ongoing harmful effects from an original completed act. *Id.* The "continuing wrong" doctrine has not, however, been applied in the context of a breach of contract claim. *Id. at 251*.

The trial court correctly divided plaintiff's breach of contract claims into two distinct periods: (a) those claims that arose more than six years before plaintiff's filing of a complaint and (b) claims that occurred within the six [*6] year period immediately preceding plaintiff's filing of a cause of action in this matter. As such, the trial court correctly granted partial summary disposition in accordance with *MCR 2.116(C)(7)*.

B. UNJUST ENRICHMENT

Plaintiff's claim for unjust enrichment should have been dismissed based on the existence of an express contract concerning the same subject matter. A claim for unjust enrichment is the equitable counterpart to the legal claim for a breach of contract. An equitable claim of unjust enrichment is premised on the theory that the law will imply a contract to prevent the unjust enrichment of another party. *Belle Isle Grill Corp v Detroit, 256 Mich App 463, 478; 666 NW2d 271 (2003)*. A contract to pre-

clude unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* The parties' partnership agreement and the relevant compensation provisions constitute an express contract within the meaning of this rule. Thus, the court erred when it denied summary disposition on the unjust enrichment claims.

C. FRAUDULENT MISREPRESENTATION AND PROMISSORY ESTOPPEL

Plaintiff also raised claims of fraudulent misrepresentation and promissory estoppel indicating defendant made promises or false representations to induce his entry into the [*7] agreement with defendant and regarding his compensation under the agreement. The statute of limitations for a fraud claim begins to run when a plaintiff either is aware or should have been aware of an injury due to the fraudulent conduct. *MCL 600.5827*; *Moll v Abbott Laboratories, 444 Mich 1, 17-18; 506 NW2d 816 (1993)*. This Court applies an objective standard when reviewing when a plaintiff discovered or should have discovered an injury. *Moll, 444 Mich at 17-18*.

Plaintiff's complaint lists nine promises and representations that were allegedly made by defendant to induce plaintiff to enter into an agreement of employment with defendant. We have created the chart below, identifying each claimed promise and representation and when a claim began to accrue for each.

Promises / Misrepresentations	**Plaintiff discovered the misrep**	**Plaintiff should have discovered the misrep**	**Plaintiff complained to Defendant**
Plaintiff would at all times be treated as a full partner of defendant	Feb 1, 2001 (Complaint, ¶ 50, p. 15)		
Plaintiff would be paid the guaranteed, minimum monthly and	Late Feb or early March 2003 (Complaint, ¶ 69, p. 22)	Feb 1, 2002	Before late Feb or early March 2003 or early (Complaint, ¶ 70, p. 22)
Plaintiff's monthly and annual compensation would annually increase based on plaintiff's productivity [*8]	Feb 1, 2001 (Complaint, ¶ 63, p. 20)		
Plaintiff's productivity would be measured by hours recorded by plaintiff and billed by defendant to clients for professional services provided by plaintiff to the clients as a member of defendant firm and annual revenue realized by defendant from client payment of fees charged by defendant for professional services provided by plaintiff	February 28, 2005 (Complaint, ¶¶ 116-117, pp. 42-43)	Feb 1, 2002	

Promises / Misrepresentations	**Plaintiff discovered the misrep**	**Plaintiff should have discovered the misrep**	**Plaintiff complained to Defendant**
and/or for which plaintiff was entitled to billing and/or supervisory credit			
Plaintiff would receive full billing credit for all clients and client matters procured by him for full supervisory credit for all client matters for which he provided legal representation whether or not he procured the client or client matter	Feb 1, 2001 (Complaint, ¶ 63, p. 20)		Before Feb 1, 2002 (Complaint, ¶ 67, p. 21)
Neither defendant nor partners of defendant would interfere with then extant and prospective client relationships procured by plaintiff	Feb 1, 2001 (Complaint, ¶ 60, p. 20)		
In all other respects plaintiff would be treated the same as other founding partners of the Detroit office and other partners of defendant relative to compensation, benefits and all other terms and conditions of employment, [*9] including but not limited to, billing and supervisory credit for clients and client matters procured by plaintiff as a member of the defendant law firm	February 28, 2005 (Complaint, ¶¶ 116-117, pp. 42-43)	Feb 1, 2002	
In all other respects plaintiff would be treated without regard to his or others' gender, race or age relative to compensation, benefits and all other terms and conditions of employment, including but not limited to, billing and supervisory credit for clients and client matter procured by plaintiff as a member of the defendant law firm	February 28, 2005 (Complaint, ¶¶ 116, 118, 119 pp. 42, 43)	Feb 1, 2002	

Promises / Misrepresentations	Plaintiff discovered the misrep	Plaintiff should have discovered the misrep	Plaintiff complained to Defendant
Plaintiff's annual compensation would be the greater of 60% of amounts annually billed by defendant for professional services provided by plaintiff or a reasonable, equitably fair higher percentage of annual revenue realized by defendant due to plaintiff's productivity and from client payment of fees charged by defendant for professional services provided by plaintiff and/or for which plaintiff was entitled to billing and/or supervisory credit, which defendant was able to set and collect at substantially higher hourly rates than that charged for most other similarly situated Detroit and other partners of defendant because [*10] of plaintiff's expertise and experience and relationships he maintained with clients that he procured	February 28, 2005 (Complaint, ¶¶ 116-117, pp. 42-43)	Feb 1, 2002	

The admissions of plaintiff in the complaint, coupled with the objective reality that the promises were purportedly breached by a date certain, allow us to surmise that the latest accrual of any alleged misrepresentation or fraud was February 1, 2008, thus the statute of limitations has run as to all such claims.

While a claim of promissory estoppel is grounded in contract law, *Huhtala, 401 Mich at 124-125*, it comprises an equitable doctrine, *Martin v East Lansing Sch Dist, 193 Mich App 166, 178; 483 NW2d 656 (1992)*. This Court has explained:

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made. The promise must be definite and clear, and the reliance on it must be reasonable. [*Zaremba Equip, Inc v Harco Nat'l Ins Co, 280 Mich App 16, 41; 761 NW2d 151 (2008)* (internal citations and quotation [*11] marks omitted).]

Plaintiff has alleged that defendant made promises that induced him to enter into an agreement with defendant in

2000. His complaint, also acknowledged that he was aware that those promises were not fulfilled as of October 2001. Thus, his claim as to the original promises made to him accrued as of that date and was barred by the statute of limitation in October 2006. Plaintiff asserts that each year, when defendant failed to calculate and pay his compensation, a new or renewed promise upon which separate promissory estoppel claims could be prosecuted arose. This mirrors his contract accrual argument with which we agree. However, alternative and concurrent counts for breach of contract and promissory estoppel cannot be brought when an enforceable contract exists as it does here where the performance that constitutes the consideration for the contract is the same performance that demonstrates detrimental reliance in a promissory estoppel claim. *Gen Aviation, Inc v Cessna Aircraft Co, 915 F2d 1038, 1042 (CA 6, 1990)*. In other words, "[p]romissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *Walker v KFC Corp, 728 F2d 1215, 1220 (CA 9, 1984)*. Therefore, plaintiff is precluded from [*12] pursuing simultaneous claims of promissory estoppel.

D. COLLATERAL ESTOPPEL

Defendant next asserts that plaintiff is collaterally estopped from pursuing his breach of contract claims premised on the assertion of employment discrimination under Michigan's Elliott-Larsen Civil Rights Act [ELCRA], *MCL 37.2101 et seq.*, due to the federal district court's factual determination that defendant's reasons for its actions were not pretextual. We agree.

This Court reviews de novo the application of collateral estoppel as a question of law. *Estes v Titus, 481 Mich 573, 578-579; 751 NW2d 493 (2008)*.

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co, 469 Mich 679, 682-684; 677 NW2d 843 (2004)* (internal citations and quotation marks omitted). Mutuality, for purposes of estoppel, exists when the litigant asserting collateral estoppel would have been bound by the previous litigation, had the judgment gone against him. *Id. at 684-685*. Such is the case here.

The federal court reviewed the circumstances pled in this case to determine if the plaintiff was [*13] a member of a protected class due to gender, age and race. Those considerations are identical to the requirement for protected class membership under *MCL 37.2202*.

In accordance with *MCL 37.2202*:

> (1) An employer shall not do any of the following:
>
> > (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The federal court found that plaintiff met that burden of going forward.

The federal court ruled that plaintiff failed to present evidence that he was subject to adverse employment actions due to membership in any protected class. "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v Sanderson Plumbing Prod, Inc, 530 U.S 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000)*. Direct evidence, indirect evidence or circumstantial evidence can be used to prove discriminatory treatment. *Sniecinski v Blue Cross and Blue Shield of Mich, 469 Mich 124, 132; 666 NW2d 186 (2003)*. "Direct evidence" has been defined as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." [*14] *Hazle v Ford Motor Co, 464 Mich 456, 462; 628 NW2d 515 (2001)*, quoting *Jacklyn v Schering Plough Healthcare Prod Sales Corp, 176 F3d 921, 926 (CA 6, 1999)*.

In *Venable v Gen Motors Corp, 253 Mich App 473, 476-477; 656 NW2d 188 (2002)* (citations and footnotes omitted), to establish a rebuttable prima facie case of discrimination, this Court explained:

> [O]ur Supreme Court adapted the *McDonnell Douglas* framework to the Michigan Civil Rights Act. This was done to accommodate additional types of discrimination claims-including employment

> discrimination based on sex and age-and to accommodate other "adverse employment action[s]." The framework, long used by courts of this state, requires a showing that plaintiff was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct."

Plaintiff contends that as an older, white male he was subject to disparate treatment in compensation when compared to younger, female and non-Caucasian employees of defendant. Under ELCRA, the plaintiff has a similar burden. The only direct evidence alleged in the federal court or here is the purported differential in compensation alleged by plaintiff.

Focusing on "female comparators," the federal district court evaluated plaintiff's Equal Pay Act, *29 USC 206(d)*, claim and rejected the [*15] claim premised, in part, on plaintiff's inability to demonstrate "that each of the proposed comparators perform job duties that are substantially equal to his." Specifically, the federal court found that "a cursory review of the profiles of Plaintiff and the proposed comparators suggests that their legal practices engage different skills, knowledge, expertise, and tasks." The federal court found that plaintiff failed to meet his "burden of demonstrating that he and his comparators perform substantially equal work." The federal court made the factual determination that "in some cases the proposed comparator did not earn *more* than Plaintiff on an annual basis," and that any alleged discrepancy set forth by plaintiff was attributable to his "attempting to impose a formula that does not reflect how Defendant determines compensation."

Under ELCRA, a plaintiff who has made a prima facie claim where the defendant offers a purported business reason for the employment action must provide proof of pretext. Again the federal court examined the same issue and found that, defendant was able to demonstrate to the satisfaction of the federal district court the reasons for higher compensation to a [*16] specific female attorney "based upon various gender-neutral factors," resulting in defendant having "established the affirmative defense that its compensation decisions were based upon 'any other factor other than sex.'" The federal district court determined that defendant's reasons or explanations for any differential in compensation were not pretextual, stating: "There is no evidence that these factors are shams or are used by the firm merely to mask sex discrimination." The federal district court clearly rejected plaintiff's contention that his compensation by defendant was discriminatory. Specifically:

> Plaintiff disagrees with Defendant's assessment of his performance . . . . Plaintiff's evidence in this regard is largely based upon his opinion of others' qualifications, contributions to firm, and/or performance. Although Plaintiff may disagree with Defendant's justifications for any perceived pay disparity or feel that Defendant's method of determining compensation is unfair, Plaintiff has not set forth facts that raise an inference that any such differential was based upon gender or that Defendant's reasoning is pretextual. Indeed, a review of partner compensation for Defendant's [*17] Detroit office reveals that the highest-paid partners (as well as the decision-makers regarding compensation) are overwhelmingly white men.

The federal court also rejected plaintiff's reverse sex and race discrimination claims under Title VII regarding his compensation. The federal court found:

> Plaintiff has failed to muster evidence that Defendant discriminates against whites and/or men, and thus cannot establish a prima facie case of reverse discrimination under Title VII. . . . Plaintiff has not presented facts raising such an inference, with respect to gender or race.

Similarly, the federal court rejected plaintiff's age discrimination claim based on the failure to present "evidence of intentional age discrimination with respect to his pay," noting that even if it were assumed that plaintiff was "treated less favorably than younger attorneys," he had failed to "set forth facts raising an inference that Defendant's reasons for doing so were pretextual." The ruling of the federal district court was affirmed by the federal appellate court finding plaintiff "failed to provide evidence that any of the partners to whom he compared himself performed substantially equal work," thereby rendering [*18] plaintiff unable to "establish a genuine factual dispute regarding at least one element of a prima face case of discrimination." *Carey v Foley & Lardner, LLP, 577 F Appx 573, 574-575 (CA 6, 2014)*. Based on the federal district court's finding that plaintiff had failed to come forward with direct evidence of pay disparity

premised on sex, age or race, collateral estoppel is applicable. *Monat, 469 Mich at 682-684.*

In examining plaintiff's claims this Court would examine whether the employees whom plaintiff claimed were treated differently than he were in fact comparable. The federal district court ruled that plaintiff failed to meet his burden of establishing that the individuals identified were properly comparable and, in addition, that plaintiff had received higher compensation than some of the identified individuals used for comparison. Further, even if plaintiff had been able to establish a prima facie case of discrimination under the applicable framework, he could not survive the burden shifting analysis that comprises the next step in evaluating his claim. The federal district court explicitly found that the reasons or justifications provided by defendant for any disparity in compensation were legitimate, nondiscriminatory and not pretextual. As such, plaintiff's claims [*19] under the ELCRA are precluded based on collateral estoppel.

Plaintiff has also, however, in the state court alleged a claim of unlawful retaliation premised on his assertion that his complaints to defendant's management regarding his disparate compensation resulted in a reduction in his compensation. Specifically, plaintiff claimed:

> Defendant through its Management Committee and other agents treated Plaintiff differently than similarly situated younger partners with respect to compensation during each of its fiscal years since and beginning with Defendant's 2001 fiscal year because of his complaints.

Based on plaintiff's amended pleading, his complaints to defendant regarding his alleged discriminatory treatment occurred yearly, "each time he was notified of his annual compensation for since [sic] and beginning with defendant's 2001 fiscal year."

To establish a prima facie case of retaliation a plaintiff must demonstrate:

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." [*20] [*Garg v Macomb Co Community Mental Health Servs, 472 Mich 263, 273; 696 NW2d 646 (2005)*, amended *473 Mich 1205 (2005)*, quoting *DeFlaviis v Lord & Taylor, Inc, 223 Mich App 432, 436; 566 NW2d 661 (1997).*]

"To establish causation, the plaintiff must show that his participation in activity protected by the CRA [Civil Rights Act] was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Comm College, 245 Mich App 306, 315; 628 NW2d 63 (2001).* In other words, to support a claim of retaliation, "[t]he employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the [EL]CRA." *Id. at 319.* If the evidence demonstrates only that the plaintiff was simply asserting "generic, non-[discriminatory]-based complaints regarding working conditions," a claim for retaliation has not been established. *Id. at 319-320.* This plaintiff, however, pleads that his complaints were specific and concerned ELCRA issues.

As a preliminary matter, this cause of action was not addressed by the federal court and, therefore, is not collaterally estopped. Defendant argues that plaintiff cannot establish the causal link between the complaints and the subsequent years' compensation decisions. We agree that expiration of an extended period between a plaintiff's participation in a protected activity and the adverse employment action [*21] may preclude a finding that the engagement in a protected activity comprised a significant factor in the adverse employment action. See *Aho v Dep't of Corrections, 263 Mich App 281, 291-292; 688 NW2d 104 (2004).* "Courts have consistently held that a lengthy period between the protected activity and the adverse employment action precludes a nexus between the two events." *Id. at 291.* However, what constitutes a lengthy period is case specific. Since compensation was a yearly decision, we cannot say as a matter of law that time alone bars this cause of action.

E. INTEGRATION CLAUSE

Defendant also asserts that plaintiff's breach of contract claim should have been dismissed based on the existence of an integration clause within the Partnership Agreement belying any different or ancillary agreements between the parties. Defendant further contends that the breach of contract claim should have been dismissed based on the prior determinations of the federal court that plaintiff had failed to demonstrate that defendant's yearly compensation calculations were pretextual or were not in conformance with the agreement and, therefore, could not be construed to be arbitrary or done in bad faith.

The parties' partnership agreement contains an integration clause. Plaintiff implicitly [*22] suggests that

the contract is voidable based on his allegations that he was induced by fraud to enter into the contract and, later, coerced into signing the agreement for his full partner position without a complete disclosure of the contract terms. Specifically, plaintiff contends he was forced to enter into an agreement with defendant in 2000 because defendant had jeopardized plaintiff's relationship with his prior employer and that defendant made false promises to entice plaintiff's entry into the agreement. He further contends that he was forced by defendant to sign the partnership agreement in 2004, without having been provided a full copy of the agreement, thereby lacking a "meeting of the minds" to establish an enforceable contract.

In general, a party breaches a contract if it fails to perform a required promise, obligation or duty required by the contract. See *Schware v Derthick, 332 Mich 357, 364-365; 51 NW2d 305 (1952)*. In this contract, defendant promises to compensate plaintiff in the "sole" or "absolute discretion" of an identified Committee. There is no language in the agreement that entitles plaintiff to a specified level of compensation or that the amount of compensation be determined in the manner preferred or advocated by plaintiff. [*23] As such, plaintiff has failed to establish a breach of the agreement by defendant based on the express terms of the partnership agreement. Notably, plaintiff does not rely on or identify any specific provision of the contract as the basis for his breach of contract claim. All of his allegations pertaining to breach of contract reference either fraud by defendant in inducing his entry into the contract or discriminatory treatment in determining his compensation.

Plaintiff's suggestion that defendant has failed to fulfill promises made to induce plaintiff's entry into the Agreement are without merit, in part, premised on the existence of the integration clause. When parties to a contract explicitly include within the contract a provision indicating that the contract is a full and complete integration of their agreement, courts have given such an expressed declaration full effect. *UAW-GM Human Resource Ctr v KSL Recreation Corp, 228 Mich App 486, 493-499; 579 NW2d 411 (1998)*.

In this instance, however, plaintiff has alleged fraud, which can render "a contract voidable at the instance of the innocent party." *Id. at 503* (citation omitted). But, "in the context of an integration clause . . . only certain types of fraud would vitiate the contract." *Id.* Specifically:

> [W]hile parol evidence is generally [*24] admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. [*Id.*]

To the extent that plaintiff contends that the terms of the written agreement are different from promises made by defendant before the agreement was reduced to a writing, his claim cannot be sustained premised on the existence of the integration clause. A sustainable claim of fraud requires the demonstration of a reasonable reliance on a misrepresented fact. *Barclae v Zarb, 300 Mich App 455, 482; 834 NW2d 100 (2013)*. A party's reliance on oral promises or representations made before entering into a fully integrated written contract is deemed to be per se unreasonable. *UAW-GM, 228 Mich App at 504*.

Further, plaintiff's argument that he was coerced into signing an agreement without full disclosure of its terms is somewhat disingenuous given plaintiff's profession as an attorney, particularly in his areas of practice, and the [*25] length of the time the parties have continued to perform under the contractual agreement. As noted, defendant's misrepresentations and coercive actions are alleged to have occurred in 2001 and early 2004. Based on plaintiff's filing of his complaint in 2011, his claims are precluded by the applicable statute of limitations. *Nat'l Sand, Inc, 182 Mich App at 333-334*. Plaintiff's claim that he signed an agreement without having access to, or defendant's provision of, all of the contract terms is unavailing as "[t]he stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge." *Christy v Kelly, 198 Mich App 215, 217; 497 NW2d 194 (1992)*, quoting *Sponseller v Kimball, 246 Mich 255, 260; 224 NW 359 (1929)*. Thus, "[i]t is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form." *Rowady v K Mart Corp, 170 Mich App 54, 60; 428 NW2d 22 (1988)*. Specifically, "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v Christensen, 126 Mich App 640, 645; 337 NW2d 611 (1983)*.

Plaintiff also suggests that defendant fraudulently induced his entry into their contract by misrepresenting future actions. "Fraud in the inducement occurs where [*26] a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied up-

on. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Samuel D Begola Servs, Inc v Wild Bros, 210 Mich App 636, 639-640; 534 NW2d 217 (1995)* (internal citations omitted). To establish fraud in the inducement, it must be shown that

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*Belle Isle Grill Corp, 256 Mich App at 477* (citation omitted).]

Even assuming that fraud occurred and plaintiff's reliance on the alleged misrepresentations was reasonable there exists, however, a commensurate responsibility that "'a person . . . who has been defrauded, must act promptly; and, if he would repudiate the contract, he must do nothing in affirmance of it after ascertaining the facts.'" *Blackburne & Brown Mtg Co v Ziomek, 264 Mich App 615, 628; 692 NW2d 388 (2004)* (citations omitted). In this instance, the [*27] alleged fraud and coercion occurred in 2001, yet plaintiff delayed until 2011 to file a lawsuit despite his acknowledgement that he was aware that defendant was not abiding by their alleged agreement since 2001.

F. GOOD FAITH AND FAIR DEALING

To the extent plaintiff suggests his breach of contract claim was not subject to dismissal based on his demonstration of bad faith and arbitrary conduct by defendant, this assertion is indiscernible from his claims of fraud and discrimination. The term "bad faith" is defined in *Black's Law Dictionary* (10th ed) as "[d]ishonesty of belief, purpose, or motive." The federal court rejected plaintiff's contentions of discrimination having found defendant's explanation for its compensation decisions to be neither discriminatory nor pretextual. The federal court's determination is, thus, contrary to any suggestion of bad faith. "Arbitrary" is defined as "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." *Id.* The Partnership Agreement permits the designated committee to determine individual or final distributions "in its sole discretion" or "absolute [*28] discretion." "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Ferrell v Vic Tanny Intern, Inc, 137 Mich App 238, 243; 357 NW2d 669 (1984)* (citations omitted). However, as explained in *Barber v SMH, Inc, 202 Mich App 366, 372-373; 509 NW2d 791 (1993)*, "this Court has refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in the employment context." Even if applicable, any implied "good faith" requirement imposed was satisfied by the federal district court's determination that defendant's explanations for plaintiff's compensation were neither discriminatory nor pretextual based on its exploration of the factors and methods used by defendant in determining individual compensation.

III. AMENDED COMPLAINT

Finally, defendant contends the trial court erred in failing to strike plaintiff's amended complaint as violative of the Michigan Rules of Court and futility. This Court reviews for an abuse of discretion the trial court's decision to strike a pleading. *Belle Isle Grill Corp, 256 Mich App at 469*. The interpretation of a court rule presents an issue of law that this Court reviews de novo. *Acorn Inv Co v Mich Basic Prop Ins Ass'n, 495 Mich 338, 348; 852 NW2d 22 (2014)*; *Muci v State Farm Mut Auto Ins Co, 478 Mich 178, 187; 732 NW2d 88 (2007)*. "A court by definition abuses its discretion when it makes an error of law." [*29] *Kidder v Ptacin, 284 Mich App 166, 170; 771 NW2d 806 (2009)* (citation and quotation marks omitted).

When construing a court rule, the legal principles governing the interpretation and application of statutes are applicable. *In re KH, 469 Mich 621, 628; 677 NW2d 800 (2004)*. The objective of the judiciary when interpreting a statute is to discern and give effect to the intent of the Legislature. *Whitman v City of Burton, 493 Mich 303, 311; 831 NW2d 223 (2013)*. The most reliable evidence of the Legislature's intent is deemed to be the language of the statute. *Id.* "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd, 492 Mich 208, 222; 821 NW2d 503 (2012)*. Effect is to be given to every word, phrase, and clause within the statute, and the court is to avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca, 492 Mich 169, 177; 821 NW2d 520 (2012)*. "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman, 493 Mich at 311*.

MCR 2.118 provides, in pertinent part:

> (A) Amendments.
>
> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require [*30] a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Plaintiff served his complaint on defendant on December 27, 2013. Rather than filing an answer to the complaint, defendant elected to file a motion for summary disposition on January 16, 2014. While the motion was pending, plaintiff filed an amended complaint, adding a claim for retaliation, on January 31, 2014.

A motion for summary disposition is not considered a responsive pleading. *MCR 2.110(A)*; *City of Huntington Woods v Ajax Paving Indus, Inc, 179 Mich App 600, 601; 446 NW2d 331 (1989)*. In accordance with *MCR 2.110(A)*, a "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer to any of the former, and a reply to an answer. *MCR 2.110(A)* specifically states, "[n]o other form of pleading is allowed." Because defendant never filed a responsive pleading to plaintiff's complaint, but only a motion for summary disposition, plaintiff had the right to file an amended complaint as a matter of course under *MCR 2.118(A)(1)*. As explained within the commentary provided by authors Dean and Longhofer in Michigan Court Rules Practice (4th ed), § 2118.2, p 552:

> Since the time allowed [*31] for an amendment as of right is limited to 14 days after service of a responsive "pleading," it is important to note that the term "pleading" is defined under *MCR 2.110(A)* to include only complaints, cross-claims, counterclaims, third-party complaints, an answer to any of these, and a reply to an answer. The list does not include, for example, a motion for summary disposition, under *MCR 2.116*, or a motion to strike or for a more definite statement under *MCR 2.115*. A party may therefore appropriately reply to a motion under either rule with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).

As such, the trial court did not err in determining that the timeframes of *MCR 2.118* did not preclude plaintiff's filing of an amended complaint.

Leave to amend a pleading should be freely granted if justice requires. *MCR 2.118(A)(2)*; *Hakari v Ski Brule, Inc, 230 Mich App 352, 355; 584 NW2d 345 (1998)*.

> However, leave to amend a complaint may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would [*32] be futile. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." [*Id.* (citations omitted).]

Plaintiff's retaliation claim is not futile. The retaliation claim added to plaintiff's complaint alleged that he complained to defendant yearly, in conjunction with his receipt of notification of his compensation, that he was dissatisfied with the amount received and attributed the perceived disparity as being attributable to age discrimination. Because we find that this is a jury question, the amended complaint should be allowed. Defendant however, is not precluded from challenging plaintiff's retaliation claim by timely filing a motion for summary disposition with the trial court.

Affirmed in part, reversed in part and remanded to the trial court for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Elizabeth L. Gleicher

/s/ Cynthia Diane Stephens

EXHIBIT - 2

UNITED STATE DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

DENNIS SHONER and BARBARA POTOCKI, individually, and as representatives of a class of similarly-situated persons and entities,

Plaintiffs,

v

CHARTER TOWNSHIP OF BRIGHTON, a municipal corporation

Defendant.

Case No. 2:16-12267

Hon. Avern Cohn

Magistrate Judge: David R. Grand

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DEFENDANT CHARTER TOWNSHIP OF BRIGHTON'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

Defendant Charter Township of Brighton (the "Township"), through its attorneys, Dykema Gossett PLLC, submits the following as its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1).

As further discussed in the attached Brief, the Township is entitled to dismissal of the Complaint because this Court lacks jurisdiction over Plaintiffs' claims against the Township under the Federal Tax Injunction Act, 28 U.S.C. §1341, and related federal common-law comity principles.

In accordance with E.D. Mich. L.R. 7.1(a), undersigned counsel contacted Plaintiffs' counsel to (i) explain the nature of this Motion and its legal basis, and (ii) request concurrence in the relief sought. Plaintiffs' counsel indicated that it did not concur with the Motion.

WHEREFORE, the Township respectfully requests that this Court (i) dismiss all of Plaintiffs' claims against the Township with prejudice; and (ii) grant any other relief this Court deems appropriate.

Dated: August 5, 2016

/s/ Theodore W. Seitz

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UNITED STATE DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

DENNIS SHONER and BARBARA POTOCKI, individually, and as representatives of a class of similarly-situated persons and entities,

Plaintiffs,

v

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Defendant.

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DEFENDANT CHARTER TOWNSHIP OF BRIGHTON'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

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II. WHETHER PLAINTIFFS' COMPLAINT IS ALSO BARRED BY PRINCIPLES OF COMITY.

III. WHETHER PLAINTIFFS' STATE LAW CLAIMS SHOULD ALSO BE DISMISSED FOR LACK OF SUPPLEMENTAL JURISDICTION.

STATEMENT OF CONTROLLING AND MOST APPROPRIATE AUTHORITY

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28 U.S.C. § 1341

I. INTRODUCTION

This matter arises from state property tax assessments, liens, and collections relating to the construction, maintenance, and operation of a public sanitary sewer system implemented by Brighton Township, Michigan (the "Township") in 2000. Starting in 1997 and in response to interest from its residents along with public health concerns, the Township began to explore the establishment of a sanitary sewer system district. In 1999, Township residents (including the Plaintiffs) petitioned the Township to construct the sanitary sewer system and to establish a special assessment district, which the Township did after a series of public hearings and notice provided to Township residents. In order to pay for the construction and operation the sewer system, the Township levied a special tax assessment (to be paid through installments over a series of years), along with operation and maintenance fees and capital charges, all of which can become tax liens on the properties, if unpaid.

Under Michigan law, the sanitary sewer system tax assessments, fees, capital charges and any resulting tax liens, could always be challenged in the Michigan Tax Tribunal, M.C.L.A.,§ 205.731, or in the Livingston County Circuit Court as part of the Michigan tax foreclosure process. M.C.L.A. § 211.78k. Indeed, several property owners in the Township have challenged the sanitary sewer tax

assessments, related fees, and charges in the Tax Tribunal. In each case, the Township's special assessments, fees, and charges were held to be valid.

Nevertheless, Plaintiffs now seek to undo the special assessments and any tax liens relating to construction, operation, and maintenance of the Township sewer system. Moreover, Plaintiffs seek the disgorgement of taxes (including those that became tax liens on properties) paid to Township relating to the sewer system over the past 16 years. Finally, Plaintiffs seek an injunction and declaratory judgment **"extinguishing all liens"** and **"permanently enjoin[ing] the Township from imposing or collecting"** the special tax assessments and other related "charges," which the Plaintiffs view as being excessive. (Dkt. 1, Pg ID 19-20, Complaint, ¶¶ D-H ("Cmplt.")(emphasis added). However, as long-recognized by the U.S. Supreme Court, U.S. Sixth Circuit Court of Appeals, and this Court, such claims cannot be maintained in federal court, and thus, Plaintiffs' claims against the Township fail for a multitude of reasons, including the following:

First, Plaintiffs' claims, including those brought against the Township under 42 U.S.C. § 1983, and the Equal Protection Clause, are barred by the federal Tax Injunction Act, 28 U.S.C. § 1341, which deprives this Court of subject matter jurisdiction over state and local tax collection matters. ***Second***, Plaintiffs' claims

are also barred by principles of comity. ***Third,*** Plaintiffs' state law claims must also be dismissed for lack of jurisdiction.

Therefore, the Plaintiffs' Complaint must be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

II. FACTUAL ALLEGATIONS CONTAINED IN PLAINTIFFS' PLEADINGS, DOCUMENTS REFERENCED THEREIN, AND APPLICABLE PUBLIC RECORDS[1]

In 1999 and in response to requests from Township residents, including petitions signed by Plaintiffs Shoner and Potocki (Ex. A), the Township decided to construct and install a sanitary sewer system for the purpose of providing sewer service to existing dwelling units and buildings within the Township. The Township spent considerable time planning and developing the sanitary sewer system. This included numerous public notices and hearings. In late 2000, the Township commenced construction of its sanitary sewer system, which it funded through the sale of bonds through Livingston County. (Dkt. 1, Pg ID 6-7, Cmplt. ¶¶16-17). In addition, the Township created a Special Assessment District of

[1]The Township refers and attaches as Exhibits, several documents that are referenced, but not formally incorporated or attached to Plaintiffs' Complaint. In addition, several public documents are referenced for this Court to take judicial notice. Courts have held that such materials may be considered within the context of a Rule 12(b)(1) motion, without converting the motion to a Rule 56 motion for summary judgment. *See Rogers v. Stratton Inds., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

which the Plaintiffs are within, along with other Township residents and businesses. In order to recover the sanitary system's design and construction costs, the Township assessed properties located within the sanitary sewer drain district. (Id.)

Several Township residents, including businesses, challenged the special assessment and charges related to the Township's sanitary sewer system in the Michigan Tax Tribunal. In each case, the special assessment was held to be valid.[2] For example, in *Tower Investment Corp. v. Brighton Township,* Michigan Tax Tribunal ("MTT") Docket No. 278959, the Tribunal held the following:

> A special assessment may be declared invalid only when the party challenging the assessment demonstrates that there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements. *Dixon Rd Group v Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986). A court will not look for "a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit ..." *Id.* at 402-403. To rebut the presumption that a special assessment is valid, Petitioner must present, at a minimum, a degree of credible evidence. *Kadzban, supra*, at 505.
>
> * * * *
>
> No evidence was presented to contend that [Brighton Township] failed to effectively establish policy or communicate guidelines in the implementation of its 2000 Sanitary Sewer Improvement Project. To

[2] In addition to the *Tower* case, among the Michigan Tax Tribunal cases challenging the special assessment and charges relating to the Township's sanitary sewer system are the following: *Conrad Cook v. Brighton Township,* MTT Docket No. 278993; *Summer-Wood Center v. Brighton Township,* MTT Docket No. 278953; and *Fonda Place v. Brighton Township,* MTT Docket No. 2789506.

> the contrary, Petitioner was well aware of the requirements established by [Brighton Township] in this project and the resulting time limitations to obtain public financing and commence construction. It would be an unreasonable expectation to require a municipality to constantly update its funding projections when a recipient of the improvement contends, after a reasonable period of time, that the municipality should revise its assumptions. To do so would inevitably require an inconsistent burden on other residents by subsequently shifting the responsibility for financing the improvements.

(Ex. B, MTT Opinion and Judgment, April 4, 2003, pp. 11-12).

On June 20, 2016, the Plaintiffs filed their Complaint against the Township. The Complaint contains several counts, all of which are tied to the Township's special assessments, tax liens, and ability to collect taxes related to the Township's sanitary sewer system, including the following: Violation Of Equal Protection Guarantees (Count I); Unjust Enrichment (Counts II and III); Assumpsit (Count IV); and Declaratory Judgment Invalidating Liens (Count V). (Dkt. 1, Pg ID 13-18, Cmplt. ¶¶ 42-71). The Plaintiffs bring this case as a putative class action and allege that this Court has original jurisdiction over their claims pursuant to 42 U.S.C. § 1983, and under the Equal Protection Clause of the U.S. Constitution. Plaintiffs also allege that pursuant to 28 U.S.C. § 1367, the Court has supplemental jurisdiction over their state law claims. (Id. at Pg ID 6, Cmplt. ¶¶ 14, 35-46).

Finally, in the "Prayer For Relief" section of their Complaint, the Plaintiffs request that the Court enter judgment in favor of Plaintiffs and their proposed putative Class, including a declaratory judgment extinguishing "all liens" against

the properties related to the special assessment, operation, maintenance, and capital charges at issue in their Complaint (Plaintiffs refer to these collectively as "Overcharges"), an injunction to "permanently enjoin the Township from imposing or collecting" the same alleged "Overcharges," along with an order to direct the Township to "disgorge and refund all Overcharges collected and to pay into a common fund" to be managed by a "Trustee." (Dkt. 1, Pg ID 19-20, Cmplt. ¶¶ A-H).

III. STANDARDS FOR A MOTION TO DISMISS BROUGHT UNDER FED. R. CIV. P. 12(b)(1)

This Motion is brought pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. which "is always a threshold determination." *American Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F.3d 534, 537 (6th Cir. 2007) (citation omitted). As explained by this Court, generally motions to dismiss for lack of subject-matter jurisdiction fall into two categories: facial attacks and factual attacks. *3D Sys. v. Envisiontec, Inc.*, 575 F. Supp. 2d 799, 803 (E.D. Mich. 2008) (Cohn, J.) (quoting *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). See also, *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012). A facial attack challenges the sufficiency of the pleading itself. Upon receiving such a motion, the Court must take all of the material allegations in the complaint as true and construe them in the light most favorable to the non-moving

party. *Id.* In contrast, a factual attack challenges the factual existence of subject-matter jurisdiction. *Id.*

Irrespective of which category an attack on subject-matter falls, the Sixth Circuit has made clear that "no presumptive truthfulness applies to the factual allegations, and the court is free to weigh evidence and satisfy itself as to the existence of its power to hear the case." *Ritchie*, 15 F.3d at 598 (6th Cir. 1994). See *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125. 1134 (6th Cir. 1996). In other words, a court may examine evidence of its power to hear a case, and must make any factual findings to determine whether it has jurisdiction.[3]

Nevertheless, when a defendant challenges subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. See *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125. 1134 (6th Cir. 1996).

IV. ARGUMENT

A. Plaintiffs' Claims are Barred By Tax Injunction Act, 28 U.S.C. § 1341, Which Also Deprives This Court of Subject-Matter Jurisdiction.

As a threshold matter, this Court lacks subject-matter jurisdiction over Plaintiffs' claims, including those allegedly arising under 42 U.S.C. § 1983, under Tax Injunction Act, which declares that "[t]he district court **shall not enjoin,**

[3]A Rule 12(b)(1) motion is not converted into a Rule 56 motion for summary judgment when a Court examines evidence for this purpose. *See Rogers v. Stratton Inds., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (emphasis added). The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *In re Gillis*, 836 F.2d 1001, 1003 (6th Cir. 1988) (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). As part of a case rejecting a challenge to Oakland County's tax collection process, the Sixth Circuit recently summarized the Tax Injunction Act as follows with respect to a lack of subject matter jurisdiction:

> Under the [Tax Injunction Act], "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. The [Tax Injunction Act] creates a jurisdictional barrier to the federal courts for claims or declaratory or injunctive relief brought by a party aggrieved by a state's administration of its taxing authority. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522, 101 S. Ct. 1221, 67 L.Ed. 2d 464 (1981). (stating that the [Tax Injunction Act] "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes"); *California v. Grace Brethren Church*, 457 U.S. 393, 396, 408, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (holding that the [Tax Injunction Act] "deprived the District Court to hear" a First Amendment challenge to state a federal taxation regimes, and extending [Tax Injunction Act's] prohibition on [*14] injunctive relief to declaratory judgments); *Colonial Pipeline Co. v. Morgan*, 474 F. 3d 211, 218 (6th Cir., 2007) (quoting *Grace Brethren* and stating that "a district

> court does not have jurisdiction over state and local tax matters where a 'plain, speedy and efficient remedy' is available in state court").

Pegross v. Oakland Cnty. Treasurer, 592 Fed. App'x 380, 384 (6th Cir. 2014).

The Tax Injunction Act operates to bar federal jurisdiction and has been "broadly interpreted to bar suits for declaratory relief, injunctive relief, as well as monetary relief when there is an adequate remedy in state court." *Hedgepeth v. Tennessee*, 215 F. 3d 608, 612 n. 4 (6th Cir. 2000)(citing *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586-88 (1995). The primary purpose of the Tax Injunction Act, to protect the collection of state and local government tax revenues, has also been explained by this Court as follows:

> [The Tax Injunction Act] implements important principles of comity. It expresses the federal government's "scrupulous regard for the rightful independence [*6] of state governments." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298, 63 S. Ct. 1070, 1073, 87 L. Ed. 1407 (1943). **It recognizes the importance of protecting the state's periodic collection of tax revenues from disruptive litigation in federal courts, which the states are powerless to control. It also respects the traditional reluctance of federal courts to intervene in the complexities of state tax administration.** See generally, *Great Lakes, supra; Perez v. Ledesma*, 401 U.S. 82, 127 n. 17, 91 S. Ct. 674, 27 L. Ed. 2d 701 (1971). (Brennan J., concurring in part and dissenting in part). **The act is a "broad jurisdictional barrier,"** *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976). **It bars even claims that the state tax is illegal or unconstitutional.** *Tully v. Griffin, Inc.*, 429

U.S. 68, 97 S. Ct. 219, 50 L. Ed. 2d 227 (1976) (emphasis added)

Heldt v. Michigan Dep't of Treasury, Case No. 06-10098, 2006 U.S. Dist. LEXIS 34850; 2006 WL 1547502 (E.D. Mich., June 13, 2006)(Cohn, J.)(emphasis added) (Ex. C).

Not surprisingly, Michigan federal courts have recognized that challenges to special assessments issued in accordance with state law (M.C.L.A. § 123.743) also fall within the scope of the Tax Injunction Act. *Lake Lansing Special Assessment Protest Asso. v. Ingham Cty. Bd. of Comm'rs*, 488 F. Supp. 767, 772-73 (W.D. Mich. 1980). Likewise, this Court has recognized that challenges to tax liens placed—even if framed in the complaint as claims brought under § 1983—also fall within the broad scope of the Tax Injunction Act. *Heldt*, 2006 U.S. Dist. LEXIS 34850; 2006 WL 1547502 (E.D. Mich., June 13, 2006)(Ex. C)

In this case, the Tax Injunction Act deprives this Court of subject-matter jurisdiction over Plaintiffs' claims because Plaintiffs Complaint' clearly challenges, and even seeks to enjoin the collection of a tax assessments and liens arising under state law. (Dkt. 1, Pg ID 2-21, Cmplt.). Further, as noted above, this Court has previously held that bringing such claims under the guise of § 1983 does not overcome the Tax Injunction Act to provide a basis for federal court jurisdiction.. *Heldt*, 2006 U.S. Dist. LEXIS 34850; 2006 WL 1547502 at**5-9 .

B. Comity Principles Also Preclude Jurisdiction In This Case.

The Tax Injunction Act is not the only jurisdictional bar to Plaintiffs' case. Under Supreme Court precedent, to which this Court has also previously subscribed, the federal common-law principal of comity also renders federal court jurisdiction inappropriate in this matter because Plaintiffs assert claims for which an adequate state remedy is available. By way of background, the Supreme Court in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) explained that principles of comity bar federal court actions brought under § 1983 to redress the allegedly unconstitutional administration of a state tax system. In *Fair Assessment*, the plaintiffs were property owners, who filed suit under § 1983 alleging that respondents "deprived them of equal protection and due process of law by unequal taxation of real property." *Id.* at 105-06. The Supreme Court reasoned that the petitioners could not recover damages under § 1983 unless the district court determined that the tax system violated the plaintiffs constitutional rights. *Id.* at 113. This would essentially amount to a declaratory judgment, which "would be fully as intrusive as the equitable actions that are barred by principles of comity." *Id.* The Supreme Court stated as follows:

> To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a

> certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications.

Id. at 114-115 (quoting 478 F. Supp. 1231, 1233-34 (1979)). The Supreme Court reasoned that it would "operate to suspend collection of the state taxes . . . , a form of federal-court interference previously rejected by this Court on principles of federalism." *Id.* (citing *Fair Assessment*, 454 U.S. at 115).

This Court, along with others in this District have relied upon the *Fair Assessment* opinion and comity principles to dismiss claims challenging the assessment and collection of state and local taxes. See *Heldt*, 2006 U.S. Dist. LEXIS 34850; 2006 WL 1547502 **5-9 (Ex. C); *Ponte v. McLachlan*, No. 13-10370, 2013 U.S. Dist. LEXIS 130375, at *15 (E.D. Mich. Sep. 12, 2013) (Cohn, J.) (dismissing §1983 and other claims—challenging assessments and tax collection—against Pittsfield Township under principle of comity)(Ex. D); *Rafaeli, LLC v. Wayne Cty.*, Case No. 14-13958, 2015 U.S. Dist. LEXIS 72199 (E.D. Mich. June 4, 2015)(Ex. E). The same is true in this case with respect to the allegations in Plaintiffs' Complaint, and thus, the Complaint should be dismissed for lack of subject matter jurisdiction on the basis of comity principles as well.

1. **Plaintiffs Have Adequate Remedies Available In The Michigan Courts.**

As noted above, the Sixth Circuit held, in *In re Gillis*, that "principles of comity dictate that a federal court should not intrude into the state tax system. . ."

In re Gillis, 836 F.2d 1001, 1009 (6th Cir. 1988). Thus, "as long as an adequate state remedy exists, taxpayers like respondents should utilize that remedy." *Id.* As further explained by the Supreme Court in *Fair Assessment*:

> [T]axpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

454 U.S. at 105-106. See also, *Pegross v. Oakland Cty. Treasurer*, 592 F. App'x 380, 385 (6th Cir. 2014).

In other words, federal courts are courts of limited jurisdiction and will not act as appellate courts to state-court tax decisions where an adequate state remedy exists for a plaintiff. Further in that regard, a plaintiff bears the burden of pleading and proving the inadequacy of state judicial remedies. See *Heldt*, 2006 U.S. Dist. LEXIS 34850; 2006 WL 1547502 at **5-9 (Ex. C).

In this case, the Plaintiffs do not plead any inadequacy of state judicial remedies in their Complaint. The reason is that they cannot do so. As this Court explained in *Heldt*, "[t]he Court of Appeals for the Sixth Circuit has examined and upheld the adequacy of remedies available to a taxpayer under the laws of Michigan to seek vindication of constitutional rights in state courts." 2006 U.S. Dist. LEXIS 34850 at *8, citing *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 542 (6th Cir. 2004); *Helmsley v. City of Detroit*, 320 F.2d 476 (6th Cir.

1963)(Declaratory Judgment Act challenge to Michigan property tax assessment under due process and equal protection principles barred, because Michigan courts provide an adequate remedy); see also *Kistner v. Milliken*, 432 F. Supp. 1001, 1003-04 (E.D. Mich. 1977)(appeal as of right to state court of appeals from Tax Tribunal is a plain and adequate remedy for purposes of Tax Injunction Act).

In this case, it is more than clear that Plaintiffs have adequate remedies available to pursue their claims in the Michigan Tax Tribunal (and thereafter the Michigan Court of Appeals). Indeed, as noted above, other Township residents previously challenged the special tax assessment and related charges for the Township's sanitary sewer system in the Michigan Tax Tribunal. (Ex. B). Likewise, any tax liens could be challenged in the Livingston County Circuit Court (and thereafter the Michigan Court of Appeals) under the Michigan General Property Tax Act. See M.C.L.A. § 211.78k(2)-(7). Moreover, as this Court has also explained, Plaintiffs' failure to avail themselves of their state remedies does not mean that they are inadequate. *Heldt*, 2006 U.S. Dist. LEXIS 34850 at *8, citing *Aluminum Co. of America v. State of Michigan, Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975). See also, *Pegross*, 592 F. App'x at 381 (explaining that the plaintiff's invocation of § 1983 claim did not form a basis for federal court jurisdiction due to adequate remedies being available to raise "any and all constitutional objections to the tax" in Michigan state courts); *Lake Lansing*

Special Assessment Protest Asso., 488 F. Supp. at 775 (explaining that the Michigan Tax Tribunal provides an adequate remedy for a taxpayer to challenge special assessments). Thus, because "plain, adequate and complete" remedies existed in the Michigan Tax Tribunal and other courts, Plaintiffs' claims are barred by the Tax Injunction Act and comity because the federal court lacks subject-matter jurisdiction to hear their claims against the Township. See *In re Gillis*, 836 F.2d at 1009-1012. See also *Fair Assessment*, 454 U.S. at 116.

2. All Remedies Plaintiffs Seek Are Barred by the Tax Injunction Act and Comity Principles.

It is anticipated that Plaintiffs may argue that the Tax Injunction Act merely deprives this Court of claims seeking injunctive or declaratory relief, but does not bar any claims seeking money damages, which the Plaintiffs have framed as "disgorgement" in their "Prayer for Relief." (Dkt. 1, Pg ID 19-20, Cmplt. ¶¶ D-H). However, such an argument is incorrect. Regardless of the relief sought, the Tax Injunction Act, deprives a federal court of jurisdiction over any action challenging "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

For example, in *Homeless Patrol v. Town of Thompson*, Civil Action No. 06-4315 (SRC), 2006 U.S. Dist. LEXIS 74841, at *9 (D.N.J. Oct. 16, 2006), the plaintiff, like the Plaintiffs in this case, brought an action under §1983 asserting

that his civil rights were violated by defendants' alleged over-taxation of his property. The plaintiff sought money damages instead of an injunction and argued that his claim was not barred by the Tax Injunction Act because he did not seek to "enjoin" the collection of state taxes. However, in dismissing his case for lack of subject-matter jurisdiction, the district court stated, "[d]espite the fact that the [Tax Injunction Act] uses only the term "enjoin," it is well-established that the prohibition of § 1341 [in the Tax Injunction Act] applies to action for damages under § 1983." *Homeless Patrol* 2006 U.S. Dist. LEXIS 74841, at *9 (D.N.J. Oct. 16, 2006) (citing *Fair Assessment in Real Estate Assoc.*, 454 U.S. at 113-14).

Likewise, in *Fair Assessment* the Supreme Court reasoned that an action for damages would be as intrusive as an equitable action. *Fair Assessment in Real Estate Assoc.*, 454 U.S. at 113-14. The Supreme Court further reasoned that a § 1983 action for damages was barred because, for a plaintiff to recover money damages, a court would have to hold that the defendant's tax system violated some constitutional right, which would effectively be a declaratory judgment. *Id.*

The Sixth Circuit has followed the Supreme Court's holding in *Fair Assessment* and explained that the Tax Injunction Act "stands on its own bottom, and extends to cases seeking monetary damages as well as injunctive or other equitable relief." *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 541 (6th Cir. 2004). See also *Rafaeli*, 2015 U.S. Dist. LEXIS 72199, at *16.

Thus, regardless of the relief sought by Plaintiffs, the Tax Injunction Act and comity principles deprive this Court of subject-matter jurisdiction to hear any of the Plaintiffs' claims raised in their Complaint against the Township.

C. The Plaintiffs' Remaining State Law Claims Must Also Be Dismissed for Lack of Jurisdiction.

Plaintiffs also assert, in addition to the claims brought under § 1983 and the Equal Protection Clause of the Constitution, several state law claims (i.e. the claims for "Unjust Enrichment" and "Assumpsit"), which they allege the Court "has supplemental jurisdiction." (Dkt. 1, Pg ID 6, Cmplt. ¶ 14). However, if claims in a complaint are dismissed pursuant to Rule 12(b)(1) based upon lack of subject matter jurisdiction, then jurisdiction, including supplemental jurisdiction asserted by a plaintiff, never existed, and thus, such claims must also be dismissed. The Sixth Circuit explained as follows:

> A Rule 12(b)(1) dismissal postulates that there never was a valid federal claim. Exercise of jurisdiction on a theory of supplemental jurisdiction would therefore violate Article III of the Constitution, because the original federal claim would not have "substance sufficient to confer subject matter jurisdiction on the court."

Musson Theatrical v. Fed. Express Corp., 89 F.3d 1244, 1255 (6th Cir. 1996) (internal citations omitted).[4] Thus, in this case, because the Court lacks subject

[4]Likewise, under Eastern District of Michigan Local Rule 41.2, when it appears that the court lacks subject matter jurisdiction, the court can on its own

matter jurisdiction over Plaintiffs' alleged federal claims, the remaining state law claims, alleged by Plaintiffs to be subject to supplemental jurisdiction, must also be dismissed.

V. CONCLUSION

For the foregoing reasons, the Township requests that this Court grant its Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and dismiss Plaintiffs' Complaint with prejudice.

Dated: August 5, 2016

/s/ Theodore W. Seitz

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motion (after reasonable notice or on application of a party), enter an order dismissing or remanding the case unless good cause is shown. LR 41.2.