**STATE OF MICHIGAN**
**WAYNE COUNTY CIRCUIT COURT**

MICHIGAN WAREHOUSING GROUP LLC,
a Michigan limited liability company, and
MIDWEST VALVE & FITTING COMPANY,
a Michigan corporation,

Plaintiffs,

v.

CITY OF DETROIT, a municipal corporation,
by and through its WATER AND SEWERAGE
DEPARTMENT,

Defendant.

Case No. 15-010165-CZ
Hon. John A. Murphy

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## FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Detroit, County of Wayne,
State of Michigan on 2/8/2018
PRESENT: HON. JOHN A. MURPHY
Circuit Court Judge

WHEREAS, Plaintiffs and Defendant in this action have moved this Court pursuant to MCR 3.501(E), for an order approving the settlement of this class action in accordance with the terms set forth in the Class Action Settlement Agreement ("Agreement") executed by counsel for the parties, and

WHEREAS, this Court having held a hearing, as noticed, on January 5, 2018 pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated September 12, 2017 (the "Order"), to determine the fairness, adequacy and reasonableness of a proposed settlement of the Class Action; and due and adequate notice (the "Notice") having been made by mailing in a manner consistent with Paragraphs 4 and 6 of the Order; and all such persons (excluding those who previously requested exclusion from the applicable Class) having been given an opportunity to object to or participate in the settlement; and the Court having heard and considered the matter, including all papers filed in connection therewith and the oral presentations of counsel at said hearing; and good cause appearing therefor,

For the reasons stated on the record and based upon the parties' and objectors' submissions to the Court, the Court makes the following Findings of Fact and Conclusions of Law:

**Findings Of Fact And Conclusions Of Law Concerning The Court's Final Approval Of The Class Action Settlement**

1. Plaintiffs, on behalf of themselves and those similarly situated, filed this action in August 2015 challenging one of the City of Detroit's (the "City") retail drainage charges (the "Per-Acre Drainage Charges") imposed by the City upon Plaintiffs' property located in the City. Plaintiffs allege that the Per-Acre Drainage Charges have been disproportionately imposed upon a subset of the City's property owners (including Plaintiffs) – i.e., those non-residential customers that prior to October 1, 2016 were billed Per-Acre Drainage Charges – i.e., billed based on the impervious acreage of their properties (the "Per-Acre Properties").

2. Plaintiffs filed their Complaint on August 3, 2015 and, with the Court's permission, filed a Second Amended Complaint ("SAC") on February 27, 2016. In Count I of the SAC, Plaintiffs asserted that the Per-Acre Drainage Charges constitute a "tax" that was not authorized by the City's voters in violation of Article 9, Section 31 of the Michigan Constitution of 1963 (the

"Headlee Amendment"). In Count II of the SAC, Plaintiffs alleged that the Per-Acre Drainage Charges violated the equal protection guarantees stated in the Michigan Constitution, Article I, Section 2, because class members (who paid the Per-Acre Drainage Charges) were being treated differently from similarly-situated commercial property owners who did not pay the Per-Acre Drainage Charges. Plaintiffs also alleged that higher rates of Per-Acre Drainage Charges imposed on private property owners compared to governmental entities such as Wayne County and the State of Michigan also violated equal protection guarantees. In Count III of the SAC, Plaintiffs alleged that the Per-Acre Drainage Charges violated the City's Charter, § 7-1202, because they were not equitable, and the City had therefore been unjustly enriched when it collected the Per-Acre Drainage Charges. In Count IV of the SAC, Plaintiffs alleged that the City had been unjustly enriched because the Per-Acre Drainage Charges were unreasonable under Michigan common law. In Count V of the SAC, Plaintiffs alleged that the City had been unjustly enriched because it had imposed the Per-Acre Drainage Charges in violation of the Prohibited Taxes on Cities and Villages Act, MCL 141.91. In Count VI of the SAC, Plaintiffs alleged that the Per-Acre Drainage Charges violated the free service provision of the Revenue Bond Act, MCL 141.118, because the City did not impose any drainage charges on itself and therefore unlawfully provided itself with free stormwater disposal service. In Count VII of the SAC, Plaintiffs sought a declaratory judgment invalidating any liens the City had imposed on property belonging to class members related to unpaid Per-Acre Drainage Charges.

3. On March 18, 2016, after significant discovery had occurred, the City filed a motion for partial summary disposition under MCR 2.116(C)(8) as to Counts I, III, IV, V, VI, and VII of Plaintiffs' SAC on the grounds that federal court orders mandated the Per-Acre Drainage Charges; that the City's Charter provided pre-Headlee authorization for the charges; that no private right of action exists for violation of a statute unless the statute expressly provides such a right; that the

City's pre-existing duties under its Charter and state statutes precluded quasi-contractual claims; that Plaintiffs' unjust enrichment claims were barred by governmental immunity; that controlling case law from the Sixth Circuit precluded Plaintiffs from suing the City under the Revenue Bond Act's free service provision; that Plaintiffs had no legal basis for their common law claim for unreasonable sewer rates; and that Plaintiffs' claim for a declaratory judgment invalidating liens for unpaid drainage charges should fail because Plaintiffs had not adequately alleged the existence of any particular lien on any particular parcel of property.

4. The parties submitted response and reply briefs regarding the City's motion for partial summary disposition. On September 9, 2016, the Court heard oral argument on the City's motion and took the matter under advisement. On September 13, 2016, the Court entered an order denying the City's motion for partial summary disposition stating that there were factual questions on each of the grounds alleged. The Court also denied the City's oral motion under MCR 2.116(C)(7) to dismiss Counts III, V and VI based on governmental immunity. At that time, Plaintiffs' motion for class certification was pending before the Court.

5. The City appealed as of right the Court's denial of its motion for summary disposition on the basis of governmental immunity, as permitted under MCR 7.202(6)(a)(v), which automatically stayed all proceedings in the trial court pending the outcome of the appeal under MCR 7.209(A)(1). The City also filed an application for leave to appeal this Court's decisions as to the City's other arguments on summary disposition. The Court of Appeals granted the City's application for leave to appeal on January 24, 2017. The parties fully briefed both appeals; the City filed two appellant's briefs, Plaintiffs filed two appellees' briefs, and the City filed two replies. Briefing on appeal was complete with the filing of the City's reply brief in support of its appeal by leave on April 3, 2017. The City's appeals remain pending but will be dismissed upon final approval of the Settlement.

6. Throughout this lawsuit, the City has denied Plaintiff's allegations and disputed the validity of its claims. The City denies that the Per-Acre Drainage Charges are a disguised tax, denies that it violated the Headlee Amendment, denies that it violated the Equal Protection clause, denies that it has been unjustly enriched, and denies that it is liable to any member of the Class. Nevertheless, the parties and their counsel commenced extensive and detailed settlement discussions which spanned several months. These settlement discussions included facilitative mediation sessions in June and August 2016 with Judge James Rashid (Ret.), formerly of the Wayne County Circuit Court. (Exhibit 1 to The City of Detroit's Opposition to DAART and LBUBS Objections and Brief in Support of Settlement) (the "City's Brief").

7. On June 20, 2017, the parties began facilitative mediation with Judge Barry Howard (Ret.), the former Chief Judge of the Oakland County Circuit Court. The parties participated in three mediation sessions during the summer of 2017, as Judge Howard describes in his affidavit (Exhibit 2 to Brief in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶ 3) (the "Approval Brief"). In Judge Howard's opinion, counsel for Plaintiffs and the City vigorously and skillfully pursued the best interests of their respective clients, forcefully arguing their respective legal and factual contentions. *Id.*, ¶ 4. The parties started from very far apart in their settlement positions and only gradually and reluctantly, with considerable give and take regarding large and small issues, reached the compromise reflected in the parties' settlement agreement. *Id.*, ¶ 5. Thus, as Judge Howard recognizes, the settlement agreement was the product of an arms-length negotiation wholly free from any sort of collusion among the parties and with the clients' interests foremost in mind. *Id.*

8. The parties ultimately reached a settlement on August 31, 2017, the terms of which are set forth in the Settlement Agreement (Exhibit 1 to the Approval Brief). The Settlement Agreement resolves all of Plaintiffs' claims on behalf of themselves and the Class, which is defined

as all owners and occupiers of non-residential parcel-based real property who or which were billed and/or paid the Per-Acre Drainage Charges between July 18, 2013 and June 30, 2017 (the "Class Period").[1]

9. The principal terms of the Settlement Agreement are as follows:

a. The City expressly denies any and all allegations that it acted improperly, but, to avoid litigation costs, the City agreed to create a settlement fund in the aggregate amount of **$29,500,000** for the benefit of the Class (which has been adjusted to $27,523,000) (the "Settlement Fund").[2] This sum will be utilized, with Court approval, to pay Class Counsel an award of attorneys' fees, the total amount of which shall not exceed $7,750,000, which is equal to approximately 10 percent of the aggregate value of the Settlement Fund, the Pre-July 2013 Write Off, and the Twelve-Month Drainage Reduction (which are described below), plus expenses for the conduct and settlement of the litigation and an incentive award to the class representatives. The remainder of the Settlement Fund will be distributed pro rata to the Class Members who have submitted claims in the form of refunds and or/credits, based upon the amount of Per-Acre Drainage Charges assessed upon each Class Member during the Class Period.

b. The City will write off and not collect all outstanding unpaid balances for Per-Acre Drainage Charges incurred by Class Members prior to July 18, 2013 (the "Pre- July 18, 2013 Write Off"), the total amount of which is estimated to be approximately $24,401,000 in past due amounts owing to the City. *See* Affid. Of Gary Brown attached to City's Brief as Ex. 7.

c. After this lawsuit was filed, the City made adjustments to its Per-Acre Drainage Charges in response to Plaintiff's claims. The Parties agree that for a twelve-month period beginning August 1, 2017 ("Twelve-Month Period"), the City's reduced Per-Acre Drainage Charge amounts shall continue, and the City shall impose upon and collect from Class Members Per-Acre Drainage Charges at an effective rate of not more than $661 per impervious acre, which results in a net reduction in Per-Acre Drainage Charges assessed upon the Class Members of approximately $24,000,000 for the Twelve-Month Period (the "Twelve-Month Drainage Reduction").

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[1] Excluded from the Class are (1) the City itself, and (2) owners or occupiers of non-residential parcel-based real property who or which were first billed the Per-Acre Drainage Charges on or after October 1, 2016 and prior to October 1, 2016, did not pay any Per-Acre Drainage Charges on any other owned or occupied non-residential parcel-based real property.

[2] The Settlement Agreement actually creates a $29.5 million Settlement Fund. Pursuant to Paragraph 3(g) of the Settlement Agreement, however, the $29.5 million Settlement Fund will be adjusted to reflect the pro rata shares of the Class Members who have excluded themselves from the Class and the pro rata shares Class Members who have released the City for all or part of the Class Period.

d. The City may not levy a tax or other assessment against property owners or water or sewer customers to finance, in whole or in part, the Settlement Fund (unless such tax or assessment receives voter approval).

e. The Settlement Agreement is intended to settle the claims of the Class. In consideration for the relief provided by the City, the Class Members have agreed to release certain claims as further described in a clear and detailed "Release and Convenant Not to Sue" that is part of the Settlement Agreement.

10. On September 12, 2017, the Court reviewed and entered a stipulated order for preliminary approval of the parties' settlement. *See* Stipulated Order Regarding Preliminarily Approval Of Class Action Settlement, Notice and Scheduling, attached to Approval Brief as Exhibit 6. As part of the September 12, 2017 preliminary approval order, the Court directed that notice be sent out to members of the class, and scheduled a hearing for January 5, 2018 to consider any objections prior to deciding whether to grant final approval to the settlement.

11. In accordance with this Court's September 12, 2017 Order, notice was mailed to the Class Members advising them of the terms of the settlement. The notice contained instructions on how to file an objection with the Court if any class member objected to any aspect of the settlement. In a Class consisting of 10,100 drainage customers, **only 40 putative Class Members who own or occupy 130 total parcels opted out of the Class.** *See* Affid. of Gregory D. Hanley, attached to the Approval Brief as Exhibit 3. The owners of the remaining 9,960 parcels chose to remain in the Class. Thus, the owners of 98.6% of parcels chose to approve and accept the terms of the settlement. In terms of the dollar value of the excluded claims, the total charges to all Class Members during the Class Period were $217,258,945.86, and the charges to the Class Members who opted out were $11,019.041.34. *Id.* Thus, the value of the claims of the ratepayers who opted out of the settlement was only 5% of the total claims of all Class Members. Moreover, only five (5) Class Members, who collectively own ten (10) parcels of property, filed and served notices of objection to

the proposed final settlement. The objectors thus own 1/10th of 1% of the total number of parcels that were assessed Per-Acre Drainage Charges during the Class Period.

12. The small number of opt-outs and objectors, and their small collective share of the overall Per-Acre Drainage Charges imposed on the Class during the Class Period, demonstrate the Class's near-unanimous agreement with this Court's preliminary conclusion that the settlement should be approved, which is the key factor the Court must consider when deciding whether to grant final approval of the settlement. *See, e.g., Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh,* 686 F. Supp. 97, 101 (W.D. Pa. 1988) ("the reaction of the class to the settlement is perhaps the most important factor to be weighed in considering the adequacy of a proposed class action settlement."); *Stoetzner v. United States Steel Corp.,* 897 F.2d 115, 118-19 (3d Cir. 1990) (fact that only 10% of class objected "strongly favors settlement"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 ("A certain number of opt-outs and objections are to be expected in a class action. . . . 'in litigation involving a large class, it would be "extremely unusual" not to encounter objections.' . . . If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement. . . . That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and demonstrates that the Settlement is 'fair, reasonable, and adequate.'") (citations omitted).

13. Michigan law is clear that settlements are highly favored. *See Faith Reformed Church v. Thompson,* 248 Mich. App. 487, 497, 639 N.W.2d 831 (2001) ("The law favors settlements"). Moreover, there is an overriding public interest in favor of settlements in class-action lawsuits. *See Kincade v General Tire & Rubber Co,* 635 F.2d 501, 507 (5th Cir. 1981).

14. MCR 3.501(E) provides that Court approval is required for the settlement of a class action.[3] "[T]he acceptance of a settlement in a class-action case is within the trial court's discretion and is reviewed on appeal for an abuse of discretion." *Brenner et. al. v. Marathon Oil Co. et. al,* 222 Mich App 128, 133; 565 NW2d 1 (1997).

15. Because the federal and Michigan class action rules are substantially the same, it is appropriate to look to federal law on class action issues in the absence of Michigan law on point. See *Brenner*, 222 Mich App at 133 ("MCR 3.501(E) has not been the subject of apposite analysis by Michigan courts and, in the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance"); *Corbett v. Montgomery Ward & Co., Inc*., 194 Mich App 624, 632; 487 NW2d 825 (1992) ("In the absence of Michigan case law . . . cases interpreting the federal statute are instructive").

*16*. Factors to be considered by a trial court before approving a settlement include whether the settlement's terms are fair and reasonable, whether the settlement is a product of fraud, overreaching, or collusion, the relative strengths and weaknesses of the plaintiffs' claims, and the stage of the proceedings. *Brenner,* 222 Mich App at 133, (citing *Priddy v Edelman,* 883 F.2d 438, 447 (6th Cir. 1989)); *In re A H Robins Co., Inc,* 880 F.2d 709, 748 (4th Cir 1989). *See also Varacallo v. Massachusetts Mutual Life Ins. Co.,* 226 F.R.D. 207, 234 (D.N.J. 2005) (under federal law, the Court reviews a proposed class action settlement to determine whether it is "fundamentally fair, adequate and reasonable").

17. Specifically, the Court is to determine a settlement's "fundamentally fair, adequate and reasonable" nature by balancing a number of factors including: (1) the complexity, expense and

[3] MCR 3.501(E) states: "Dismissal or Compromise. An action certified as a class action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to the class in such manner as the court directs."

likely duration of further litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Varacallo,* 226 F.R.D. at 234; *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (describing relevant factors as "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."); *In re Cadizem CD Antitrust Litig.,* 218 F.R.D. 508, 522 (E.D. Mich. 2003) (applying a similar standard); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 928 (E. D. Mich. 2007) (noting that Sixth Circuit precedent requires a court to consider "the likelihood of success on the merits, the risk associated with and the expense and complexity of litigation, and the objections raised by class members") (quotations omitted). It is however, "the settlement taken as a whole, rather than the individual components parts, that must be examined for overall fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

18. Moreover, "the Court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. **Therefore, the settlement or fairness hearing shall not be turned into a trial or rehearsal for trial on the merits**." *Officers for Justice v. Civil Service Commission,* 688 F.2d 615, 625 (9th Cir. 1982) (emphasis added); *see also Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th

Cir. 1977) ("In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties. *Flinn v. FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975). Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel. *Id.* at 1173.").

19. The settlement here is "entitled to an initial presumption that it is fair because '(1) the settlement negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Varacallo,* 226 F.R.D. at 235 (quotations omitted).

20. Federal precedents state that the Court must determine, as part of the final approval process, whether the prerequisites for class certification are satisfied. *See, e.g., In re Cardizem*, 218 F.R.D. 508, 517 (E.D. Mich. 2003).

21. The Court finds that the prerequisites for class certification under MCR 3.501 are satisfied in this case for the reasons set forth in Plaintiffs' Motion for Class Certification and supporting brief (attached to the Approval Brief as Exhibit 8), and permanently certifies the Class under MCR 3.501.

22. The Court finds that certification of the Class as defined in the Settlement Agreement is appropriate for settlement purposes because (a) the class consisting of the owners and occupiers of over 10,000 non-residential properties in the City is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of this Class that predominate over questions affecting only individual members, including whether the City's method of imposing the Charges violates the equal protection rights of the Class and whether the Charges constitute "taxes" which are subject to the Headlee Amendment; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class because the representative's claims arise from the same events or practices or course of conduct that gives rise to

the claims of the other class members and are based on the same legal theories; (d) the representative parties will fairly and adequately assert and protect the interests of the class because there are no conflicts of interest with the Class, and the Class is represented by experienced, competent counsel; and (e) the maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

23. Each of the relevant factors supports approval of the parties' settlement here and therefore the Court finds that the settlement is fundamentally fair, adequate, and reasonable, and that it should be approved by the Court.

24. The Court specifically finds, for the reasons set forth in the City's Brief and the Approval Brief, that (1) the litigation will be complex, expensive, and lengthy; (2) the reaction of the Class supports approval of the settlement; (3) the parties have engaged in substantial discovery and motion practice and are well-informed about the legal and factual issues present in this case; (4) there is a risk that Plaintiffs will not establish liability or the Class's right to a full refund if the case proceeds to trial; (5) there is a risk that Plaintiffs will not be able to maintain a class action through trial due to the City's anticipated arguments about the need for individualized inquiry; (6) the City's financial position would make it difficult or impossible for the City to refund 100% of the Per-Acre Drainage Charges; and (7) there is a risk that in the event of a monetary judgment the City will seek to levy the judgment under MCL 600. 6093.

25. The Court has considered the Objections filed by Detroit Alliance Against The Rain Tax ("DAART"), Central Auto Parts, Gallilee Missionary Baptist Church, Danto Furniture Company, Judith Sale and LBUBS 2007-C1 Conner Retail, LLC. "An objector to a proposed settlement has the burden of showing that the compromise is unreasonable, since preliminary approval makes the settlement presumptively reasonable." *Olden*, 472 F. Supp. 2d at 931. The Court rejects the Objections and finds that the Objectors have not met their burden and have failed to

demonstrate that the settlement is unreasonable or that adequate grounds exist to disapprove of the settlement.

26. Another Class Member, Red Cap Properties, LLC ("Red Cap"), filed an objection but only after earlier opting out of the Class. By opting out, Red Cap deprived itself of standing to object to the proposed settlement. *See, e.g., Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922 (E.D. Mich. 2007) ("If one actually opts-out, she has no standing to object to the settlement as she will not be bound by it").

**Findings Of Fact And Conclusions Of Law Concerning The Court's Approval Of Class Counsel's Motion For Fees, Costs And Incentive Awards For Class Representatives**.

1. Class Counsel, Kickham Hanley PLLC ("Class Counsel" or "KH") seeks the Court's approval of its attorneys' fees to be paid from the Settlement Fund. The attorneys' fee represents 28% of the Settlement Fund or approximately 10% of the total financial benefits conferred upon the Class by the settlement.

2. KH, as Class Counsel, litigated this complex case for two and a half years in three forums against a competent and vigorous defense by the City and its able counsel. KH, among other things, (1) devised the theory of recovery, (2) undertook significant formal and informal discovery and investigation (including a review and analysis of hundreds of pages of technical and financial documents), (3) defended dispositive motions in state and federal court, (4) developed a detailed analysis of the City's Per-Acre Drainage Overcharges and (5) negotiated a complex settlement agreement with the City with the assistance of former circuit court judge, Barry Howard, which included an agreement to certify the Plaintiff Class.

3. KH bore the sole risk that it would not be compensated in the absence of a recovery**.** The contingency risk here was substantial in that the outcome of the case was subject to significant and reasonable doubt.

4. KH seeks an attorney fee award of Seven Million, Seven Hundred and Fifty

Thousand Dollars ($7,750,000) as identified in ¶ 27 and ¶ 28 of the Settlement Agreement to be paid from the Settlement Fund. The total class benefits in this matter include the aggregate value of the $29,500,000 Settlement Fund, the $24 million in Pre-July 2013 Write-Off, and the Twelve-Month Drainage Reduction valued at another $24 million ("Total Class Benefits"). **The proposed fee represents approximately 28% of the common fund created or approximately 10% of the estimated Total Class Benefits being provided to the Class pursuant to the settlement**.

5. The amount KH would be seeking for attorneys' fees was fully disclosed to the Class in the notices that were mailed to the Class Members and, out of a Class that included approximately 10,100 commercial properties that incurred the Drainage Charges during the Class Period, only 40 class members (representing 130 properties) opted out of the Class and only 5 class members (representing only 10 properties) objected to the settlement agreement and the proposed fee award contained therein.

6. The Court finds that in this matter the Settlement Fund constitutes a "common fund" created for the benefit of the Class.

7. "[I]t is well established that 'a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531-32 (E.D. Mich. 2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Michigan law recognizes the right of a successful class representative to an award of attorney fees under the common fund doctrine, where the prevailing party creates a common fund on behalf of himself and other class members. *In re Attorney Fees of Kelman, Loria, Downing, Schneider & Simpson*, 406 Mich. 497, 504, 280 N.W.2d 457 (1979); *Grigg v. Michigan Nat'l Bank*, 405 Mich. 148, 192, 274 N.W.2d 752 (1979).

8. In common fund cases, the successful attorney's fees can be deducted from the total sum of all amounts awarded to class members before those awards are distributed to the class

members. The purpose behind this rule is to prevent unjust enrichment of class members at the expense of those class representatives who actually pursued the litigation:

> To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense [*Kelman, Loria*, 406 Mich. at 504 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970))].

7. In common fund cases, the Sixth Circuit has held that "a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.,* 9 F.3d 513, 516 (6th Cir. 1993); *Rankin v. Rots*, 2006 WL 1791377, at *1 (E.D. Mich. 2006). Moreover, the "overriding requirement" is that the award for attorneys' fees in common fund cases is that they be "reasonable under the circumstances." *Rawlings*, 9 F.3d at 516; *Cardizem*, 218 F.R.D. at 531-532.

8. Courts generally favor awarding fees from a common fund based upon the "percentage-of-the-fund" method. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939). A percentage-of-the-fund methodology fosters judicial economy because it is "easy to calculate" and it "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery." *Prudential-Bache Properties*, 9 F.3d at 516. "[M]ore importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." *F&M Distribs. Inc. Sec. Litigation,* 1999 U.S. Dist. LEXIS 11090 at *8 (E.D. Mich. 1999)(Exhibit 3 to the Brief in Support of Class Counsel's Request for Reimbursement of Costs and Expenses, and For An Incentive Award For the Class Representatives) ("Expense Brief")). As a result, in the Sixth Circuit, there has been a clear "trend towards adoption of a percentage of the fund method in [common fund] cases." *Rawlings v. Prudential-Bach Props.*, *Inc.*, 9 F.3d 513, 515 (6th Cir. 1993).

9. The Court finds that the "percentage of the fund" method is a fair and reasonable method for awarding attorneys' fees in this matter, and in employing that method, the Court awards KH an attorney fee of $7,750,000 to be paid from the Settlement Fund per the terms of the Settlement Agreement.[4] The requested percentage is less than the percentage routinely awarded by Courts employing the percentage of the fund method in awarding attorneys' fees in "common fund" class actions. When compared to attorneys' fees awarded by other courts, the percentage fee requested here is within the range of percentages that numerous other courts have found were reasonable, even if one only considers the value of the Settlement Fund and not the Total Class Benefits.[5]

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[4] Importantly, is well established that class counsel is entitled to attorneys' fees **based upon the whole benefit obtained on behalf of the class**. *In re Checking Account Overdraft Litig.,* 2013 U.S. Dist. LEXIS 190562 at p. 35, citing *Van Gemert, supra,* 444 U.S. at 478. Moreover, "when using the *percentage*-of-the-*fund* approach, courts compensate class counsel for their work in extracting non-cash relief from the defendant in a variety of ways. When the non-cash relief can be reliably valued, **courts often include the value of this relief in the common fund and award class counsel a percentage of the total fund**." *Id. citing Staton v. Boeing, supra,* 327 F.3d at 974 ("[W]here the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts [may] include such relief as part of the value of a common fund for purposes of applying the percentage method."); *see also* Principles of the Law of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010) ("[A] percentage of the fund approach should be the method utilized in most common-fund cases, **with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement**.")(emphasis added).

[5] *See, e.g., In re Lason, Inc. Sec. Litig.*, No. 99-CV-76079, Order and Final Judgment (E.D. Mich. 2003) (Tarnow, J.) (awarding attorneys' fees of 30% of $12.7 million common fund); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278, Order (E.D. Mich. Nov. 26, 2002) (Edmunds, J.) (awarding attorneys' fees of 30% of $110 million common fund for Sherman Act Class Plaintiffs) *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503-04 (E.D. Mich. 2000) (awarding attorneys' fees of approximately 30% of $4 million common fund); *Fe&M,* 1999 U.S. Dist. LEXIS 11090, at *19-20 (awarding attorneys' fees of 30% of $20.25 million common fund); *Bd. of Trustees of Birmingham ERS v. Comerica*, Case No. 09-cv-13201, Docket No. 137 (E.D. Mich. Dec. 27, 2013) (Hon. Stephen J. Murphy III) (awarding 30 percent of $11 million fund); *In Re Caraco Pharmaceutical Labs,* Case No. 09-cv-12830, Docket No. 96 (E.D. Mich. June 26, 2013) (awarding 33 ⅓ percent of $2.975 million fund); *Jane Simpson v. Citizens Bank,* Case No. 12-10267, Docket No. 50 (E.D. Mich. Jan. 31, 2014) (awarding 33 ⅓ percent of $2 million fund); *In Re Federal-Mogul Corp. Securities Litigation,* Case No. 00-40222, Docket No. 74 (Hon. Paul V. Gadola) (E.D. Mich. Jan. 12, 2004) (awarding 33 ⅓

10. The requested fee is also market-based fee. The Supreme Court recognizes that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). If this were a private contingent non-class matter, the customary fee arrangement would be a percentage in the range of 33.33% to 40% of the recovery. *Blum*, 465 U.S. at 902 n.19 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *see also* PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 543 (10th ed. 2000) ("A common contingent fee is 30 % - 40 %."). Here, KH requests an award which is well below customary contingent fee arrangements. , As stated earlier, the percentage of the fee award is only approximately 28% of the revised Settlement Fund.

11. Courts evaluate the reasonableness of a requested fee using a number of factors: including, among others: (1) the value of the benefit rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; and (3) whether the services were undertaken on a contingent fee basis. *Cardizem*, 218 F.R.D. at 533. For the reasons discussed below, each of the factors referenced above supports the fee request.

12. First, there is substantial value to the benefit rendered to the Class by KH's efforts. In common fund cases, the primary factor in determining a reasonable fee is the result achieved on behalf of the class. *In re DPL, Inc. Sec. Litig.*, 307 F. Supp. 2d 947, 951 (S.D. Ohio 2004) ("the award of attorneys' fees must be driven by the results obtained by Plaintiffs' counsel."). KH has rendered a substantial benefit to the Class that fully supports the fee request. Here, the recovery of $27.56 million in cash and credits (net of opt outs), the write-off of millions of dollars in unpaid balances and the City's agreement to reduce its drainage charges provides a more than satisfactory result for

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percent of $1.5 million fund). Thus, even if the Court derives the percentage from the Settlement Fund alone, the attorney fee requested by KH (28%) is still reasonable.

the Class given the risks attendant to this Action. Class Counsel asserts that the Total Class Benefit achieved is approximately $77 million. This factor fully supports the conclusion that the settlement is a good result and provides a very valuable benefit to the Class.

13. Second, society's stake in rewarding attorneys who produce such benefits in complex litigation like this one warrants granting the requested fee. *See Cardizem*, 218 F.R.D. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this benefits society"). No other law firm brought a case challenging the Drainage Charges until March 2017. Here, KH's efforts provided a substantial benefit to society and weigh heavily in favor of approval of its fee request.

14. Third, KH has prosecuted this case on an entirely contingent basis. Courts in the Sixth Circuit recognize that the attorneys' contingent fee risk "counsels in favor of a generous fee." *F&M*, 1999 U.S. Dist. LEXIS 11090, at *18 (recognizing the importance "that [counsel] undertook this case on a contingent basis, which required them to fund all of the significant litigation costs while facing the risk of a rejection of their clients' claims on the merits"). KH undertook this litigation knowing that it possibly could last for years, require the expenditure of hundreds of attorney hours and tens of thousands of dollars in expenses, and ultimately result in a loss on a motion to dismiss, at summary judgment or at trial. In fact, KH received no compensation during the time this Lawsuit has been pending, and was never guaranteed the payment of any fee.

15. Fourth, the Class's reaction to the proposed fee set forth in the Notice is important evidence of the fairness and reasonableness of the fee request. *Cardizem*, 218 F.R.D. at 534. The Notice disclosed the amount of the fee, informed Class Members when they could object and only ***five*** class members, representing ***ten*** commercial properties in the Class, filed objections to the settlement. Virtually all of the class members did not object to KH's fee request. The Class's overwhelmingly "favorable response" and "lends further support to the Court's conclusion that the

requested fee is reasonable and fair." *Cardizem*, 218 F.R.D. at 534.[6]

16. The Objectors to KH's fee request assert that Headlee Amendment class actions may not settle for a percentage of the common fund because the Headlee Amendment contains a fee shifting provision that allocates a Headlee plaintiff's reasonable costs and fees to the defendant. The Objectors further claim that this Court must apply the framework for awarding attorneys' fees set forth in *Smith v. Khouri,* 481 Mich 519; 751 NW2d 472 (2008) and can only award KH for its time spent at reasonable hourly rates. The Court rejects these arguments.

17. The Objectors' assertions about KH's fee request fail for at least four independently-dispositive reasons: (1) there were numerous non-Headlee claims asserted in this case which did not authorize fee-shifting and Plaintiffs clearly obtained a recovery on those non-Headlee claims; (2) Plaintiffs are not "prevailing parties," who would be entitled to an award of fees under the cited fee-shifting provision because this case is being resolved through settlement; (3) Class Counsel seeks fees from the Class paid out of the "common fund" created by Counsel's efforts, but the *Smith v. Khouri* framework for determining the amount attorneys' fees applies only where fees are sought from an adverse party and has never been applied in a class action context; and (4) the courts uniformly hold that "common fund" attorneys' fees are available in a settled class actions even where a fee-shifting statute applies.

20. KH also requests an award of expenses relating to this litigation.

21. KH asserts that it has incurred litigation expenses in the current amount of $224,694.22. These expenses are detailed in the Affidavit of Kimberly Plets (Exhibit 1 to the Brief

[6] Other factors that are properly considered include: (1) the value of the services on an hourly basis; (2) the complexity of the litigation; and (3) the professional skill and standing of counsel involved on both sides. *Id.* These factors further support the fee award because KH spent hundreds of hours of attorney time in litigating this case in three separate courts, the factual and legal issues were extremely complex, and both Plaintiffs and the City were represented by highly-skilled counsel experienced in these types of matters.

in Support of Class Counsel's Request for Reimbursement of Costs and Expenses, and For An Incentive Award For the Class Representatives) ("Expense Brief").

22. A significant portion of KH's expenses are attributable to the work performed by the class action settlement administrator. As contemplated by the Settlement Agreement, KH has retained the Garden City Group, a well-established class action settlement administrator, to administer the settlement by, among other things, processing the City's payment records, disseminating the settlement class notice, calculating the amounts due to each class member, and printing and distributing the thousands of settlement checks to Class members. Pursuant to its agreement with the Garden City Group, KH will pay Garden City $199,500.97 for these services upon final court approval of the settlement and of this expense. A copy of Garden City's invoice to KH is attached to the Expense Brief as Exhibit 2.

23. "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *Fe&M*, 1999 U.S. Dist. LEXIS 11090, at *20. "Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *Cardizem*, 218 F.R.D. at 535.

24. The Court finds that the requested expenses are fair and reasonable and approves the requested amount of $224,694.22, to be paid from the Settlement Fund per the terms of the Settlement Agreement.

25. Finally, KH requests incentive awards in the amount of $20,000 each for the named plaintiffs Michigan Warehousing Group, LLC and Midwest Valve & Fitting Co., which have acted as class representatives in this action. No objections have been made by any Class Member to this request.

26. Courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred. As noted in *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 U.S. Dist. LEXIS 5964, 17-18 fn. 33 (E.D. Mich. 2015) *citing Lonardo v. Travelers Indemnity Company*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010): "Courts within the Sixth Circuit...recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone." *See also Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 747, 2014 U.S. Dist. LEXIS 91661 (E.D. Tenn. June 30, 2014) (in direct purchaser pharmaceutical antitrust action, awarding a $50,000 incentive award to each class representative); *In re Cardizem,* 218 at 535-536 (awarding $75,000 each to the corporate class representatives); *Meijer, Inc. v. Barr Pharms., Inc.*, 2009 U.S. Dist. LEXIS 133250 (D. D.C. Apr. 20, 2009) (awarding $50,000 to five class representatives—a total of $250,000).

27. The Court finds that the requested incentive awards are reasonable and appropriate and grants KH's request for those awards, to be paid from the Settlement Fund per the Settlement Agreement.

Based upon these Findings of Fact and Conclusions of Law, IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The terms of the Agreement are fair, reasonable and adequate and in the best interests of the members of the Class and are hereby approved.

2. Plaintiffs and Defendant are hereby ordered and directed to perform and consummate the settlement set forth in the Agreement in accordance with the terms and conditions of the Agreement.

3. The notification to the Class members regarding the Settlement is the best notice practicable under the circumstances and is in compliance with MCR 3.501(E) and the requirements of due process of law.

4. This Lawsuit is hereby dismissed with prejudice, and without costs to any party except as provided for in the Agreement.

5. Kickham Hanley PLLC, counsel for the Class, is hereby awarded attorneys' fees and costs in the amount of Seven Million Nine Hundred Seventy-Four Thousand, Six Hundred Ninety-Four Dollars ($7,974,694), to be paid as set forth in the Agreement. Plaintiff Michigan Warehousing Group, LLC is granted an incentive award of $20,000, to be paid as set forth in the Agreement. Plaintiff Midwest Valve & Fitting Company is granted an incentive award of $20,000, to be paid as set forth in the Agreement.

6. Without any further action by anyone, Plaintiffs and all members of the Class as certified by the Order dated September 12, 2017, who previously did not submit a timely and valid Request for Exclusion are deemed to have executed the following Release and Covenant not to Sue which is hereby approved by the Court:

> In executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers, directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the City, and each of its successors and assigns, present and former agents, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of past, present and/or future actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever, that, with respect to any parcel owned or occupied by the Class Member at any time during the Class Period, (a) challenge the City's Per-Acre Drainage Charge, and/or (b) challenge the method employed by the City to recover the direct and indirect costs incurred (including capital costs) by the City to operate, manage,

maintain, treat and dispose of storm water and surface water runoff (including but not limited to infiltration and inflow as defined under 40 C.F.R. § 35.2005(b)(20)-(21)) on the grounds that the Per-Acre Drainage Charge (or the methodology employed by the City) is, or results in the assessment of, an unlawful tax, or is unlawful under the Headlee Amendment of the Michigan Constitution. This release does not extend to claims challenging the Per-Acre Drainage Charge based upon any other legal theory or authority

Also, in executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers, directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the City, and each of its successors and assigns, present and former agents, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever known or unknown, which arise from the beginning of time through June 30, 2017 that, with respect to any parcel owned or occupied by the Class Member at any time during the Class Period, concern or relate to (1) the legality of the City's Per-Acre Drainage Charges; (2) the City's calculation or assessment of the Per-Acre Drainage Charges; (3) the components of costs included in the Per-Acre Drainage Charges; and/or (4) the City's efforts to charge and/or collect the Per-Acre Drainage Charges.

This release is intended to include all claims that were asserted or could have been asserted in the Lawsuit concerning the City's Per-Acre Drainage Charges. In executing the Release and Covenant Not to Sue, each Class Member also covenants that: (a) except for actions or suits based upon breaches of the terms of this Agreement or to enforce rights provided for in this Agreement, he, she or it will refrain from commencing any action or suit, or prosecuting any pending action or suit, in law or in equity, against the City on account of any action or cause of action released hereby; (b) none of the claims released under the Release and Covenant Not To Sue has been assigned to any other party; and (c) he, she or it accepts and assumes the risk that if any fact or circumstance is found, suspected, or claimed hereinafter to be other than or different from the facts or circumstances now believed to be true, the Release and Covenant Not To Sue shall be and remain effective notwithstanding any such difference in any such facts or circumstances. This release does not extend to claims that challenge the administered application of the City's retail Drainage Charge rate to a particular parcel, -- e.g., a claim that the City has miscalculated the impervious surface area of a particular property or has failed to properly record and deduct paid charges from drainage amounts owed.

8. If the Defendant complies with the prospective relief described in the Agreement for the duration of FY 2017-2018, as defined in the Settlement Agreement, the Class Members who

receive Payments and/or Credits as part of the settlement agree to extend their release as more fully set forth in Paragraph 26 to include the FY 2017-2018 Period.

9. This Court retains continuing jurisdiction to effectuate the provisions of the Agreement and the terms of this Order.

IT IS SO ORDERED:

Dated: 2/8/2018, 2018.

/s/ John A. Murphy
Wayne County Circuit Court Judge

We hereby stipulate to the entry of the above order.
**Approved as to form and substance:**

*/s/ Gregory D. Hanley*
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 15, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filing Participants.

*/s/ Kim Plets*
Kim Plets