STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff,

v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant.

Case No. 20- 199 -CZ
Hon. WANDA M. STOKES

Gregory D. Hanley (P51204)
John J. Premo (P55393)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

Andrew Abood (P43366)
Abood Law Firm
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900
Counsel for Plaintiff

There is no other pending or resolved civil action between these parties arising out of the transaction or occurrence alleged in the complaint.

PLAINTIFF'S CLASS ACTION COMPLAINT

Plaintiff James Heos ("Plaintiff"), by his attorneys, Kickham Hanley PLLC and the Abood Law Firm, individually and on behalf of a class of similarly situated class members, states the following for his Class Action Complaint against the City of East Lansing (the "City"):

INTRODUCTION

1. This is an action challenging the "Franchise Fees" imposed by the City on citizens whose properties receive electric service from the Lansing Board of Water and Light ("LBWL"), a municipal utility owned by the City of Lansing, Michigan. The City has extracted millions of dollars from the payers of the Franchise Fees, at a rate of about $1.4 million per year, that it has used to finance the City's general governmental functions.

2. The Franchise Fees constitute unlawful taxes that have been imposed by the City in violation of the Headlee Amendment to the Michigan Constitution because the Franchise Fees were not approved by the City's voters, as required by Section 31 of the Headlee Amendment.

3. The Franchise Fees also violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91, because they constitute taxes that are not ad valorem property taxes and were not being imposed on January 1, 1964.

4. The Franchise Fees also violate equal protection guarantees of the Michigan Constitution (*see* Mich. Constitution 1963, Article 1, § 2) because they are imposed only on City citizens who are located in those geographical areas of the City which receive electric service from the LBWL and are not imposed on City citizens who are located in different geographical areas of the City which receive their electric service from Consumers Energy. By imposing the Franchise Fees in this manner, the City has failed to treat all persons and entities of the same class equally, but has instead extended privileges to an arbitrary or unreasonable class which are denied to persons and entities who incur the Franchise Fees. No rational basis exists for imposing the Franchise Fees only upon one subset of the citizenry based upon their physical location in the City.

5. The Franchise Fees in fact are a total sham because the City is prohibited by Michigan law (the Foote Act) from imposing any fees as a condition of allowing the LBWL to

provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

6. The City therefore must be enjoined from continuing collection of the Franchise Fees and must refund all Franchise Fees it has received since it began imposing the Franchise Fees on July 1, 2017, and all Franchise Fees it receives during the pendency of this lawsuit.

JURISDICTION AND VENUE

7. Plaintiff is a property owner in the City who receives electric service from the LBWL, has paid the Franchise Fees, and seeks to act as a class representative for all similarly situated persons.

8. Defendant City of East Lansing (the "City") is a municipality located in Ingham County and Clinton County, Michigan.

9. Venue and jurisdiction are proper in the Ingham County Circuit Court under MCL 600.1615 because the City may exercise governmental authority in Ingham County, and because the actions which give rise to Plaintiff's claims occurred in Ingham County.

GENERAL ALLEGATIONS CONCERNING THE FRANCHISE FEES

10. In FY 2018, the City was experiencing a budgetary shortfall of about $1 million per year. Upon information and belief, the City began imposing the Franchise Fee at issue here as a means of generating additional revenue to finance its general governmental obligations.

11. The City is serviced by two electric utilities, each of whom has been granted a monopoly over sizeable portions of the City's land area. The LBWL services parts of the City, while Consumers Energy services other parts. Upon information and belief, some areas of the City can be serviced by both utilities, including.

12. The City has a franchise agreement with Consumers Energy that does not require the payment of any fee in exchange for the grant of the franchise. Thus, persons and entities in the City

who/which receive electric service from Consumers Energy are not required to pay any Franchise Fees to the City.

13. In or about June or July 2017, the City entered into a Franchise Agreement with the LBWL which imposed a Franchise Fee.

14. The LBWL voted to enter into the Franchise Agreement on May 23, 2017. *See* LBWL Board Packet 7/25/17, Exhibit A hereto, pp. 12-16 (minutes reflecting the LBWL's adoption of the Franchise Agreement during its May 23, 2017 meeting).

15. The Franchise Agreement was approved by the City Council through its enactment of Ordinance No. 1411 on June 6, 2017. *See* Ordinance No. 1411, Exhibit B hereto.

16. Ordinance No. 1411 was not approved by a majority of the voters of the City and remains so unapproved today.

17. Section 2 of the Franchise Agreement requires the LBWL to collect the Franchise Fees from its electric customers in the City and to remit the Fees to the City:

> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, **collect and remit** to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. **Such fee will appear on the corresponding energy bills.**
>
> The fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.
>
> **The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.**
>
> **Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance.**

However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease. [emphasis added]

18. Notably, the Franchise Fees are **not** imposed on the LBWL. Instead, the Agreement appoints the LBWL as a mere collection agent which bears no responsibility to pay the Franchise Fees beyond the amount collected from its City customers. The Franchise Fees are imposed directly on the City's citizens who receive electric service from the LBWL.

19. Various provisions of the Agreement make clear that the Franchise Fees are imposed directly on the City citizens and not on the LBWL. For example, Section 2 states in pertinent part: "The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the **collection and remittance** of this franchise fee." (emphasis added). Section 7 states in pertinent part: "The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the **collection and remittance** of the Franchise Fee described in Section 2." (emphasis added). Finally, and importantly, Section 14 allows the LBWL to charge the City a fee for collecting and remitting the Franchise Fees. That section provides that the LBWL will receive "an administrative charge of ½ percent (0.5%) of collected franchise fees … ."

20. In sum, the LBWL is required to "collect and remit" the fees to the City, not merely "pay" the fees to the City. The ordinance expressly requires the LBWL to include the fees on the "corresponding energy bills." This is a total "pass-through" obligation. Moreover, if the LBWL cannot collect and remit the fees to the City (i.e., pass-through the fees), the LBWL does not have to pay anything.

21. The legal incidence of the Franchise Fees falls on the inhabitants of the City who are electric customers of LBWL. *See, e.g., U.S. v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975) ("where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser").

22. Clearly, if the City sought to impose a new tax directly on its citizenry without utilizing the LBWL as a collection agent, the City would be required to seek voter approval of that tax under the Headlee Amendment. The City cannot evade that obligation by the subterfuge of its Franchise Agreement with the LBWL.

23. Indeed, the LBWL apparently knew, or at least suspected, that the Franchise Agreement was unlawful. In its November 15, 2016 meeting minutes, the LBWL recorded the following:

> General Manager Peffley stated that there is **a concern that this fee could be illegal** and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the **BWL would only be the collection agency for the City of E. Lansing.** However, the **BWL does not want to get in the middle of a law suit**, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:
>
> 1. East Lansing will need to provide the BWL a legal opinion confirming a franchise fee can be assessed;
>
> 2. BWL will need an Agreement with East Lansing to **reimburse the BWL for all costs for defending against a third-party claim** associated with a franchise fee;
>
> 3. East Lansing stated they will be requesting a franchise fee from Consumers Energy so the BWL requests that both agreements should start concurrently; and
>
> 4. BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into the franchise agreement. [LBWL Meeting Minutes for November 15, 2016, Exhibit C hereto, p. 13 (emphasis added).]

24. Similarly, the LBWL's May 23, 2017 meeting minutes regarding its assent to the Franchise Agreement provide as follows:

> GM Peffley stated that at the November 8, 2016 Finance Committee a request was brought forth that was made by East Lansing to implement a franchise agreement. Four items emerged that needed to be accomplished: (1) East Lansing would provide the BWL with a legal opinion confirming a franchise fee can be assessed; **(2) BWL will need an agreement with East Lansing to reimburse the BWL for all costs for defending against a third party claim associated with the franchise fee;** (3) East Lansing will be requesting a franchise fee from Consumers

> Energy and requests that both agreements should start concurrently; (4) BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into a franchise agreement with East Lansing. East Lansing has met (1), (2), and (4). Mr. Peffley said that he would like to offer an amendment. Through negotiations with the East Lansing manager, George Lahanas, and his staff, in lieu of a Consumers Energy franchise fee, East Lansing has granted BWL an exclusive franchise fee for all future development in the BWL service territory. [Exhibit A, pp. 12-13 (emphasis added).]

25. The LBWL thus understood that the Franchise Agreement could give rise to a cause of action by its customers and required the City to indemnify the LBWL against any such claims as a condition of entering into the Franchise Agreement. Accordingly, the LBWL made certain that it would be protected against any fallout from its devil's bargain with the City.

CLASS ALLEGATIONS

26. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of all persons or entities who/which have incurred or paid Franchise Fees during the relevant class periods.

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

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

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

30. 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 Franchise Fees imposed by the City are taxes;

b. whether the Franchise Fees imposed by the City violate the Headlee Amendment;

c. whether the Franchise Fees imposed by the City violated MCL 141.91;

d. whether the Franchise Fees imposed by the City violate the Foote Act; and

e. whether the imposition of the Franchise Fees on only one subset of the citizenry of the City based on their geographical location violates equal protection guarantees under the Michigan Constitution.

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

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

COUNT I
VIOLATION OF THE HEADLEE AMENDMENT

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

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

35. In particular, the City may not disguise a tax as a fee under Article 9, Section 31 of the Michigan Constitution of 1963, which provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const. 1963, art. 9, § 31].

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

37. The Franchise Fees were not "authorized by law or charter" when Headlee was ratified in December 1978. To the contrary, such fees have long been prohibited by the Foote Act.

38. The Franchise Fees 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 Franchise Fees are disproportionate to the cost incurred by the City providing the benefits for which the Fees are purportedly imposed;

c. The Franchisee Fees are designed to generate revenue;

d. The Franchise Fees lack a regulatory purpose;

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

f. Various other indicia of a tax described in *Bolt v. City of Lansing* are present.[1]

39. As a direct and proximate result of the City's implementation of the Franchise Fees, Plaintiff and the Class have been harmed.

40. Plaintiff seeks her attorneys' fees and costs as allowed by Article 9, Section 32 of the Michigan Constitution of 1963 and MCL 600.308a.

41. Plaintiff seeks a refund of all amounts to which it and the Class are entitled.

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[1] Pursuant to MCR 2.112(M), Plaintiff identifies subparts (a) through (e) of Paragraph 37 as "factual questions that are anticipated to require resolution by the Court."

COUNT II
ASSUMPSIT FOR MONEY HAD AND RECEIVED – VIOLATION OF THE PROHIBITED TAXES BY CITIES AND VILLAGES ACT, MCL 141.91

42. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

43. The Prohibited Taxes by Cities and Villages Act, MCL 141.91, provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

44. The City did not impose the Franchise Fees on or before January 1, 1964.

45. In fact, the City did not begin to impose the Franchise Fees until 2017.

46. The Franchise Fees are not ad valorem property taxes.

47. Because the Franchise Fees are taxes that were not being imposed on January 1, 1964, they are unlawful under MCL 141.91.

48. As a direct and proximate result of the City's unlawful and improper conduct in collecting the Franchise Fees, the City has collected millions of dollars to which it is not entitled.

49. 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.

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

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

52. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected.

COUNT III
UNJUST ENRICHMENT – VIOLATION OF THE PROHIBITED TAXES BY CITIES AND VILLAGES ACT, MCL 141.91

53. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

54. The Prohibited Taxes by Cities and Villages Act, MCL 141.91, provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

55. The City did not impose the Franchise Fees on or before January 1, 1964.

56. In fact, the City did not begin to impose the Franchise Fees until 2017.

57. The Franchise Fees are not ad valorem property taxes.

58. Because the Franchise Fees are taxes that were not being imposed on January 1, 1964, they are unlawful under MCL 141.91.

59. As a direct and proximate result of the City's unlawful and improper conduct in collecting the Franchise Fees, the City has collected millions of dollars to which it is not entitled.

60. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Franchise Fees, Plaintiff and the Class have conferred a benefit upon the City and it would be inequitable for the City to retain that benefit.

61. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected.

COUNT IV
VIOLATION OF STATE EQUAL PROTECTION GUARANTEES

62. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

63. The City's practice of imposing the Franchise Fees only upon Plaintiffs and the other members of the Class is a constitutionally improper classification which violates State equal protection guarantees.

64. There is no natural distinguishing characteristic between the persons and entities that are subject to the Franchisee Fees and the persons and entities in the City that are not subject to the Franchise Fees. Thus, Plaintiff and the Class are irrationally being charged differently than the similarly situated persons and entities that are not being assessed the Franchise Fees.

65. The City has violated Mich. Constitution 1963, Article 1, § 2 by imposing the Franchise Fees upon Plaintiffs and the Class in violation of their constitutional equal protection guarantees.

66. Plaintiff and the Class have been financially harmed as a result of the City's violation of their constitutional equal protection guarantees.

67. Plaintiff seeks a refund of all amounts to which it and the Class are entitled.

COUNT V
UNJUST ENRICHMENT – VIOLATION OF FOOTE ACT

68. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

69. Michigan law prohibits the City from imposing any Franchise Fees under these circumstances. Specifically, the City is prohibited by the Foote Act from imposing any fees as a condition of allowing the LBWL to provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

70. By imposing Franchise Fees even though they are prohibited by the Foote Act, the City has collected amounts in excess of the amounts it was legally entitled to collect.

71. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Franchise Fees, Plaintiff and the Class have conferred a benefit upon the City, and it would be inequitable for the City to retain that benefit.

72. Under equitable principles, the City should be required to disgorge the revenues attributable to the Franchise Fees it has imposed or collected since the implementation of the Franchise Fee, and Franchise Fees it imposes or collects during the time this action is pending and refund the Franchise Fees to Plaintiff and the Class.

COUNT VI
CLAIM IN ASSUMPSIT – VIOLATION OF FOOTE ACT

73. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

74. Michigan law prohibits the City from imposing any Franchise Fees under these circumstances. Specifically, the City is prohibited by the Foote Act from imposing any fees as a condition of allowing the LBWL to provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

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. Therefore, Plaintiff is entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g., Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

76. By imposing Franchise Fees even though they are prohibited by the Foote Act, the City has collected amounts in excess of the amounts it was legally entitled to collect.

77. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Franchise Fees, Plaintiff and

the Class have conferred a benefit upon the City, and it would be inequitable for the City to retain that benefit.

78. Under equitable principles, the City should be required to disgorge the revenues attributable to the Franchise Fees it has imposed or collected since the implementation of the Franchise Fees, and Franchise Fees it imposes or collects during the time this action is pending and refund the Franchise Fees to Plaintiff and the Class.

PRAYER FOR RELIEF

Plaintiff requests that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC designated Class Counsel;

B. With respect to Count I, define the Class to include all persons or entities which have incurred or paid Franchise Fees at any time in the one-year period prior to the filing of this action and/or which incur or pay the Franchise Fees during the pendency of this action.

C. With respect to Counts II, III, IV, V, and VI define the Class to include all persons or entities which have incurred or paid Franchise Fees at any time since the implementation of the Franchise Fee and/or which incur or pay the Franchise Fees during the pendency of this action.

C. With respect to Counts I through VI, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all Franchise Fees collected during the respective class periods and to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of Franchise Fees to which Plaintiff and the Class are entitled;

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

E. Permanently enjoin the City from collecting any past Franchise Fees and from imposing or collecting Franchise Fees in the future;

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

G. Grant any other appropriate relief.

KICKHAM HANLEY PLLC

Gregory D. Hanley (KP)

Gregory D. Hanley (P51204)
John J. Premo (P55393)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

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