

18-011569-CZ FILED IN MY OFFICE IN WAYNE COUNTY CLERK 9/27/2019 11:39 AM Inga Robertson

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

GENERAL MILL SUPPLY CO.,
Individually and on behalf of a
Class of similarly situated persons
and entities,

Case No. 18-011569-CZ
Hon. Kevin J. Cox

Plaintiff,

v.

THE GREAT LAKES WATER AUTHORITY,
an incorporated municipal authority,

and

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

Defendants.

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

James G. Fausone (P33579)
Michael M. McNamara (P48055)
James M. Pelland (P51237)
Fausone Bohn, LLP
41700 W. Six Mile Road, Suite 101
Northville, MI 48168
(248) 380-0000
Attorneys for Defendants

Mark L. Dolin (P45081)
Michael J. Watt (P63869)
Kopka Pinkus Dolan PC
32605 W. Twelve Mile Road, Suite 300
Farmington Hills, MI 48334
(248) 324-2620
*Co-Counsel for Defendant Great Lakes Water
Authority*

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

PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff General Mill Supply Co. (“Plaintiff”), individually and on behalf of a class of similarly situated person and entities, by its counsel, Kickham Hanley PLLC, states the following for its First Amended Class Action Complaint against the Great Lakes Water Authority (“GLWA”) and the City of Detroit, by and through its Water and Sewerage Department (the “City”):

INTRODUCTION

1. This is an action challenging an Industrial Waste Control Charge (“IWC Charge”) GLWA and the City collectively impose on owners of non-residential property located in various municipalities in Southeast Michigan.

2. Defendants impose the IWC Charge in order to pay the cost of monitoring the discharge of industrial waste by a small set of Significant Industrial Users (“SIUs”). Upon information and belief, there are about 250 SIUs under GLWA’s jurisdiction.

3. In GLWA’s own words, the purpose of the IWC Charge is “to offset the cost incurred in administering regulatory activities under the Sewer Use Ordinance/Industrial Waste Control Ordinance as required in the National Pollutant Discharge Elimination System (NPDES) Permit Program and the Clean Water Act.”

4. The IWC Charge has nothing to do with the actual treatment costs of industrial waste. Instead, the IWC Charge purportedly finances, among other things, the costs associated with inspections, issuance of notices of violation or noncompliance, and other enforcement activities related to industrial waste generated by SIUs.

5. Monitoring the discharge of industrial waste by SIUs provides a public benefit because it helps prevent pollution, including pollution of waterways.

6. However, Defendants do not impose the cost of monitoring the discharge of industrial waste by SIUs on the public at large. Defendants also do not impose the cost of monitoring the discharge of industrial waste by SIUs on residential properties which also utilize the sewer systems operated by Defendants.

7. Defendants instead pay the cost of monitoring the discharge of industrial waste by approximately 250 SIUs by imposing the IWC Charge on approximately 52,000 owners of non-residential property.

8. The IWC Charge is imposed on virtually all owners of non-residential property based on the size of the water meter serving the property.

9. Whether a person or entity owns non-residential property is not relevant to whether he, she, or it receives a benefit from GLWA's monitoring of SIUs. Nor is the size of the person or entity's water meter related in any way to the amount of the benefit he, she, or it receives.

10. Moreover, even if GLWA could lawfully impose some IWC Charge on non-residential property owners, the total IWC Charges collected greatly exceed GLWA's actual cost of monitoring the discharge of industrial waste by SIUs.

11. GLWA has thus systematically garnered millions of dollars of revenue from property owners in excess of its actual cost of monitoring the discharge of industrial waste by SIUs. This overcharge affects both the SIUs and the 52,000 other property owners who pay the IWC Charge.

12. The IWC Charges are precisely the type of exaction the Michigan Supreme Court found to be an unconstitutional tax in the seminal case of *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998). The IWC Charges are not legitimate user fees but rather constitute unlawful taxes under the *Bolt* decision; they are motivated by a revenue-raising and not a regulatory purpose because the amount charged to Plaintiff and the Class is grossly disproportionate to GLWA's actual costs of providing the purported benefits for which the IWC Charges are purportedly imposed, and payment of the IWC Charges is not voluntary.

13. The IWC Charges were first authorized and imposed after the ratification of the Headlee Amendment.

14. The IWC Charges also are arbitrary, capricious and unreasonable, and have been imposed in violation of common law rate-making principles and MCL 141.91.

15. Because the IWC Charges have been imposed on owners of non-residential property who do not receive a benefit from the monitoring of SIUs that is different from the benefit received by the similarly-situated general public, and the IWC Charges are not imposed on similarly-situated properties (i.e., residential properties) the IWC Charges violate the Michigan Constitution's equal protection guarantees.

JURISDICTION AND VENUE

16. Plaintiff owns property in Southeast Michigan, has paid the IWC Charges, and seeks to act as class representative for all similarly situated persons and entities.

17. Defendant GLWA is an incorporated municipal water authority formed pursuant to MCL 124.282 with its primary offices in Detroit, Michigan.

18. Defendant the City of Detroit is a Michigan home-rule city and is located in Wayne County, Michigan.

19. Venue and jurisdiction are proper in the Wayne County Circuit Court because all parties are present in Wayne County, Michigan, and the actions which give rise to Plaintiff's claims occurred in Wayne County, Michigan.

GENERAL ALLEGATIONS CONCERNING THE IWC CHARGES

20. Through an "Industrial Waste Control Division," GLWA performs, and the City performed prior to January 1, 2016, regulatory activities such as inspection and testing of waste discharged by SIUs.

21. Before January 1, 2016, the City was responsible for administering the IWC Charges and monitoring the SIUs.

22. In November 2014, GLWA was incorporated pursuant to MCL 124.282 as a new regional water authority to act on behalf of the City of Detroit, Macomb, Oakland, and Wayne Counties and the State of Michigan.

23. On January 1, 2016, GLWA assumed operation of the City's regional assets, including the administrating of the IWC Charges and the monitoring of SIUs.

24. GLWA's regulatory activities are funded through the IWC Charges applied to commercial and industrial sewer accounts based on the size of their water meter. The municipalities which receive sewage disposal services from GLWA inform GLWA of the number of non-residential customers subject to the meter fee and the aggregate number of meters. GLWA informs the municipalities the amounts of IWC Charges that should be collected from the non-residential customers based upon that information. The municipalities collect the Charges from the non-residential customers in their jurisdictions and remit them to GLWA. This arrangement also existed during the time the City was imposing and collecting the Charges. Currently, the City imposes and collects IWC Charges from non-residential properties in the City and then remits the associated revenues to GLWA.

25. The IWC Charges are imposed on end-users (i.e., the non-residential properties) and the municipalities act as mere collection agents on behalf of GLWA. Defendants have repeatedly admitted this fact. For example:

- a) "The IWC Charge **is assessed to any water meter** that is greater than or equal to 5/8" diameter under the following circumstances:
 - i. **The user** is a commercial or industrial user whose operations are defined by the 1987 SIC Code (or its corresponding designation of the North American Industrial Classification system) being Divisions A, B, C, D, E, F, G, H, I and/or J;
 - ii. The water meter in question is not strictly used for Fire Protection;
 - iii. The facility is not a residential or multi-family dwelling."

See December 18, 2018 email from Stephen Kuplicki of GLWA to Tammy Gushard (GLWA000031, emphasis added).

- b) "**A user** challenging the assessment would need to file an appeal with supporting documentation." *See* December 18, 2018 email from Stephen Kuplicki of GLWA to Tammy Gushard (GLWA000031, emphasis added).

- c) In a March 25, 2015 “Industrial Waste Control and Pollutant Surcharge Program Review” (GLWA000042-GLWA000059) Mark Savitskie and Cheryl Jordan of DWSD:
- d) Define “End-User” as “the business that **ultimately pays** the IWC charges and/or pollutant surcharge.” *See* GLWA000044, (emphasis added).
- e) State “Over 47,000 non-residential commercial and industrial **end-users pay IWC charges monthly**, either through a direct billing from DWSD (for Detroit end-user locations) or a billing from their community customer (for suburban end-user locations) with the proceeds forwarded to DWSD.” *See* GLWA000045, (emphasis added).
- f) State “Program costs **are passed to the customer** based on their meter size (5/8 inches or greater)” *Id.*, (emphasis added).
- g) Identify that the purpose of IWC charges is to “[r]ecover the cost of the program by establishing charges based on meter size (IPP) and concentration of waste (PS) **for all non-residential customers** (subject to some exclusions)” *See* GLWA000046, (emphasis added).
- h) Note that, with respect to the IWC charge, “many are billed a small amount each.” *See* GLWA000051.
- i) The IWC Charge “is **assessed against any water meter size greater than 5/8” to all commercial and industrial users of the DWSD system**, whose operations are defined by the 1987 SIC Code Division A, B, C D, E, F, G, H, I and J” *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added).
- j) “**Any user not specifically exempted by the court’s 1981 order or as stated above, is to be assessed the Industrial Waste Control charge.**” *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added).
- k) The DWSD “recovers the cost of the Industrial Waste Control Division budget through the **assessment of a meter charge** placed on all water meters of 5/8” or greater than 5/8” in all communities serviced by DWSD’s Wastewater System.” *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added).
- l) “**IWC costs are not allocated to individual communities** or separately between Detroit and Suburban Wholesale. Total revenue requirements allocated to IWC are simply divided by the total IWC billing units to determine a set of charges that varies by meter size but that is uniform throughout the customer base.” *See* “IWC Observations” (GLWA000384, emphasis added).

26. IWC Charges are not imposed on owners of properties with water meters that are used for fire protection, residential water meters, or tax-exempt entities such as churches and schools.

27. The IWC Charges are intended to be used for the support of regulatory programs benefitting the general public.

28. SIUs are users that generate a significant volume of particularly noxious pollutants which usually require pretreatment. An SIU is specifically defined in City of Detroit Ordinance 08-05, Chapter 56, Article III, Division 3, Section 56-3-58.1. All SIUs operate under permits issued by the City and/or GLWA as the “Control Authority”, court orders or consent decrees.

29. 26. The Industrial Waste Control Division files annual reports with the MDEQ. Those reports indicate that all or virtually all of the activities of the Industrial Waste Control Division are devoted to the SIUs. On information and belief, in 2014, the Division inspected only SIUs, and took enforcement actions only with respect to SIUs.

30. The IWC Charges have been foisted upon a particularized and narrow subset of Southeast Michigan property owners (including Plaintiff) – i.e., owners of certain nonresidential properties.

31. GLWA persists in the exaction of the IWC Charges from the owners of non-residential properties, even though the monitoring of SIUs, “which benefits the public without providing any individualized, measurable benefit to individual property owners, does not lend itself to a system of funding based on user fees.” *Dekalb County v. U.S.*, 108 Fed. Cl. 681 (U.S. Court of Claims 2013) (regarding a stormwater drainage system).

32. Accordingly, the IWC Charge constitutes a “tax” that has not been authorized by voters in violation of Article 9, Section 31 of the Michigan Constitution of 1963 (the “Headlee Amendment”) and is precisely the type of exaction the Michigan Supreme Court found was an unconstitutional tax in the seminal case of *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998). The IWC Charge also is an unlawful tax under MCL 141.91.

33. In addition to being taxes, the IWC Charges also have been and continue to be grossly excessive.

34. At relevant times, the IWC Charges have generated up to approximately \$22 million per year, which is ostensibly used to monitor the operations of about 250 SIUs.

35. Prior to 2018, neither GLWA nor the City performed a detailed cost-of-service analysis to determine the actual direct and indirect costs associated with the activities for which the IWC Charges were imposed. In fact, in earlier years, the rates for the IWC Charges were established through a completely arbitrary, capricious and unreasonable “methodology” that was untethered from any actual analysis of the relevant costs. For example, for FY 2013-14 and 2014-15, the IWC Charge rates were determined primarily by simply assigning to the Industrial Waste Control Division a flat 10% of the entire operations and maintenance expenses of the City’s Sewage Disposal System. This resulted in grossly inflated IWC Charges that had no reasonable relation to the actual associated costs.

36. For FY 2013-14, utilizing the completely arbitrary, capricious and unreasonable methodology described above, the City determined that the Revenue Requirement for the IWC Charges was \$22.4 million. In March 2015, however, the City undertook a more detailed analysis of the actual Revenue Requirements associated with the Industrial Waste Control Division. At that time, the City “obtained FY 2014 Revenue Requirement data” for the IWC Charge, and performed a “[r]econstructed cost buildup from ‘bottom up’ based on actual for FY 2014.” In other words, the City used “reconstructed data from FY 2014 to recalibrate FY 2016 rates.”

37. As part of the new analysis, the City determined that the \$22.4 million Revenue Requirement included \$9.5 million in wastewater operations expenses when the actual wastewater operations expenses were \$2.29 million. The analysis further determined that the \$22.4 million Revenue Requirement included \$4.46 million in indirect administrative overhead when the actual indirect administrative overhead was \$2.65 million. As a result of the City’s more detailed 2015 analysis,

the City determined that the Revenue Requirement for the IWC Charges should have been only \$13 million (as opposed to \$22.4 million) and proposed a 38% reduction in the IWC Charges for the fiscal year beginning July 1, 2015.

38. The City's "reconstructed" IWC Charges imposed between July 1, 2015 and June 30, 2018 (approximately \$14 million per year) were still grossly excessive and wholly disproportionate to the direct and indirect costs incurred by the City through December 31, 2015 and GLWA from January 1, 2016 through June 30, 2018 relating to the Industrial Waste Control division.

39. In 2018, GLWA finally undertook a detailed cost of service study and determined that the actual direct and indirect costs associated with the activities for which the IWC Charges are imposed are far less than the revenues generated by the Charges. In fact, GLWA's rate consultant determined in February 2018 that the direct and indirect costs associated with GLWA's Industrial Waste Control Division were only approximately \$9.1 million per year.

40. The \$9.1 million in expenses that GLWA's rate consultant derived in 2018 are themselves grossly excessive because they include direct and indirect expenses that are not properly attributable to the activities of Industrial Waste Control Division. The direct personnel costs associated with the Industrial Waste Control Division – the most significant expenses -- were only approximately \$2.4 million.

41. Effective July 1, 2018, GLWA finally implemented an additional 31% reduction in the amount of the IWC Charges. The City's rate consultant characterized this reduction as "material." However, this reduction came too late for thousands of non-residential property owners who/which were grossly overcharged for years, and still does not reflect the actual direct and indirect costs associated with the Industrial Waste Control Division.

42. Even if the IWC Charges do not constitute taxes, they still are arbitrary, capricious and unreasonable because the aggregate Charges far exceed the direct and indirect costs of the activities for which the Charges are collected. The IWC Charges have not been reasonable because they have consistently generated revenues far in excess of Defendants' actual costs.

43. In addition, GLWA's practice of imposing the IWC Charges only on owners of non-residential property who do not receive a particularized benefit from monitoring SIUs, but not imposing the IWC Charges on the general public or other sewer users (including residential properties), denies the payors of the IWC Charges the equal protection to which they are entitled under the Michigan Constitution.

44. The class of property owners who have wrongfully incurred IWC Charges consists of all owners of non-residential property who/which are **not** SIUs and who/which have paid IWC Charges to GLWA or the City. Within this class is an additional subset of several hundred rate payers in Canton Township, who/which are located in the Western Township Utility Authority ("WTUA") collection area and whose wastewater is not managed by GLWA, who are nonetheless required to pay the IWC Charges even though GLWA is not responsible for monitoring the discharge of SIUs in their region.

CLASS ALLEGATIONS

45. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of:

- A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.
- B. WTUA Collection Area Subclass: All persons or entities who/which are not SIUs who are located in the WTUA collection area and who/which have paid or incurred

the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City between July 18, 2013 and December 31, 2015.

C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

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

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

48. The GLWA and the City have acted wrongfully in the same basic manner as to the entire class.

49. 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 IWC Charge imposed by the GLWA and the City is a tax;
- B. whether the IWC Charge imposed by GLWA violates the Headlee Amendment;
- C. whether the IWC Charge is arbitrary, capricious and/or unreasonable;
- D. whether by virtue of setting the IWC Charge at an amount that far exceeds the amount required to monitor SIUs, GLWA and/or the City have collected amounts in excess of the amounts they were legally entitled to collect.

50. 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.

51. 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 (AS TO GLWA)

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

53. GLWA is bound by the Michigan Constitution of 1963, including those portions commonly known as the Headlee Amendment.

54. In particular, GLWA may not disguise a tax as a fee under Article 9, Section 31 of the Michigan Constitution of 1963.

55. The IWC Charge is a disguised tax and intended to avoid the obligations of the Headlee Amendment, including the requirement that the IWC Charge, as a tax, be approved by a majority of the electorate.

56. The IWC Charge has all relevant indicia of a tax:

- A. It has no reasonable relationship to any service or benefit actually received by the taxpayer;
- B. GLWA sets the IWC Charge at an amount disproportionate to the actual cost it incurs in monitoring SIUs;
- C. The IWC Charge is designed to generate revenue;

- D. The payers of the IWC Charge benefit in no manner distinct from any other taxpayer or the general public;
- E. Payment of the IWC Charge is not discretionary, but effectively mandatory;
- F. Various other indicia of a tax described in *Bolt v. City of Lansing* are present.¹

57. As a direct and proximate result of GLWA's implementation of the IWC Charge, Plaintiff and the Class have been harmed.

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

59. Plaintiff seeks a refund of all IWC Charges paid by Plaintiff and the Class during the one-year period prior to the commencement of this action and during the pendency of this action.

COUNT II
ASSUMPSIT/MONEY HAD AND RECEIVED
UNREASONABLE CHARGES (AS TO GLWA AND CITY)

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

61. Even if the IWC Charge is not a tax, the amount of the IWC Charge must still be reasonable. *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003).

62. By virtue of (a) the City's and GLWA's imposition of an IWC Charge on only one subset of the public that benefits from their activities in monitoring SIUs and (b) their imposition of a Charge that far exceeds the actual cost of monitoring the SIUs, the IWC Charge is arbitrary, capricious, and unreasonable. *See, e.g., Trabey v. Inkster*, 311 Mich. App. 582; 876 N.W.2d 582 (2015) (observing that "clear evidence of illegal or improper expenses included in a municipal utility's rates" is sufficient for a court to conclude that a utility rate is unreasonable).

¹ Pursuant to MCR 2.112(M), Plaintiff identifies subparts (a) through (f) of Paragraph 50 as "factual questions that are anticipated to require resolution by the Court."

63. 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.

64. By virtue of the City's and GLWA's imposition of an IWC Charge that greatly exceeds the cost of monitoring SIUs, the City and GLWA have collected amounts in excess of the amounts they were 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).

65. As a direct and proximate result of the City and GLWA's improper conduct, they have collected millions of dollars to which they are not entitled. By paying the IWC Charge, Plaintiff and the Class have conferred a benefit on the City and GLWA.

66. Under equitable principles, the City and GLWA should be required to disgorge the revenues attributable to the IWC Charges imposed or collected by the City and GLWA since July 2013 and during the time this action is pending, and refund the IWC Charges to Plaintiff and the Class.

COUNT III
UNJUST ENRICHMENT
UNREASONABLE CHARGES (AS TO GLWA AND THE CITY)

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

68. Even if the IWC Charge is not a tax, the amount of the IWC Charge must still be reasonable. *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003).

69. By virtue of (a) the City's and GLWA's imposition of an IWC Charge on only one subset of the public that benefits from their activities in monitoring SIUs and (b) their imposition of a Charge that far exceeds the actual cost of monitoring the SIUs, the IWC Charge is arbitrary, capricious, and unreasonable. *See, e.g., Trabey v. Inkster*, 311 Mich. App. 582; 876 N.W.2d 582 (2015) (observing that

“clear evidence of illegal or improper expenses included in a municipal utility’s rates” is sufficient for a court to conclude that a utility rate is unreasonable).

70. The City and GLWA have collected amounts in excess of the amounts they were legally entitled to collect.

71. As a direct and proximate result of the City’s and GLWA’s improper conduct, they have collected millions of dollars to which they are not entitled. By paying the IWC Charge, Plaintiff and the Class have conferred a benefit upon the City and GLWA, and it would be inequitable for the City and GLWA to retain that benefit.

72. Under equitable principles, the City and GLWA should be required to disgorge the revenues attributable to the IWC Charges they imposed or collected since July 2013 and revenues they impose or collect during the time this action is pending and refund the IWC Charges to Plaintiff and the Class.

COUNT IV
ASSUMPSIT/MONEY HAD AND RECEIVED
VIOLATION OF MCL 141.91

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

74. 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.”

75. GLWA and the City did not impose the IWC Charge on or before January 1, 1964.

76. Although the IWC Charge is a tax, it is not an ad valorem property tax.

77. Because the IWC Charge is a tax that was not being imposed on January 1, 1964, it is unlawful under MCL 141.91.

78. As a direct and proximate result of GLWA's and the City's unlawful and improper conduct in collecting the IWC Charge, GLWA and the City have collected millions of dollars to which it is not entitled.

79. 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.

80. By virtue of the City and GLWA's imposition of an IWC Charge that violates MCL 141.91, the City and GLWA have collected amounts in excess of the amounts they were 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).

81. As a direct and proximate result of the City and GLWA's improper conduct, they have collected millions of dollars to which they are not entitled. By paying the IWC Charge, Plaintiff and the Class have conferred a benefit on the City and GLWA.

82. Under equitable principles, the City and GLWA should be required to disgorge the revenues attributable to the IWC Charges imposed or collected by the City and GLWA since July 2013 and during the time this action is pending and refund the IWC Charges to Plaintiff and the Class.

COUNT V
UNJUST ENRICHMENT
VIOLATION OF MCL 141.91

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

84. 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."

85. GLWA and the City did not impose the IWC Charge on or before January 1, 1964.

86. Although the IWC Charge is a tax, it is not an ad valorem property tax.

87. Because the IWC Charge is a tax that was not being imposed on January 1, 1964, it is unlawful under MCL 141.91.

88. As a direct and proximate result of GLWA's and the City's unlawful and improper conduct in collecting the IWC Charge, GLWA and the City have collected millions of dollars to which they are not entitled.

89. By paying the IWC Charge, Plaintiff and the Class have conferred a benefit upon the City and GLWA, and it would be inequitable for the City and GLWA to retain that benefit.

90. Under equitable principles, the City and GLWA should be required to disgorge the revenues attributable to the IWC Charges they imposed or collected since July 2013 and revenues they impose or collect during the time this action is pending and refund the IWC Charges to Plaintiff and the Class.

COUNT VI
VIOLATION OF EQUAL PROTECTION GUARANTEES
STATED IN THE MICHIGAN CONSTITUTION OF 1963, ARTICLE I, SECTION 2

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

92. The Michigan Constitution of 1963 provides in pertinent part that "no person shall be denied the equal protection of the laws..." Mich. Constitution 1963, Article 1, § 2. Plaintiff is not asserting claims under the U.S. Constitution or other federal law.

93. GLWA and the City's practice of imposing the IWC Charges upon Plaintiff and other non-residential property owners who are not SIUs violates Michigan equal protection guarantees.

94. There is no natural distinguishing characteristic between the persons and entities who paid the IWC Charges, but are not SIUs, and those who did not pay the IWC Charges. Thus, Plaintiff

and the Class (who paid the IWC Charges but are not SIUs and did not receive a particularized benefit) are irrationally being charged differently than the similarly situated owners of parcels of property (including residential properties) that did not pay the IWC Charges.

95. The manner in which the IWC Charges are imposed upon non-residential properties which are not SIUs unduly burdens Plaintiff and the Class, and puts all Class members at a distinct financial disadvantage as compared to the owners of parcels that do not pay the IWC Charges. Thus, Plaintiff and the Class are subsidizing the alleged cost of monitoring SIUs for the persons and entities who do not pay the IWC Charges.

96. There is no legitimate governmental purpose being served through GLWA and the City charging Plaintiff and the Class the IWC Charges when they are not SIUs, and when other property owners who are also not SIUs are not subject to the IWC Charges.

97. GLWA and the City have violated Mich. Constitution 1963, Article 1, § 2 by imposing the IWC Charges upon Plaintiff and the Class in violation of their constitutional equal protection guarantees.

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

99. GLWA and the City should be required to disgorge the revenues attributable to the IWC Charges they have imposed or collected during the three years preceding the filing of this action, and refund the improperly-assessed IWC Charges to Plaintiff and the Class.

PRAYER FOR RELIEF

WHEREFORE Plaintiff requests that the Court grant the following relief:

- A. Certify this action to be a proper class action with Plaintiff certified as the Class Representative and Kickham Hanley PLLC designated as Class Counsel;
- B. With respect to Count I, define the Class to include all persons or entities who/which have paid or incurred the IWC Charge at any time in the one year preceding the filing of this lawsuit or who/which pay or incur the IWC Charge during the pendency of this action;
- C. With respect to Counts II, III, IV and V, define the Class to include all persons or entities who/which have paid or incurred the IWC Charge at any time after July 18, 2013 or who/which pay or incur the IWC Charge during the pendency of this action;
- D. With respect to Count VI, define the Class to include all persons or entities who/which have paid or incurred the IWC Charges at any time during the three years preceding the filing of this action or who/which pay or incur the IWC Charge during the pendency of this action;
- E. Enter judgment in favor of Plaintiff and the Class and against the City and GLWA, and order and direct the City and GLWA to disgorge and refund all IWC Charges collected by each of them during the class period(s) and to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of IWC Charges to which Plaintiff and the Class are entitled;
- F. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;
- G. Find and declare that the IWC Charge violates the Headlee Amendment, MCL 141.91, and the Michigan Constitution's equal protection guarantees, and is unlawful and unreasonable.
- H. Award Plaintiff and the Class the costs and expenses incurred in this action, including reasonable attorneys', accountants', and experts' fees; and
- I. Grant any other appropriate relief.

KICKHAM HANLEY PLLC

By: /s/ Gregory D. Hanley

Gregory D. Hanley (P51204)

Edward F. Kickham Jr. (P70332)

32121 Woodward Avenue, Suite 300

Royal Oak, Michigan 48073

248-544-1500

Attorneys for Plaintiff and the Class

Date: September 27, 2019

KH159902

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, I electronically filed the foregoing pleadings with the Clerk of the Court using the court's electronic filing system, which provided service to all counsel of record.

/s/ Kim Plets

Kim Plets