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

MIDWEST VALVE & FITTING COMPANY, a Michigan corporation, individually and on behalf of similarly-situated persons and entities,

Plaintiffs,

v.

GREAT LAKES WATER AUTHORITY, an incorporated municipal authority, and CITY OF DETROIT, a municipal corporation,

Defendant.

Case No. 2020-006845-CB

Hon. David J. Allen

KICKHAM HANLEY PLLC
Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
ghanley@kickhamhanley.com
ekickhamjr@kickhamhanley.com
Counsel for Plaintiff and the Class

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76658)
101 N. Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 668-7786
mithani@millercanfield.com
giordano@millercanfield.com
Attorneys for Defendant City of Detroit

FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Midwest Valve & Fitting Company ("Midwest" or "Plaintiff"), by its counsel, Kickham Hanley PLLC, individually and on behalf of a class of similarly situated class members, states the following for its First Amended Class Action Complaint against Defendants Great Lakes Water Authority ("GLWA") and the City of Detroit (the "City"):

INTRODUCTION

1. This is a class action on behalf of certain non-residential property owners in the City challenging an excessive overcharge for a purported municipal utility "service."

2. Plaintiff Midwest Valve & Fitting Company ("Midwest" or "Plaintiff") challenges the Drainage Charges (the "Per-Acre Drainage Charges") imposed by GLWA upon Plaintiff's property located in the City and collected by the City's Water and Sewerage Department ("DWSD"). Defendants impose the Per-Acre Drainage Charges for the alleged purpose of recovering the City's costs of managing and disposing of "stormwater", which is rainfall and snowmelt that enters the City's sewer system from the surface of the land.

3. The revenues Defendants derive from the Per-Acre Drainage Charges imposed upon Plaintiff and the Class are grossly disproportionate to the costs incurred by Defendants for the "service" – *i.e.*, stormwater management -- provided to Plaintiff and the Class. As applied to Plaintiff and the Class, the overall Per-Acre Drainage Charge Rates (the "Drainage Charge Rates" or "Rates") are arbitrary, capricious and unreasonable and therefore have been imposed in violation of (a) Michigan common-law principles governing municipal utility rates; (b) § 7-1202 of the City's own Charter, which requires that DWSD establish "equitable" water, drainage and sewerage service rates; and (c) Michigan's Revenue Bond Act. The Drainage Charge Rates also violate equal protection guarantees under the Michigan Constitution.

4. The Drainage Charge Rates result in overcharges (the "Drainage Charge Rate Overcharges" or the "Overcharges") to Plaintiff and the Class for essentially two reasons.

5. First, Defendants artificially inflated the amount of the current stormwater management costs they need to recover through the Drainage Charges (the "Drainage Charge Revenue Requirement"). Defendants falsely claim that the Drainage Charge Revenue Requirement exceeds $130 million annually. The higher the Drainage Charge Revenue Requirement, the higher the resulting Rates. Defendants artificially inflated the Drainage Charge Revenue Requirement by, among other things, including millions of dollars of phantom "bad debt expense."

6. Second, Defendants should have allocated the appropriate Revenue Requirement equitably to all property owners by charging uniform rates based upon the amount of impervious surface present on each property. Instead, Defendants have grossly overcharged Plaintiff and the Class by allocating an excessive amount of the already-inflated Drainage Charge Revenue Requirement to Plaintiff and the Class by charging Plaintiff and the Class higher Drainage Charge Rates than other similarly-situated property owners.

7. Defendants have failed to charge the same Rates to all similarly-situated landowners in the City. Indeed, as of July 1, 2017, Defendants had nonsensically created three distinct groups of landowners and devised a Drainage Charge Rate structure that imposed different Drainage Charge Rates for each group. Plaintiff and the Class constituted the first group, "New Parcels" (as defined in Paragraph 28 below) constituted the second group, and the State of Michigan and Wayne County (the "State and County") constituted the third group.

8. Since July 1, 2017, Defendants have imposed the full Per-Acre Drainage Charge Rates on Plaintiff and the Class but imposed drastically lower Per-Acre Drainage Charge Rates on the New Parcels. Instead of charging the full Rates to the New Parcels, the City has been "phasing-in" the Rates to the New Parcels over a five-year period ending June 30, 2021.

9. Similarly, Defendants have imposed drastically lower Per-Acre Drainage Charge Rates on the State and County and thereby have grossly undercharged the State and County for drainage that enters the City's sewer system from State highways and County roads.

10. Because Defendants have not charged the New Parcels and the State and County the same Rates they imposed on Plaintiff and the Class, Plaintiff and the Class necessarily have been overcharged and have borne a disproportionate share of the City's stormwater management costs. The Per-Acre Drainage Charge Rates charged to Plaintiff and the Class have included illegal or

improper expenses because those Rates include a significant portion of the stormwater management expenses attributable to the New Parcels and the State and County roads.

11. Further, Defendants have failed to collect Drainage Charges at all from the Detroit Land Bank Authority ("DLBA"), a public body that owns approximately 25% of the land parcels in the City (the "DLBA Parcels"), even though the DLBA Parcels contribute significant volumes of stormwater to the City's system.

12. Because Defendants have not charged the DLBA Parcels, Plaintiff and the Class necessarily have been overcharged and have borne a disproportionate share of the City's stormwater management costs. The Per-Acre Drainage Charge Rates charged to Plaintiff and the Class have included illegal or improper expenses because those Rates include a significant portion of the stormwater management expenses attributable to the DLBA Parcels.

13. By virtue of the Overcharges, since July 1, 2017, Defendants have collected from Plaintiff and the Class tens of millions of dollars to which they are not entitled.

JURISDICTION AND VENUE

14. Plaintiff owns non-residential real property situated in the City of Detroit, Wayne County, Michigan; has been assessed, and has paid, the Per-Acre Drainage Charge at issue in this case; and seeks to act as class representative for all similarly situated persons and entities. Plaintiff is a member of the Class it seeks to represent.

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

16. Defendant City is a Michigan home-rule city and is located in Wayne County, Michigan.

17. 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

18. Pursuant to its statutory authority, MCL 141.104, the City, through the DWSD, owns, maintains and operates a sewer system (the "Sewer System") to provide sanitary sewage treatment and disposal services to inhabitants of the City and to collect snowmelt and rainwater ("stormwater") runoff. DWSD's stormwater disposal services are of a general public nature and are furnished to the City at large. Because DWSD is a department of the City and not an independent legal entity, references in this Complaint to "DWSD" include the City.

19. Prior to 2016, DWSD also provided "wholesale" sewer services to numerous suburban Detroit communities. In 2016, however, GLWA began providing those services. GLWA is a regional water, sewer, and storm water authority established through a September 9, 2014 memorandum of understanding (MOU) executed between the City of Detroit, Oakland County, Wayne County, Macomb County, and the state of Michigan, pursuant to 1955 PA 233. Under the MOU, GLWA operates, controls, and improves the regional water and sewage assets owned by the City – which were previously operated by the DWSD – under lease agreements for an initial term of 40 years, and the City continues to manage and operate its own local water and sewer infrastructure. *Id.* at 1-2. In short, the City and its agencies continue to manage the supply of water, drainage, and sewage services to retail customers of the City. *Id.* at 4.

20. Nonetheless, pursuant to certain Leases and the Water and Sewer Services Agreement between GLWA and DWSD, GLWA has a direct supplier/customer relationship with Plaintiff and the Class.

21. There are two leases between GLWA and DWSD, one for the Water Supply System (the "Water Lease") and one for the Sewage Disposal System (the "Sewer Lease"). Both contain identical provisions giving GLWA broad powers and relegating DWSD to a mere collection agent for the water and sewer charges GLWA imposes on the Detroit customer class. In this regard, Section 3.3 of the Sewer Lease provides:

> In addition, the City and the Authority agree that (i) the Authority shall have the exclusive right to establish rates for sewer service to customers of the Sewage Disposal System, including Retail Sewer Customers; (ii) the Authority may delegate, and through the Water and Sewer Services Agreement is delegating, its right to establish rates for sewer service to customers of the Sewage Disposal System to one or more agents, as it deems necessary or convenient; and (iii) directly or through an agent, **the Authority shall have the exclusive right to charge and bill to and collect from such customers amounts for sewer services constituting the Revenues, including the Retail Revenues**. [emphasis added]

22. The Sewer Lease defines "Retail Sewer Customers" as "those individual customers located within and outside the City that receive sewer service directly from the Detroit Local Sewer Facilities" and further defines "Retail Revenues" as "Revenues collected from Retail Sewer Customers."

23. The Water and Sewer Services Agreement (the "Agreement") makes clear that DWSD is a mere collection agent for charges imposed on Detroit customers by GLWA. In this regard, the Article 3.2 of the Agreement provides the following with respect to sewer services:

> 3.2. Sewer Services. (a) the Authority shall provide Sewer Services in amounts sufficient and in compliance with the technical and other requirements as provided in Exhibit B. The City agrees to remit payment for all Sewer Services provided by the Authority at such rates as the Authority may establish, but only from amounts billed to and collected from Retail Customers. **The City shall act as the agent for the Authority pursuant to Article 2 with respect to the development of rates, and billing and collecting and enforcing the collection of fees and charges from Retail Customers for Sewer Services**. … [Emphasis added].

15. Article 2.1 of the Agreement confirms this principal/agency relationship. That provision states in pertinent part:

> 2.1 Appointment and Termination of Agency. (a) The Authority hereby appoints the City as its agent, and the City hereby accepts such appointment as agent, to perform the services and undertake the duties, obligations and administrative functions described in the third sentence of Section 3.1(a), the third sentence of Section 3.2(a), and the second paragraph of Section 4.1. …
>
> (b) **The City shall act in its capacity as agent for the Authority (and not in its own capacity as principal or otherwise) for the purposes described in Sections 3.1(a), 3.2(a) and 4.1**. … [Emphasis added].

16. Collectively, these provisions confirm that GLWA has a direct relationship with the Detroit customer class, and thus with Plaintiff and the Class in this action.

17. Pursuant to the City's Charter, DWSD is required to establish equitable water, drainage and sewerage service rates. *See* 2012 Charter of the City of Detroit at Article 7, Chapter 12, § 7-1202.

THE DISTINCTION BETWEEN SANITARY SEWAGE AND STORMWATER

18. Like many older communities in Southeast Michigan, the City primarily has a combined sanitary and storm sewer system, which is a system that is designed to collect both (i) snowmelt and rainwater ("stormwater") runoff and (ii) domestic sewage and industrial wastewater ("sanitary sewage"), in the same pipe.

19. Sanitary sewage – i.e., spent water from a municipal water supply system which may be a combination of liquid and water-carried wastes -- enters a combined system directly from residences, commercial buildings, industrial plants, institutions and other structures. Owners and/or occupiers of such structures which generate the sewage are "users" of the sanitary sewage disposal services provided by the City.

20. Stormwater, in contrast, does not originate from any use of the water supply system or sanitary sewer system, and its presence in the combined system is wholly unrelated to the amount of tap water used, or sanitary sewage generated, by users of the system whose structures are physically connected to that system. Stormwater collects on both private and public land, roads and

other physical, impervious surfaces during rainfall events, and the runoff enters the combined sewer system through catch-basins and other collection devices.

21. Even though they have different origins, both sanitary sewage and stormwater collected in a combined sewer system need to be disposed of. Here, the City's combined sewer system carries the combined sanitary sewage and stormwater to the DWSD/GLWA treatment plant for disposal and treatment.

22. Each year, Defendants determine the purported costs associated with the treatment and disposal of the stormwater portion of the total flows treated, and then add the operational and capital costs of certain Combined Sewer Overflow ("CSO") facilities. Defendants then incorporate those costs into the Drainage Charge rates they impose on residential and nonresidential property owners.

23. Defendants' costs to treat and dispose of stormwater are largely dependent upon the volume of stormwater that ends up at the DWSD treatment plant. Defendants contend that the two principal determinants of the City's stormwater disposal costs to any particular nonresidential property are: (1) the size of the property and (2) the portion of the property that has "impervious" surfaces – i.e., surfaces that do not absorb rain.

24. The purported costs Defendants incur for stormwater management are currently recovered through Per-Acre Charges that are imposed, at varying rates, on certain landowners in the City.

THE CITY'S METHODOLOGY FOR IMPOSING STORMWATER DRAINAGE CHARGES RESULTS IN GROSSLY EXCESSIVE CHARGES TO PLAINTIFF AND THE CLASS WHICH FAR EXCEED THE CITY'S PURPORTED COST OF STORMWATER MANAGEMENT AND DISPOSAL TO PLAINTIFF AND THE CLASS

25. The first step in determining utility rates and charges is to determine the "Revenue Requirement" – i.e., the total monetary amount necessary to cover the costs necessarily and properly incurred by the utility during the period at issue.

26. The Revenue Requirement for the Detroit local sewer system consists of three elements: (1) the GLWA "Wholesale" revenue requirement, (2) the "Indirect Retail" revenue requirement and (3) the "Direct Retail Revenue Requirement." The total Detroit local sewer system revenue requirement for FY 2018[1] was $256,367,000.

27. Defendants allocate the total local sewer system Revenue Requirement among two distinct revenue sources: (1) charges imposed on retail sanitary sewer customers, which are primarily based upon their water usage (the "Sewer Charges") and (2) Per-Acre Drainage Charges.[2] For FY 2018, the Drainage Charge Revenue Requirement was approximately $123 million. Defendants then design Drainage Charge Rates that are at least in theory intended to generate revenues equal to the Drainage Charge Revenue Requirement.

28. Notably, Defendants' actual methodology for establishing the Per-Acre Drainage Charge Rates for FY 2018 allegedly was lost by the City and therefore the City apparently has set the rates since that time by piecing together information that purportedly supported the methodology. Prior to the filing of this lawsuit, Plaintiff's counsel submitted a FOIA request which asked the City to provide documents sufficient to disclose the formula or methodology used to derive the Drainage Charge rates. In an April 29, 2019 response, the City stated:

> As we informed you on April 10, 2019, the version of the rate model that was relied upon to set rates for FY 2017-18 was lost when the former Chief Financial Officer's computer crashed. Nonetheless, after extensive review, we were able to locate documents that, at the very least, reflect the methodology that was used to set drainage rates. See Exhibit 1, which is an allocation of costs sheet; and Exhibit 2, which is a determination of model revenue requirements for drainage. These

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[1] The term "FY 2018" refers to the time period from July 1, 2017 through June 30, 2018. The term "FY 2019" refers to the time period from July 1, 2018 through June 30, 2019. The term "FY 2020" refers to the time period from July 1, 2019 through June 30, 2020.

[2] It may be useful to imagine the Revenue Requirement as a bucket, and the two sources of revenue as two spigots that can be used to fill the bucket. Assuming the size of the bucket remains constant, drawing more "water" (i.e., money) from one spigot allows Defendants to draw less "water" from the other spigot, while still filling the bucket.

> documents, however, only approximate the costs that were used to calculate rates because the rate model was updated on a rolling basis as assumptions changed, additional revenue was generated, and/or anticipated system costs became known and/or were updated. …

29. Plaintiff does know this, however: Since July 2017, Defendants have established the Per-Acre Drainage Charge rates by utilizing a grossly-inflated Drainage Charge Revenue Requirement that far exceeds the City's actual stormwater management expenses for which the Per-Acre Drainage Charges are imposed.

30. Defendants inflated the Drainage Charge Revenue Requirement by including phantom "bad debt expense" (the "Bad Debt Expense") of at least $14 million per year in the Revenue Requirement.

31. Defendants include over $14 million of Bad Debt Expense annually in the Rates, purportedly to cover Drainage Charges that they expect will go unpaid by certain of Drainage Charge customers. In other words, by including Bad Debt Expense, the Rates are set to generate from paying Drainage Charge customers over $14 million in additional revenues from those customers that the Defendants then use to cover the costs associated with non-paying Drainage Charge customers. This results in a direct Rate subsidy flowing from paying customers to non-paying customers.

32. Worse, the purported Bad Debt Expense is grossly inflated because Defendants ultimately receive, or have the legal ability to receive, virtually all of the revenues they claim they do not initially collect from non-paying Drainage Charge customers. This is because, after water and sewer charges (including Drainage Charges) go unpaid for six months, the City has the right to transfer the unpaid charges on to the City tax bill of each property associated with the unpaid charges.

33. In a recent bond offering Memorandum, GLWA described the DWSD collection process as follows:

> In the event that an account remains delinquent for more than six months, the Municipal Water Lien Act, MCL 123.161 et seq., provides that the charges for water and sewer service furnished to premises may become a lien on such premises when the service is provided, and the lien may be placed on the property tax roll. The lien may then be enforced in the same manner as the collection of property taxes and enforcement of a lien for property taxes (assuming proper statutory notice to the party responsible for the payment of the charges). **The Department historically has transmitted delinquent accounts to the City Treasurer who places the delinquent amount on the winter tax bill. If the delinquent amounts are not collected by the City Treasurer by March 1 each year, the City transfers unpaid real property tax bills to Wayne County in accordance with State law. The City receives payment for such taxes from Wayne County's delinquent tax revolving fund as of March 1 each year, which is funded by the issuance of Delinquent Taxes Anticipation Notes**. If the delinquent real property taxes remain uncollected after three years, the County charges the respective amount of such taxes back to the City.

34. Stated simply, the "Bad Debt Expense" included in the Drainage Charge rates is grossly inflated because the City has the right to collect all (or virtually all) of the initially unpaid Drainage Charges through the process described above.

35. The methodology the City used to determine the Drainage Charge Revenue Requirement was arbitrary, capricious, unreasonable, and completely untethered from the City's actual stormwater management expenses. Utilizing a proper methodology that reflects the City's actual costs and the proper number of impervious acres, the actual Drainage Charge Revenue Requirement during the Class Period was tens of millions of dollars less than the Drainage Charge Revenue Requirement used by the City.

36. Not only have Defendants used a grossly-inflated Drainage Charge Revenue Requirement, but they have also allocated a disproportionate share of that already-inflated Revenue Requirement to Plaintiff and the Class, further increasing the magnitude of the Overcharges to Plaintiff and the Class.

37. The properties owned by Plaintiff and the Class have historically incurred the full Per-Acre Drainage Charges. However, prior to October 2016, thousands of residential and non-residential parcels incurred Drainage Charges that were based upon the size of the water pipe

servicing structures on those parcels, and thousands of other non-residential parcels did not incur Drainage Charges at all (collectively, the "New Parcels").

38. Beginning in 2016, Defendants began charging the New Parcels Per-Acre Drainage Charges. However, instead of charging the New Parcels the same full Drainage Charge Rates imposed upon Plaintiff and the Class, Defendants imposed drastically lower Rates that Defendants planned to increase, in phases, over a five year period of time ending July 1, 2021, at the earliest. Only at the end of the phase-in period would the New Parcels be paying the same full Per-Acre Drainage Charge Rates already being paid by Plaintiff and the Class.

39. For example, in FY 2018, Plaintiff and the Class incurred Per-Acre Drainage Charges at the Rate of $661 per month. In contrast, New Parcels that had previously been billed based upon the size of their water meters or which had never been billed at all were charged just $250 per month per impervious acre. Defendants had no rational basis for charging the New Parcels a Rate that was a mere fraction of the Rates being charged to Plaintiff and the Class.

40. This practice was particularly pernicious because Plaintiff and the Class had already been subsidizing the New Parcels for decades by paying all or part of the share of the stormwater management costs attributable to the New Parcels. Defendants extended this improper subsidy through at least 2020 to the New Parcels, even though the owners of those New Parcels already had enjoyed the benefits of their "free-riding" off of Plaintiff and the Class for decades.

41. In addition, Defendants have historically undercharged the State and County for drainage from the State highways and County roads in the City. Indeed, as of the filing of this Complaint, Defendants are charging Plaintiff and the Class $602 per impervious acre per month but are only charging the State and County $93.28 per impervious acre per month. The State and County roads constitute 2,349 impervious acres. Therefore, at the current rate of $602 per impervious acre per month, the State and County should be paying at least $16,969,176 per year in

Drainage Charges. Instead, during the current fiscal year, Defendants have charged the State and County only $2,629,200.

42. The disparity in these Rates is not attributable to any cost-based factors. Indeed, it would be nonsensical for Defendants to even argue that it costs six times more to manage the stormwater from private lands than the stormwater from State highways and County roads.

43. Defendants did not achieve these discounts for the New Parcels and the State and County by decreasing the Revenue Requirement. Defendants simply shifted the cost from the New Parcels and the State and County to Plaintiff and the Class.

44. The disparity in the Rates necessarily shifts the burden of a disproportionate share of the City's total stormwater management costs to Plaintiff and the Class, who are literally subsidizing the New Parcels and the State and County. Stated simply, given a fixed Revenue Requirement, the lower the Rates imposed on New Parcels and the State and County, the higher the Rates that need to imposed on Plaintiff and the Class in order to generate the required Drainage Charge revenues. Recall the bucket analogy from Paragraph 27, n.2 above. Defendants are undercharging the New Parcels and the State and County, so to fill the bucket they must overcharge Plaintiff and the Class.

45. Defendants have determined that there are at least 25,339 impervious parcel-based acres and 2,349 impervious acres of State and County roads in the City. This does not include the tens of thousands of impervious acres in the City that are attributable to the City's own roads and streets. Accordingly, at a minimum, Defendants should have determined the monthly Per-Acre Drainage Rates by dividing the total Revenue Requirement by 27,688 (the total number of impervious acres in the City (excluding City streets and roads)) and by 12 (the number of months in a year).

46. For example, for the FY ending June 30, 2020, Defendants imposed a monthly Per-Acre Rate of $602 per impervious acre. The actual Drainage Charge Revenue Requirement for that

FY was $133,484,687. Therefore, the Per-Acre Drainage Rates at most should have been $401.75 per acre ($133,484,687 divided by 27,688 divided by 12).

47. By imposing monthly Per-Acre Rates of $602, Defendants overcharged Plaintiff and the Class by at least $200.25 per acre per month during the FY ending June 30, 2020. This Overcharge was directly attributable to Defendants' practice of grossly undercharging the New Parcels and the State and County by applying much lower Per-Acre Rates to those property owners. Given that the parcels owned by Plaintiff and the Class comprise at least 12,000 impervious acres, , even if the City were using the correct Revenue Requirement (it is not), and leaving aside the implications of Defendants' failure to charge and/or collect Drainage Charges from the DLBA Parcels, **the Overcharge to Plaintiff and the Class since July 1, 2017 exceeds $98 million.**

48. Further, Defendants have failed to impose and/or collect Drainage Charges at all from the DLBA, a public body that owns approximately 25% of the land parcels in the City (the "DLBA Parcels"), even though the DLBA Parcels contribute significant volumes of stormwater to the City's system.

49. On information and belief, in establishing the Drainage Charge Rates, the City has excluded the impervious parcel-based acres attributable to the DLBA Parcels from the total number of impervious parcel-based acres that are subject to the Drainage Charges. In other words, the total number impervious parcel-based acres in Defendants' rate model should have been hundreds of acres higher, which would have resulted in lower Drainage Charge Rates to Plaintiff and the Class.

50. The City has falsely represented to the public that all City-owned parcels, including the DLBA Parcels incur and pay Drainage Charges. The City made similar representations to the Michigan Court of Appeals in *Binns v. City of Detroit*, COA Case No. 337609 (November 6, 2018), and the Court of Appeals relied upon those representations in determining that the Drainage Charges did not constitute "taxes" imposed by the City in violation of the Headlee Amendment to

the Michigan Constitution. Defendants' actual practice, however, stands in stark contrast to the City's representations to the public and to the Court of Appeals.

51. Because Defendants have not charged the DLBA Parcels and/or included the impervious parcel-based acres of the DLBA Parcels in establishing the Drainage Charge Rates, Plaintiff and the Class necessarily have been overcharged and have borne a disproportionate share of the City's stormwater management costs. The Per-Acre Drainage Charge Rates charged to Plaintiff and the Class have included illegal or improper expenses because those Rates include a significant portion of the stormwater management expenses attributable to the DLBA Parcels.

52. In sum, in determining the Drainage Charge Rates, Defendants should have done the following:

(A) Determined the Drainage Charge Revenue Requirement by eliminating Bad Debt Expense and using the actual expenses associated with the treatment and disposal of stormwater that enters the City's combined sewer system and flows to the treatment plant and actual expenses of the CSO facilities.;

(B) Determined the actual number of impervious parcel-based acres in the City (including New Parcels and DLBA Parcels) and the acres of impervious State and County Roads; and

(C) Divided (A) by (B) and again by 12 to determine the monthly Per-Acre Drainage Charge to be imposed on all properties that are subject to a Per-Acre Drainage Charge.

53. Because Defendants did not determine the Per-Acre Drainage Charge Rates in accordance with an appropriate methodology, the Per-Acre Drainage Charges Rates at all relevant times have been arbitrary, capricious and unreasonable.

54. Interestingly, in 2017, the City represented to the Michigan Court of Appeals that the Per-Acre Drainage Charges would be drastically reduced by now. Indeed, as the Court of Appeals stated, "DWSD expects the rate of the drainage charge to decrease by 32% through fiscal year

2019." *Binns.* Notwithstanding these representations, which apparently were relied upon by the Court of Appeals in concluding that the Drainage Charges were not "taxes", the City announced that the Per-Acre Drainage Charge Rates for the fiscal year beginning July 1, 2020 will be **$626** per impervious acre, per month.

CLASS ALLEGATIONS

55. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of 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 1, 2017 and the date of the final judgment in this action (the "Class Period"). Excluded from the Class are (1) the City itself, (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, and (3) any owners or occupiers of non-residential parcel-based real property who have previously released or waived their claims related to the Per-Acre Drainage Charges for the entire Class Period.

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

57. 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.

58. The Defendants have acted wrongfully in the same basic manner as to the entire class.

59. 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 Per Acre Drainage Overcharge violates the City's Charter Article 7, Chapter 12, § 7-1202;

b. whether the Per Acre Drainage Overcharge is "unreasonable,"

c. whether the Per Acre Drainage Overcharge has been imposed in violation of the Revenue Bond Act;

d. Whether the Per Acre Drainage Overcharge violates equal protection guarantees afforded to Plaintiff and the Class by the Michigan Constitution; and

e. whether the City has been unjustly enriched by collecting the Per Acre Drainage Charge.

60. 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.

61. 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. Plaintiff anticipates no difficulty in the management of this action as a class action.

COUNT I
ASSUMPSIT – MONEY HAD AND RECEIVED

UNREASONABLE RATES

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

63. The Per Acre Charges must be "reasonable." *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015); *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003).

64. As applied to Plaintiff and the Class, the Per Acre Drainage Charge is arbitrary, capricious and unreasonable.

65. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges"). By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon on Defendants.

66. 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.

67. By virtue of the Defendants' inclusion of the Per Acre Drainage Overcharges in the Rates, Defendants have collected amounts in excess of the amounts they were legally entitled to collect. Therefore, Plaintiff and the Class are entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g.*, *Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT II
UNJUST ENRICHMENT

UNREASONABLE RATES

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

69. The Per Acre Charges must be "reasonable." *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015); *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003).

70. As applied to Plaintiff and the Class, the Per Acre Drainage Charge is arbitrary, capricious and unreasonable.

71. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges"). By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon on the City.

72. Defendants have improperly received the Per Acre Drainage Overcharges to which they were not legally entitled, and it would be unfair for Defendants to retain the Per Acre Drainage Overcharges under the circumstances.

73. Defendants should be required to disgorge all unlawfully collected Per Acre Drainage Overcharges.

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT III
ASSUMPSIT – MONEY HAD AND RECEIVED

CHARTER VIOLATION

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

75. § 7-1202 of the City's Charter requires that DWSD establish equitable water, drainage and sewerage service rates.

76. The Defendants have exceeded the authority stated in the City's Charter, § 7-1202, by imposing an inequitable drainage rate—the Per Acre Drainage Overcharge—upon Plaintiff and the Class.

77. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges").

By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon Defendants.

78. 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.

79. By virtue of the Defendants' inclusion of the Per Acre Drainage Overcharges in the Rates, Defendants have collected amounts in excess of the amounts they were legally entitled to collect. Therefore, Plaintiff and the Class are entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g.*, *Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT IV
UNJUST ENRICHMENT

CHARTER VIOLATION

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

81. § 7-1202 of the City's Charter requires that DWSD establish equitable water, drainage and sewerage service rates.

82. The Defendants have exceeded the authority stated in the City's Charter, § 7-1202, by imposing an inequitable drainage rate—the Per Acre Drainage Overcharge—upon Plaintiff and the Class.

83. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges").

By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon Defendants.

84. Defendants have improperly received the Per Acre Drainage Overcharges to which they were not legally entitled, and it would be unfair for Defendants to retain the Per Acre Drainage Overcharges under the circumstances.

85. Defendants should be required to disgorge all unlawfully collected Per Acre Drainage Overcharges.

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT V
ASSUMPSIT – MONEY HAD AND RECEIVED

VIOLATION OF REVENUE BOND ACT

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

87. Defendants are subject to the requirements of the Revenue Bond Act, including MCL 141.118.

88. The Revenue Bond Act is clear in its prohibition that "free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." MCL 141.118(1). Under MCL 141.118(1), "[t]he **reasonable cost and value of any service rendered to a public corporation, including the borrower by a public improvement shall be charged against the public corporation** and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, …"

89. The State and County are "public corporations" within the meaning of MCL 141.118(1) and therefore Defendants must charge, and the State and County must pay, the "reasonable cost and value" of the drainage services rendered to the State and County.

90. Defendants have violated MCL 141.118 because they do not charge the State and County "the reasonable cost and value" of the drainage services Defendants provide to the State and County, but instead charge an amount more than six times lower than the amount they charge to Plaintiff and the Class. This results in a subsidy flowing from Plaintiff and the Class to the State and County.

91. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges"). By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon Defendants.

92. 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.

93. By virtue of the Defendants' inclusion of the Per Acre Drainage Overcharges in the Rates, Defendants have collected amounts in excess of the amounts they were legally entitled to collect. Therefore, Plaintiff and the Class 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).

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT VI
UNJUST ENRICHMENT

VIOLATION OF REVENUE BOND ACT

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

95. Defendants are subject to the requirements of the Revenue Bond Act, including MCL 141.118.

96. The Revenue Bond Act is clear in its prohibition that "free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." MCL 141.118(1). Under MCL 141.118(1), "[t]he **reasonable cost and value of any service rendered to a public corporation, including the borrower by a public improvement shall be charged against the public corporation** and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, …"

97. The State and County are "public corporations" within the meaning of MCL 141.118(1) and therefore Defendants must charge, and the State and County must pay, the "reasonable cost and value" of the drainage services rendered to the State and County.

98. Defendants have violated MCL 141.118 because they do not charge the State and County "the reasonable cost and value" of the drainage services they provide to the State and County but instead charge an amount more than six times lower than the amount they charge to Plaintiff and the Class. This results in a subsidy flowing from Plaintiff and the Class to the State and County.

99. As a direct and proximate result of Defendants' improper conduct, Defendants have collected millions of dollars to which they are not entitled (the "Per Acre Drainage Overcharges").

By paying the Per Acre Drainage Overcharges, Plaintiff and the Class have conferred a benefit upon Defendants.

100. Defendants have improperly received the Per Acre Drainage Overcharges to which they were not legally entitled, and it would be unfair for Defendants to retain the Per Acre Drainage Overcharges under the circumstances.

101. Defendants should be required to disgorge all unlawfully collected Per Acre Drainage Overcharges.

WHEREFORE, Defendants should be required to disgorge the revenues attributable to the Per Acre Drainage Overcharges imposed or collected by Defendants between July 1, 2017 and the date of the filing of this action, and during the pendency of this action, and refund all Per Acre Drainage Overcharges they have collected to Plaintiff and the Class.

COUNT VII
VIOLATION OF EQUAL PROTECTION GUARANTEES

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

103. Defendants' practice of imposing the Per-Acre Drainage Charge Rates on Plaintiff and the other members of the Class that are higher than the Rates imposed on New Parcels and the State and County and Defendants' failure to charge the DLBA Parcels constitutes a constitutionally improper classification which violates State equal protection guarantees.

104. In *Alexander v Detroit*, 392 Mich 30; 219 NW2d 41 (1974), the Michigan Supreme Court enumerated a two-part test to be applied in an equal protection challenge to a legislative enactment. The questions to be considered are:

(1) Are the enactment's classifications based on natural distinguishing characteristics and do they bear a reasonable relationship to the object of the legislation?

> (2) Are all persons of the same class included and affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind? [Id. at 35-36. Citations omitted.]

105. There is no natural distinguishing characteristic between Plaintiff and the Class, on the one hand, and the New Parcels, the State and County, and the DLBA Parcels, on the other hand, and the classifications created by Defendants do not bear a reasonable relationship to the object of the Drainage Charges. Thus, Plaintiff and the Class are irrationally being charged differently than similarly-situated persons and entities who/which are being assessed lower Rates.

106. In addition, by virtue of Defendants' Per-Acre Drainage Charge Rate structure, all persons of the same class are NOT included and affected alike but, instead, immunities and privileges are extended to an arbitrary or unreasonable class (the New Parcels, the State and County, and the DLBA Parcels) while denied to others of like kind – *i.e.*, Plaintiff and the Class.

107. Defendants have violated Mich. Constitution 1963, Article 1, § 2 by imposing the Per-Acre Drainage Overcharges upon Plaintiff and the Class in violation of their constitutional equal protection guarantees.

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

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

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 as Class Counsel;

B. With respect to Counts I through VII, define the Class to include 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 1, 2017 and the date of the

final judgment in this action (the "Class Period"). Excluded from the Class are (1) the City itself, (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, and (3) any owners or occupiers of non-residential parcel based real property who have previously released or waived their claims relating to the Per-Acre Drainage Charges for the entire Class Period;

C. With respect to Counts I through VII, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all Per Acre Drainage Overcharges collected during the Class Period, and order the City to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of Per Acre Drainage Overcharges 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. Enter an order invalidating any municipal lien or associated tax liens which have been imposed, or which may become imposed, against the properties of all class members arising out of or relating to the Per Acre Drainage Overcharges.

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

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

Date: August 3, 2020

JURY DEMAND

Plaintiff, individually and on behalf of the putative Class, hereby demands a trial by jury on all issues so triable.

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

Date: August 3, 2020