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Judge: Calendar, 3

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

KATHRYN FARMER, Individually,)
and as Representative of a Class of)
Similarly-Situated Persons and Entities,)
)
Plaintiff,) Case No. 2021 CH 04583
) Jury Demand
CITY OF CHICAGO, an Illinois)
Municipal Corporation,)
)
Defendant.)

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff, Kathryn Farmer ("Plaintiff"), by and through her attorneys, individually, and on behalf of a class of similarly situated persons and entities, hereby moves pursuant to 735 ILCS 5/2-801 for entry of an order certifying this matter as a class action.

In support of this motion, Plaintiff relies upon the following Brief in Support.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

I. NATURE OF PLAINTIFF'S CLAIMS

This is an action challenging unlawful charges the City imposes and collects from citizens whose properties in the City receive water and sewer services from the City. Plaintiff alleges that the City's water and sewer rates and charges (the "Rates" and "Charges") are illegal because, as applied to Plaintiff and the Class, they are unfairly discriminatory and because they are excessive.[1]

The City's Water and Sewer Rates and Charges to Plaintiff and the Class have been unreasonably discriminatory because the City has arbitrarily exempted various types of similarly-situated water and sewer customers (who own or occupy tens of thousands of properties serviced by the City's water and sewer system) from their obligation to pay the City's Water and/or Sewer

[1] This motion seeks class certification for the claims stated in Counts XI and X of the FAC. On September 2, 2022, the

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Charges (the "Exempt Customers"). This practice has resulted in dramatically higher Rates and Charges being assessed against Plaintiff and the Class who are **not** exempt from payment (*see* Count IX of the FAC, the "Unjust Discrimination Claims"). Because of the Exemptions, Plaintiff and the Class (the "Non-Exempt Customers") pay tens of millions of dollars more per year for water and sewer services than they would pay in the absence of the Exemptions.

Next, Plaintiff challenges the City's overcharges to the Water and Sewer Customers and its improper transfer—without consideration—of tens of millions of dollars of revenues garnered from Water and Sewer Charges to: (a) the City's general corporate fund for general governmental use; and (b) two of the City's pension funds to finance the City's obligations to those funds (*see* Count X of the FAC, the "Exorbitant Rate Claims"). The City accomplishes these overcharges and misappropriation of Water and Sewer Funds in at least two ways: (a) by grossly over-allocating the alleged indirect (but phantom) costs of other City departments to the Water and Sewer Funds (the "Excessive Cost Allocations"); and (b), by charging the Water & Sewer Funds tens of millions of dollars per year in additional phantom costs allegedly to cover the Water and Sewer Funds' proportionate share of the City's total annual contribution to the Municipal Employees' Annuity and Benefit Fund (the "Municipal Fund") and the Laborers' and Retirement Board Annuity and Benefit Fund (the "Laborers' Fund") (collectively, the "Pension Overcharges"). By virtue of the annual inclusion of tens of millions of dollars of these phantom expenses, the City's Water and Sewer Rates and Charges have been, and continue to be, completely untethered to the City's actual costs of providing water and sewer services to its citizenry.

II. NATURE OF PLAINTIFF'S MOTION

Plaintiff now moves the Court to certify a class pursuant to 735 ILCS 5/2-801 et seq. consisting of: "all persons or entities who/which have received water and/or sewer service within the

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Court dismissed Counts I through VI. On March 24, 2024, the Court dismissed Counts VII and VIII.

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City and who/which have incurred or paid Water and/or Sewer Rates and Charges on or after September 9, 2016 and who are not 'Exempt Customers.'"

As an initial matter, class-certification decisions rest within the trial court's discretion and will be disturbed only where the court clearly abused its discretion or applied impermissible legal criteria. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125, 835 N.E.2d 801 (2005). Generally, in exercising its discretion, **a court should err in favor of granting class certification**. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 672, 850 N.E.2d 357 (2006).

Class certification under 735 ILCS 5/2-801 is particularly appropriate in this case because:

(1) The City's liability is based upon uniform, systemic, and pervasive acts and practices that violate and/or are preempted by Illinois statutes and common law principles applicable to municipal utility rates. It is well established that where liability is premised on a common practice uniformly applied, it is proper for the trial court to find a plaintiff's claims present questions of fact and law, common to the class, that predominate over questions affecting only individual members of the class. *See S37 Management v. Advance Refrigeration Co.*, 2011 IL App (1st) 102496, ¶ 1, 961 N.E.2d 6;

(2) The City's uniform and unlawful conduct caused millions of its water and sewer customers to pay the discriminatory and unreasonably inflated Water and Sewer Charges in order to subsidize the water and sewer usage of the Exempt Customers;

(3) The City's uniform and unlawful conduct caused millions of its water and sewer customers to pay discriminatory and unreasonably inflated Water and Sewer Charges by including in its Water and Sewer Rates phantom expenses designed to subsidize certain of the City's general fund obligations—but which are untethered to the actual cost of providing water and sewer service; and

(4) Without the benefit of the class action procedural device, most Class members would be unable or unwilling to pursue legal recourse given the limited nature of their individual losses, which makes a class action the superior method of adjudicating the claims of Plaintiff and the Class.

Central legal issues in this case include: (a) whether the City's exemption of the Exempt Customers from payment of the Water and Sewer Rates and Charges renders the City's Water and Sewer Rates unreasonably discriminatory; (b) whether the City grossly over-allocates the direct and indirect costs of the City's other departments to the Water and Sewer Fund; (c) whether the City's unfair cost allocation methods have rendered the Water and Sewer Rates unreasonable or exorbitant; (d) whether the City's Pension Overcharge render the Water and Sewer Rates unreasonable or exorbitant; and (e) whether the City should be required to disgorge and refund to its water and sewer

customers all wrongfully collected Water and Sewer Charges described herein. Here, not only are the factual and legal issues susceptible to class-wide determination, but the losses suffered by the Class by virtue of their payment of the unfairly discriminatory and exorbitant Water and Sewer Rates and Charges are also easily determined on a class-wide basis based upon the City's records.

As the Court stated in its July 11, 2025 Opinion and Order ("July 11 Order" Exhibit 1 hereto): the "central inquiry" for the unreasonable discrimination claim is "whether similarly situated customers are charged differently without cost justification." July 11 Order at p. 3. This "central inquiry" will be resolved by uniform application of facts and law that are common to all class members. There are no individual questions related to this "central inquiry." Indeed, the City has conceded that there is no cost justification for the Exemptions (*see* City's Answer to FAC, Exhibit 2 hereto at ¶¶ 203, 216-217). Thus, if the Water and Sewer Rates are demonstrated to be discriminatory—then these Rates are discriminatory as to all Non-Exempt Customers. There is no need for members of the putative plaintiff class to prove on an individual basis their right to recover.[2] The same is true for the Exorbitant Rate claims. If the City's pension allocations and cost allocations are improper, they are improper as to each and every class member and, because the phantom pension costs and the improper cost allocations are part of the City's Water and Sewer Rates, all class members overpaid for their water and sewer services and thus all were injured by the City's conduct.

III. KEY ADMISSIONS BY THE CITY THAT SUPPORT CLASS CERTIFICATION

The facts which form the basis for Plaintiff's claims are set forth in detail in ¶¶ 1-21; ¶¶ 27-30, ¶¶ 37-68, ¶¶ 173 - 233 (Count IX) and ¶¶ 234-¶¶ 322 (Count X) of the FAC. Plaintiff incorporates these facts by reference herein. *See* Exhibit 2 (City's Answer to FAC which incorporates Plaintiff's

[2] The Court also held that "whether the City's justifications [for the discrimination] can be substantiated is a question for a later stage." Exhibit 1, July 11 Order at p. 4. Again, the City's "justifications" are not customer-specific—to the contrary, these justifications apply equally to all class members—further support that the claims in this case are suited for class certification.

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allegations). Further, while the City denies its actions are unlawful, it has admitted the precise uniform conduct that underlies Plaintiff's allegations and which supports class certification in this case. In its Answer to Plaintiff's FAC (Exhibit 2), the City admitted crucial allegations that prove the uniformity of the City's conduct and thus are pertinent to the issue of class certification.

First, the City generally admits that its Water and Sewer Rates and Charges must be uniform, reasonable and just for the same amount and character of service. *See* Exhibit 2, Answer to FAC at ¶¶ 41-43 (admitting the City is "subject to some of the same rules that apply to a privately owned utility, including the requirement that utility rates be reasonable and not excessive or exorbitant."); ¶¶ 236-237 (admitting "under Illinois common law, water and sewer rates must be reasonable and not excessive," and recognizing that the City is subject to a "prohibition against discrimination that results in unreasonably excessive and exorbitant rates").

With regard to the Unjust Discrimination Claims, the City admits its uniform conduct of **exempting** "**certain customers from some or all water and sewer charges"** See Exhibit 2 at ¶ 2; ¶ 179, ¶ 198. The City also admits that these Exemptions "are not based on a difference in costs …" or a difference in "water quality." *Id.* ¶ 181, ¶ 203, ¶¶ 216-217. The City further admits that the City "incurs costs to provide water and sewer services to **all** its customers, including customers exempt from water or sewer charges." *Id.* ¶ 223 (emphasis added). With specific regard to the Senior Sewer exemption, the City admits: (a) its uniform conduct in imposing the exemption and admits that this exemption has been in place since 2014 (*id.* ¶ 224), (b) that its Ordinance § 3-12-050 totally exempts qualified sewer customers 65 and over from payment of the Sewer Charges (i*d.* ¶ 199) and (c) that home ownership is one of the necessary conditions for qualifying for the Senior Sewer Exemption. *Id.* ¶ 200.

With regard to the Exorbitant Rate Claims (Count X) the City generally admits the uniform conduct which forms the basis of Plaintiff's allegations, such as: (a) facts that support the excessive

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cost allocations. *See* Exhibit 2, ¶¶ 241-244, ¶ 248; ¶¶ 250-252; ¶¶ 254-256, ¶ 259, ¶ 262, ¶¶ 266-267, ¶¶ 275; and (b) facts that form the basis of the pension overcharges, *i.e* that the City annually transfers Water and Sewer Funds to the Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Annuity and Benefit Fund. *Id.* ¶¶ 299-305.

III. THIS CASE MEETS ALL OF THE REQUIREMENTS TO BE CERTIFIED AS A CLASS ACTION PURSUANT TO 735 ILCS 5/2-801 AND F. R. CIV. P. 23.

A. THE STANDARD FOR GRANTING CLASS CERTIFICATION.

Certification of a class action in Illinois is governed by section 2-801 of the Code of Civil Procedure, which sets forth four prerequisites for maintaining a class action:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members;
(3) the representative parties will fairly and adequately protect the interest of the class; and
(4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801; *Bueker v. Madison County*, 2016 IL App (5th) 150282, ¶ 23, 61 N.E.3d 237. The party seeking class certification has the burden of establishing the above statutory prerequisites. *Id; citing Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 486, 459 N.E.2d 1364 (1984). A Circuit Court must find that the four prerequisites are present before it can certify the class. *Bueker, supra*.

In *Enzenbacher v. Browning-Ferris Industries of Illinois, Inc.,* 332 Ill. App. 3d 1079, 1084, 774 N.E.2d 858 (2002), the Illinois Court of Appeals set forth the quantum of information that a party seeking class certification must supply a circuit court as follows:

> At the time such a motion [for class certification] is presented for hearing, the trial court may consider any matters of law or fact properly presented by the record, including pleadings, depositions, affidavits, answers to interrogatories, and any evidence adduced at hearing on the motion.

Finally, in *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 892 N.E.2d 78 (2d Dist. 2008) the Court of Appeals cautioned that though a trial court may conduct the factual inquiry necessary to

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resolve the issues of class certification presented by the record, it emphasized the "trial court is not to determine the merits of the complaint, but only the propriety of class certification, and its factual inquiry and resolution of factual issues is to be limited solely to that determination." *Id.* p. 763.

B. The Class Is So Numerous That Joinder Of All Members Is Impracticable Pursuant to 735 ILCS 5/2-801 (1).

In *Cruz supra,* the Illinois court of appeals stated that "plaintiffs need not demonstrate a precise figure for the class size, because a good-faith, nonspeculative estimate will suffice" 383 Ill. App. 3d at p. 771, *citing Arenson v. Whitehall Convalescent & Nursing Home, Inc.,* 164 F.R.D. 659, 662 (N.D. Ill. 1996).[3] "Plaintiffs need demonstrate only that the class is sufficiently numerous to make joinder of all of the members impracticable" 383 Ill. App. 3d at 771, *citing Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 54; 880 N.E.2d 653 (1st Dist. 2007). There are almost 500,000 water and sewer customers in the City. *See* Exhibit 2 to the FAC at p. 12. The City admits that "the proposed members of the proposed class would be so numerous that joinder of all members would be impracticable." Exhibit 2, at ¶ 70. Accordingly, the class is sufficiently numerous that joinder of the sewer customers that have paid or incurred the Water and Sewer Taxes manifestly would be "impracticable."

C. There Are Questions Of Law Or Fact Common To The Members Of The Class That Predominate Over Questions Affecting Only Individual Members Pursuant to 735 ILCS 5/2-801 (2).

The second factor pursuant to § 2-801 is the "commonality" factor—whether there exists a common question of fact or law that applies to the entire class, the resolution of which will advance the litigation. Commonality requires that questions of law or fact common to the class predominate over any questions affecting only individual members. *Adelphia, Inc. v. Heritage-Crystal Clean, Inc.*,

[3] Section 2-801 is patterned after Rule 23 of the Federal Rules of Civil Procedure. Because of this close relationship between the state and federal provisions, "federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *See Cruz v. Unilock Chicago, Inc.*, *supra*, 383 Ill. App. 3d at 761 *citing Avery*

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2019 IL App (2d) 180791-U, ¶ 55. As the U.S. Supreme Court has stated:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.
>
> ****
>
> [A plaintiff's] claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. **That common contention, moreover, must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke**. [*Wal-Mart Stores, Inc v Dukes*, 564 US 338, 349-50 (2011) (emphasis added).]

Commonality is a two-factor showing: (1) that there are questions of fact or law common to the class; and (2) the common questions predominate over any questions affecting only individual members. *Adelphia, Inc., supra* ¶ 55, *citing Walczak supra*, 365 Ill. App. 3d at 673. "Predominance is shown not by whether common issues outnumber individual issues, but by whether common issues or individual issues will be the focus of most of the efforts of the parties and the court." *Cruz*, *supra* 383 Ill. App. 3d at 772-73. A class action is proper where the defendant allegedly acted wrongfully in the same basic manner as to an entire class, and, in such circumstances, the common class questions predominate the case and the class action is not defeated. *Adelphia, Inc., supra* ¶ 55*; Walczak*, *supra,* at p. 674. *See Smith v. Illinois Central R.R.*, 363 Ill. App. 3d 944, 948, 845 N.E.2d 703, 707 (5th Dist. 2005) (class certification proper where defendant acted in "same basic manner" to an entire class and not defeated by "some factual variations among the grievances of class members"). Thus, the "commonality" factor does not require *all* issues in the litigation to be common; it merely requires the common issue or issues to predominate over those that require individualized proof.

The commonality factor is amply satisfied in this case. Initially, as discussed *supra* (pp. 3-4), there are uniform questions of fact and law that are common to the class and which predominate over any questions affecting only individual members. Here, each and every member of the Class has paid

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v. State Farm, supra, 216 Ill. 2d at 125.

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and/or incurred the Water and Sewer Charges, and as such the claims of each class member are based upon the same uniform conduct by the City—namely the conduct of imposing and collecting discriminatory and unreasonable Water and Sewer Rates. *See Illinois Central R.R; supra*. Each class member has suffered the same injury by rendering payment of the unfairly discriminatory and exorbitant Water and Sewer Rates and Charges. Thus, if the Water and Sewer Charges are unlawful under the legal theories pleaded by Plaintiff, the Water and Sewer Charges are unlawful as to each and every member of the Class.[4] Put simply, the issues presented here are manifestly capable of class wide determination—*i.e.* determination of their "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Walmart Stores, supra,* 564 US at pp. 349-50.

Applying the commonality/predominance standard, the Illinois Courts have repeatedly held that overcharge cases are suitable for class-wide treatment where, as here, the overcharges are attributable to a defendant's uniform conduct. *See, e.g., Ramirez supra,* 378 Ill. App. 3d at p. 53 (affirming class certification in consumer fraud action alleging false billings); *Hall v. Sprint Spectrum L.P.,* 376 Ill. App. 3d 822, 876 N.E.2d 1036, 315 Ill. Dec. 446 (2007) (affirming class certification in consumer fraud action arising out of termination fees charged in the same basic manner to the class); *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.,* 345 Ill. App. 3d 992, 803 N.E.2d 1020, 281 Ill. Dec. 399 (2004) (affirming class certification where class was predicated on an essentially identical entry appearing on class members' bills). Accordingly, this prong of the class certification standard has been satisfied.

D. The Representative Plaintiff Will Fairly And Adequately Assert And Protect The Interests Of The Class Pursuant to 735 ILCS 5/2-801 (3).

"The basic premise of the class action procedure is the fairness of having a proper

[4] The Court has held that the "central inquiry" in this case is "whether similarly situated customers are charged differently without cost justification." Exhibit 1, July 11 Order at p. 3. This "central inquiry" will be resolved by uniform application of facts and law that are common to all class members—there are no individual questions related to this "central inquiry."

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representative act on behalf of the absent parties." *Lee v. Buth-Na-Bodhaige*, 2019 IL App (5th) 180033, ¶ 63; 143 N.E.3d 645. "The adequate representation requirement of section 2-801 ensures that class members receive proper, efficient, and appropriate protection of their interests." *Bayeg v. Admiral at the Lake*, 2024 IL App (1st) 231141, ¶ 46, 244 N.E.3d 377 (citing *Gordon v. Boden*, 224 Ill. App. 3d 195, 203, 586 N.E.2d 461 (1991)). *See also Uesco Industries v. Poolman of Wisconsin, Inc.*, 2013 IL App (1st) 112566, ¶ 46, 993 N.E.2d 97; *P.J.'s Concrete Pumping Service, supra*., 345 Ill. App. 3d at p. 1004.

"The test of adequate representation is whether the interests of the named parties are the same as the interests of those who are not as those who are not joined and whether the litigating parties fairly represent those not joined." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14, 428 N.E.2d 478, 56 Ill. Dec. 886 (1981). Moreover, "to adequately represent the class, plaintiff must be a member of the class." *Eshaghi v. Hanley Dawson Cadillac Co*., 214 Ill. App. 3d 995, 999, 574 N.E.2d 760, 158 Ill. Dec. 647 (1991); *see also Ramirez supra*, 371 Ill. App. 3d at p. 810.

A representative plaintiff must also establish that they are not seeking relief which is potentially antagonistic to the non-represented members of the class. *Uesco Industries, supra; Ramirez*, *supra*. Additional factors that courts may consider include the extent to which the class's interests and those of existing parties converge or diverge, the commonality of legal and factual positions, the practical abilities of existing parties in terms of resources and expertise, and the vigor with which existing parties represent the class's interests. *Walczak supra.*, 365 Ill. App. 3d 678-79.[5]

[5] Plaintiff's lead counsel, Kickham Hanley PLLC, is well qualified and will adequately represent the proposed class by "ensuring that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Uesco Industries, supra.* Kickham Hanley has extensive experience in litigating class actions and has been repeatedly certified as class counsel in other certified class actions. *See, e.g., Durant v. ServiceMaster Co.*, 208 F.R.D. 228 (E.D. Mich. 2002) (referring to Kickham Hanley: "Based on the high quality of advocacy that Plaintiff's attorneys have demonstrated to this point, the Court is equally satisfied that the named Plaintiff would prosecute vigorously the class's interests through qualified counsel"); Exhibit 4, Opinion in *Wolf v. City of Ferndale*, Case No. 14-138464-CZ (Oakland County

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In this case, the Plaintiff is committed to the vigorous prosecution of this action. Here, Plaintiff is a member of the class she seeks to represent because she has paid the Water and Sewer Charges at issue in this case and has suffered the same injury as all other class members. As discussed at length *supra*, there is a commonality of legal and factual positions—quite simply, Plaintiff's interests are **identical** to the interests of those she seeks to represent.

In its Answer to the FAC, the City admits that Plaintiff is a City water and sewer customer but denies that "Plaintiff is a proper representative for water and sewer customers before 2019 [because] Plaintiff was not a water and sewer customer before 2019." Exhibit 2, Answer to FAC at ¶ 69. The City further asserts two affirmative defenses in its Answer to Plaintiff's FAC that challenge the adequacy of Plaintiff as the named class representative. ***First*** the City asserts that Plaintiff "lacks standing" to challenge the City's Water and Sewer rates imposed prior to 2019 because she was "not paying water or sewer rates before 2019" and thus, according to the City, does not have standing to challenge the City's water or sewer rates for years 2016, 2017 and 2018. Exhibit 2, Answer to FAC at pp. 72-73. The Cites no authority for this premise—and as discussed below it is expressly contravened by governing case law.

Second the City reframes its challenge to Plaintiff's "standing" and "adequacy" to pursue claims for the entire class period asserting an affirmative defense based upon the "statute of limitations." Here, the City correctly notes that the statute of limitations for Plaintiff's claims is five years, which would set the start of the class period in September 2016—five years prior to the date that Plaintiff filed her original complaint in September 2021. However, the City asserts that because

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Circuit Court) at p. 6 ("the Court is satisfied that Plaintiff' counsel is well qualified and will adequately represent the class"); Exhibit 5, Opinion in *Gottesman v. City of Harper Woods*, Wayne County Circuit Court Case No. 17-014341-CZ at p. 10 ("Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes eighteen cases cited by Plaintiff." *See also* Exhibit 6 hereto (identifying other certified class actions in which Kickham Hanley has been designated as class counsel).

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Plaintiff was not a City water and sewer customer prior to 2019 she cannot seek relief for years prior to 2019. As such, the City posits, any claims for relief for years 2016, 2017, and 2018 are barred by the statute of limitations. The City is wrong. The Court should reject these arguments because they are unsupported by governing law.

1. Plaintiff Has Standing to Pursue Claims for the Entire Class Period on Behalf of All Similarly-Situated Class Members.

"To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must **possess the same interest and suffer the same injury shared by all members of the class he represents**." *Harmon v Shell Oil Co*, 2023 U.S. Dist. LEXIS 157163, at *12-13 (SD Tex, 2023) (Exhibit 3) *citing Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) (emphasis added). In *Harmon* the court expressly held that standing "does not require a participant to allege injury for the entire class period." *Harmon at* *14-15, citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591-93 (8th Cir. 2009)(a representative plaintiff has standing to seek relief on the "basis of the legal rights and interest of others" and in such a case "may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered"). *See also Dennis v. Andersons, Inc.*, No. 20 C 4090, 2025 LX 58424 (N.D. Ill. 2025) (finding claims of representative plaintiff typical of the class even though plaintiff did not transact during the entire class period).

2. The City's "Statute of Limitations" Defense Must Fail.

The City's challenge based upon statute of limitations must fail for the same reasons that the City's challenge to Plaintiff's "standing" to pursue claims or the entire class period must fail. As an initial matter, the City's statute of limitations "defense" is a misnomer, as applied to Plaintiff. The City acknowledges that Plaintiff has been a water and sewer customer since 2019. Because her claims are governed by a five-year statute of limitations, all of Plaintiff's personal claims are timely.

Given this reality, the City instead argues that the **claims of absent class members** for Water

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and Sewer Charges imposed in years 2016, 2017, and 2018 are barred by the five-year limitations period. Not only is this argument irrelevant to the issue of class certification, but it is legally wrong, because the filing of a class action tolls the statute of limitations for absent class members.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the U.S. Supreme Court established the class action tolling rule and held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The Illinois courts faithfully apply the *American Pipe* rule. *See*, *e.g*., *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 342-43, 371 N.E.2d 634, 13 Ill. Dec. 699 (1977) (holding that the "commencement of the class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit continued as a class action"). Thus, while Plaintiff herself may not have claims arising out of Water and Sewer Charges imposed in 2016, 2017 and 2018, her filing of this class action tolled the statute of limitations for absent class members who did pay such Charges in 2016, 2017 and 2018.

Based upon the foregoing, it is clear that Plaintiff is a proper class representative and meets the adequate representation requirement of section 2-801. Plaintiff has standing to pursue claims on behalf of herself and the class she seeks to represent. She is a member of the class she seeks to represent and has the exact same interest in the litigation as all other class members—simply, Plaintiff has a strong incentive to prove the City's uniform wrongful conduct as to all class members because her claims arise from that same uniform conduct. Plaintiff has suffered the same injury shared by all members of the class. And, importantly, as stated above, she does not have to allege that she was harmed for the entire class period (*Harmon, Braden*) but **in her representational capacity** may challenge the uniform wrongdoing of the City that "sweep(s) more broadly than the injury [s]he personally suffered." *Braden, supra,* 588 F3d at 591-92.

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E. The Maintenance Of This Action As A Class Action Is An Appropriate Method For The Fair And Efficient Adjudication Of The Controversy Pursuant To 735 ILCS 5/2-801 (4).

Finally, the Court must determine whether the maintenance of a class action is an appropriate method for fairly and efficiently adjudicating the controversy. In applying this prerequisite in a particular case, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. Further, "[a] controlling factor in many cases is that the class action is the only practical means for class members to receive redress—particularly where the claims are small." *Gordon supra*, 224 Ill. App. 3d at 203-04; *Bueker v. Madison County supra*, ¶ 47.

Moreover, many courts have determined that where the first three prerequisites for the maintenance of a class action are established, it is evident that the fourth requirement has been fulfilled as well. See *Hall v. Sprint Spectrum L.P.*, 376 Ill. App. 3d 822, 833-34, 876 N.E.2d 1036 (5th Dist. 2007); *Bueker supra*, at ¶ 48 (where plaintiffs have established the previous three prerequisites (numerosity, commonality, representation) it is evident that a class action is appropriate). As stated in *Cruz supra*:

> The numerous individuals in the proposed class and the existence of predominant common questions of fact or law indicate that a class action would serve the economies of time, effort, and expense as well as prevent inconsistent results. Litigating the claims on an individual basis would waste judicial resources, while addressing the common issues in a single proceeding would aid judicial efficiency and administration. [383 Ill. App. 3d at 780.]

This case meets the standard discussed above. Here, like the cases cited above, certification is appropriate based upon the sheer number of potential class members, the common questions of fact and law that predominate in this case, and the fact that a class action will serve judicial economies.

Moreover, class certification is appropriate here because each individual class member has not suffered an injury that warrants the cost of separate litigation. Here, while the loss per class member is not yet known, it is likely that the individual loss caused by the City's imposition of the wrongful

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Water and Sewer Charges will rarely, if ever, provide the impetus for an individual class member to expend the time and resources to seek relief. Litigation of complex issues is simply too expensive to justify bringing an individual suit to recover such a relatively small loss. However, if the total claims of the Proposed Class are aggregated, they will total tens of millions of dollars. This is exactly the type of case suited to the class action procedural device, because many members of the proposed class will not or cannot pursue their rights individually: The above factors lead to the inevitable conclusion that a class action is by far the most practical and appropriate way to adjudicate the claims of all class members who seek to recover from the City and enjoin any future attempt to extract the unlawful Water and Sewer Charges.

CONCLUSION

Based upon the foregoing, Plaintiff requests that the Court grant the following relief:

A. Certify this action to be a class action with Plaintiff certified as Class Representative and with Kickham Hanley PLLC and Moskovic & Associates, Ltd. designated as Class Counsel;

B. Define the Class to include "all persons or entities who/which have received water and/or sewer service within the City and who/which have incurred or paid Water and/or Sewer Rates and Charges on or after September 9, 2016 and who/which are not 'Exempt Customers.'"

KICKHAM HANLEY PLLC

By: /s/*Gregory D. Hanley*

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CERTIFICATE OF SERVICE

I, Jamie Warrow, an attorney, certify under penalty of perjury pursuant to 735 ILCS 5/1-109 that on September 29, 2025, I served a copy of *Plaintiff's Motion for Class Certification and Brief in Support* by the Odyssey electronic filing system and by e-mailing a copy of same to the parties listed below from e-mail jwarrow@kickhamhanley.com.

/s/ Jamie Warrow

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Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, 3

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EXHIBIT – 1

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY

KATHRYN FARMER, Individually and as Representative of a Class of Similarly Situated Persons and Entities,	)	
Plaintiff,	)	Case No.: 2021 CH 04583
v.	)	Calendar 3
CITY OF CHICAGO, an Illinois Municipal Corporation	)	Judge Allen P. Walker
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant City of Chicago's motion pursuant to 735 ILCS 5/2-615 to dismiss Counts IX and X of Plaintiff's Fourth Amended Complaint ("FAC"). Counts IX and X allege, respectively, that the City's water and sewer rates are unjustly discriminatory and exorbitant/unreasonable under Illinois common law. For the reasons set forth below, the City's motion to dismiss is denied.

BACKGROUND

This matter comes before the Court on Defendant City of Chicago's motion to dismiss Counts IX and X of Plaintiff Kathryn Farmer's Fourth Amended Complaint ("FAC") pursuant to 735 ILCS 5/2-615. These are the only remaining claims in the case and concern the legality of the City's water and sewer rates from 2017 to the present.

Plaintiff filed the original complaint on April 29, 2021, and has since amended it multiple times. On March 25, 2024, the Court dismissed the corresponding counts in Plaintiff's Third Amended Complaint ("TAC") for failure to state a claim. In that order, the Court found that the TAC lacked concrete allegations demonstrating that the rates charged were unreasonable or discriminatory at the time of their establishment, and that it failed to allege facts necessary to support equitable relief. (Mar. 25, 2024, Order at 5).

On February 26, 2024, Plaintiff filed the FAC, which is now the operative pleading. It asserts two counts: Count IX alleges that the City's exemption of certain customers—including City departments, sister agencies, and nonprofit organizations—from water and sewer charges results in unjustified rate discrimination. *FAC* ¶¶ 173–215. Count X alleges that the City inflates the overall "Revenue Requirement" charged to ratepayers by embedding unrelated or excessive costs—such as indirect overhead and pension allocations—into the rate base. *FAC* ¶¶ 223–231, 235, 239–290. The FAC includes over 150 new factual paragraphs and references supporting

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exhibits, including budget line items and comparative cost estimates. *FAC* ¶¶ 174, 223–231, 235, 239–290.

The City has moved to dismiss the FAC under Section 2-615, contending that the claims remain legally insufficient and that the rate-setting practices described in the FAC reflect legitimate governmental objectives and standard municipal budgeting discretion. The motion is fully briefed and submitted for decision.

2-615 MOTION TO DISMISS STANDARD

A motion brought under 735 ILCS 5/2-615 challenges the legal sufficiency of a pleading and admits all well-pleaded facts. A claim will survive dismissal if the facts alleged, when viewed in the light most favorable to the plaintiff, set forth a legally cognizable cause of action. *Doe-3 v. McLean County Unit Dist. No. 5*, 2012 IL 112479, ¶ 15.

DISCUSSION

I. Count IX – Unreasonable Rate Discrimination

Plaintiff alleges that the City of Chicago has created an unreasonably discriminatory rate structure by exempting certain categories of customers (the "Exempt Customers") from paying water and sewer charges, thereby shifting the financial burden to all remaining customers (the "Non-Exempt Customers"). *Plaintiff's Response Brief in Opposition to City's MTD FAC*, at 6–7. These Exempt Customers are identified in Chicago Municipal Code § 11-12-540 and include City-owned or City-occupied properties, Chicago Public Schools, City Colleges, certain hospitals, armories, and nonprofit entities. *Id. FAC* ¶¶ 17, 27, 207–215.

The FAC alleges that these exemptions result in a rate of $0—or a significantly reduced rate—for certain favored entities, while ordinary residents and businesses must pay full price for the same water and sewer services. *Plaintiff's Response Brief*, at 6–7; *FAC* ¶¶ 17, 62, 223. Plaintiff further contends that the cost to the City of delivering these services is the same for both classes of users, but because Exempt Customers do not contribute to the City's revenue requirement, their share of the system's costs is indirectly paid by the Non-Exempt Customers. *Id.* The FAC quantifies this shift at more than $50 million annually. *See id.*; see also *FAC* ¶¶ 17, 61–62, 207–215, 223.

Plaintiff asserts that there is no cost-based justification for these exemptions. *Plaintiff's Response Brief*, at 6–7; *FAC* ¶¶ 220–223. The FAC explicitly alleges that the disparity in treatment is not grounded in any demonstrated difference in the cost of service and instead reflects the City's policy choices to subsidize certain customers at the expense of others. *Id.*, at 7. The FAC further alleges that "[b]ecause the City does not receive payments from the Exempt Customers to cover those costs, those costs are necessarily covered by the Rates paid by the Non-Exempt Customers." *FAC* ¶ 223. Plaintiff argues that this creates a preference and corresponding disadvantage that meets the common-law definition of unjust discrimination. *FAC ¶¶ 41–43, 46; see also Plaintiff's Response Brief, at pp. 2–4, 7.*

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The City argues in response that exemptions from payment are not equivalent to rate discrimination. It contends that all customers are subject to the same nominal per-unit rate for water and sewer services and that the exemption scheme merely reflects a decision not to collect payments from certain users. *City's Reply in Support of MTD FAC*, at 3–4.

The City also relies heavily on *Village of Niles v. City of Chicago*, 201 Ill. App. 3d 651 (1st Dist. 1990), to argue that exemptions, by themselves, do not establish unreasonable discrimination unless the plaintiff can show that such exemptions rendered the rates charged to others unreasonably high. The City asserts that in *Niles*, the plaintiffs did not prevail because they failed to quantify how free or discounted services to others affected their rates. Here, the City argues that Plaintiff has similarly failed to plead facts that support a finding that the exemptions caused Plaintiff's rates to exceed the City's cost of providing service. *City's Reply,* at 5–6.

The City further dismisses Plaintiff's reliance on *Austin View Civic Ass'n v. City of Palos Heights*, 85 Ill. App. 3d 89 (1st Dist. 1980), noting that *Austin View* involved a straightforward comparison of different rates charged to different geographic customer classes and did not involve an exemption-based challenge. *City's Reply;* at 3.

Under Illinois law, utility rates must be reasonable and not unjustly discriminatory. While municipal utilities are not subject to the Illinois Public Utilities Act, common-law principles governing rate reasonableness and discrimination remain applicable. As the court in *Austin View* explained, "whether there has been discrimination in the application of water rates is a question of fact to be determined from the evidence presented." *Austin View, 85 Ill. App. 3d at 95.*. The court also noted that rate differentials are not impermissible per se, but "must be supported by differences in the cost of furnishing the service." *Id.*

The Illinois Appellate Court in *Niles* reaffirmed this standard and explained that, to prevail on a discrimination claim, plaintiffs must show that they paid rates that exceeded the City's cost of service "to the point of unreasonableness." *Niles,* 201 Ill. App. 3d at 672–73. The court in *Niles* ultimately denied relief because the plaintiffs did not quantify the burden imposed by exemptions or establish a nexus between those exemptions and the rates charged to paying customers.

Plaintiff's allegations, taken as true at the pleading stage, go beyond the level of generality found deficient in *Niles. Niles,* 201 Ill. App. 3d at 673–74. Unlike the plaintiffs in Niles, Plaintiff here identifies both the scope of the Exemptions and the estimated cost impact—over $50 million per year—borne by paying customers. *Plaintiff's Response Brief,* at 6; *FAC* ¶¶ 17, 27, 62, 207–215, 223. The FAC further alleges that there is no cost-of-service distinction between Exempt and Non-Exempt Customers that would justify this treatment. *FAC ¶¶ 220–223*. The structure described—a zero or discounted rate applied to some, while others pay full cost—is precisely the sort of economic preference that courts have found to be potentially unlawful under common law standards. *FAC* ¶ 43.

Plaintiff's reliance on *Austin View* is also not misplaced. While that case involved geographic discrimination, the central inquiry—whether similarly situated customers are charged differently without cost justification—applies equally here. Plaintiff has alleged that she and other

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Non-Exempt Customers pay higher effective rates than Exempt Customers, despite receiving the same service and imposing the same costs on the system. *Plaintiff's Response Brief,* at 7.

Finally, whether the City's policy goals in providing exemptions are sound is not at issue at the pleading stage. What matters is whether Plaintiff has alleged facts that, if proven, would support a finding that the resulting rate structure imposes unjust discrimination. Plaintiff has done so here. *Doe v. Coe,* 2019 IL 123521, ¶ 20 ("we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. We also construe the allegations in the complaint in the light most favorable to the plaintiff.").

Plaintiff has adequately stated a claim for unreasonable rate discrimination. The FAC identifies two customer classes, alleges unequal economic treatment not justified by differences in cost, and quantifies the impact of that treatment. Whether the City's justifications can be substantiated is a question for a later stage. For present purposes, Plaintiff has alleged facts sufficient to survive a motion to dismiss under Illinois common law standards. Accordingly, the motion to dismiss Count IX is denied.

II. Count X – Exorbitant and Unreasonable Rates

Plaintiff alleges that the City of Chicago has imposed water and sewer rates that are exorbitant and unreasonable because they grossly exceed the actual cost of providing those services. According to the FAC and supporting brief, each year the City calculates a "Revenue Requirement" that informs how much must be collected from ratepayers. Plaintiff does not challenge the concept of recovering legitimate costs—such as operations, maintenance, and fair administrative allocations—but contends that the Revenue Requirement includes inflated or illegitimate costs that substantially pad the rate base and result in overcharging customers. *FAC* ¶¶ 6–7, 12, 19–20, 28–30, 53–68.

Two principal categories of alleged padding are identified. First, the City's allocation of "indirect costs" from central administration is, according to Plaintiff, vastly overstated. The FAC cites a 2022 Maximus study that found the Water Fund's fair share of central service costs to be approximately $21.7 million, while the City's 2022 budget allocated $69.3 million—more than three times the calculated fair share. Similarly, the Sewer Fund was allocated $37.7 million, though Maximus estimated its share should be only $1.5 million. *FAC* ¶ 245. Plaintiff characterizes this as a covert tax on utility customers used to fund unrelated City operations. *FAC* ¶¶ 239–245.

Second, the FAC alleges that the City unfairly burdened the Water and Sewer Funds with pension obligations that far exceed their proportional share of pension-eligible employees. For instance, in 2021, the Water Fund was charged $36.9 million toward the Municipal Employees' pension fund, while the Corporate Fund—which covers the bulk of City employees—was charged $49.7 million. *FAC* ¶¶ 294–304. Plaintiff asserts that the Water Department does not comprise a proportionate share of the workforce to justify such allocations. Moreover, the City has continued to collect these overcharges despite a dedicated utility tax enacted in 2017 to fund pensions. *FAC* ¶¶ 19, 294–304.

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Plaintiff also alleges that the rate-setting structure, codified by ordinance in 2016, locked in annual increases indexed to inflation, effectively perpetuating and compounding the excessive baseline rates set at that time. *FAC* ¶¶ 64–68. According to Plaintiff, the rate ordinance baked the excesses into the structure, and subsequent inflationary increases merely carried forward the unjustified charges.

The City responds that Plaintiff improperly relies on post-2016 data—such as the Maximus study and recent budget figures—to challenge rates set nearly a decade ago. Citing *West v. City of Batavia*, the City argues that utility rate reasonableness must be assessed at the time the rates are set and not through hindsight using more recent evidence. *West v. City of Batavia*, 155 Ill. App. 3d 925, 928 (2d Dist. 1987) ("Judicial review of rates which were unilaterally established by a municipal utility may not take intervening circumstances or after-acquired information into account").

The City further contends that municipalities have some flexibility in setting rates, including the ability to build modest reserves or earn a return akin to depreciation. The City suggests that even if the allocations are not perfectly precise, they do not rise to the level of unreasonableness required to state a claim.

Illinois courts have consistently held that municipal utility rates must reflect reasonable compensation for services rendered. In *Village of Niles v. City of Chicago*, the court stated that "the ultimate question is whether the rates charged the plaintiffs are reasonably related to the cost of service." *Village of Niles v. City of Chicago*, 201 Ill. App. 3d 661 (1st Dist. 1990). The court further explained that "[i]f the rates charged to plaintiffs are discriminatorily high or exceed the cost of service to the point of unreasonableness, plaintiffs are entitled to relief." *Id.* at 673. Likewise, the Illinois Municipal Code mandates that municipalities may charge only "reasonable compensation for the use and service of the combined waterworks and sewerage system." 65 ILCS 5/11-139-8.

The FAC meets the applicable pleading standard by alleging that the City's rates were unreasonable at the time of their adoption and remain unreasonable due to the embedded cost inflators. Plaintiff alleges that by 2016, the City had already included excessive indirect costs and pension allocations in its rate structure, and those costs were carried forward under the inflation-indexed increases adopted by ordinance. *FAC* ¶¶ 60–66, 224–225, 288, 297–298. The 2016 Appropriation Ordinance included specific line items for "General Fund Reimbursements" and "Pension Expense" in the water and sewer budgets, demonstrating that the challenged categories were part of the rates as originally set.

While the Maximus study and 2021–2022 budget data are more recent, they illustrate the scale of the alleged overcharges and reinforce the claim that similar overcharges existed in 2016. Importantly, the Maximus study analyzed 2020 figures—closer in time to the rate-setting date—making its findings probative of the conditions at issue. Plaintiff uses these later data points to support a reasonable inference that the same flawed practices were present earlier.

The magnitude of the alleged overcharges—more than $40 million annually in indirect costs alone, plus substantial pension over-allocations—far exceeds what might reasonably be

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attributed to reserves or returns on investment. Plaintiff alleges the rates generate over $100 million in surplus annually, suggesting not incidental misallocation but systemic overcharging for unrelated City obligations. If proven, such practices amount to a hidden tax imposed through utility billing—a practice the Illinois Supreme Court has cautioned against. *East St. Louis v. Union Electric Co.*, 37 Ill. 2d 537, 542–43 (1967) ("On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers.... Adoption of the Company's argument would give it the best of possible worlds.... The Company cannot plead that it has the burden of the utility tax and then pass it on to its consumers and in the same voice relieve itself of its obligations.... Plainly, such a construction would be unreasonable.").

Plaintiff also points to violations of municipal ordinances governing the use of utility revenues. Section 3-12-010 of the Municipal Code restricts the use of the sewer fund to sewer-related purposes, and Section 11-12-260 similarly mandates that water rates must cover the system's needs. Allegations that revenues have been siphoned to the City's Corporate Fund or to pay general pension obligations bolster the claim that the rates are not grounded in legitimate cost recovery.

Finally, Plaintiff's allegations align with Section 11-139-8 of the Illinois Municipal Code, which limits water/sewer charges to "reasonable compensation." The combination of specific factual allegations, quantitative data, and citations to statutory and municipal limits all support a plausible claim that the rates far exceed the cost of service. *FAC* ¶¶ 4, 45–46, 58, 59–60.

Count X of the Fourth Amended Complaint adequately pleads a cause of action for exorbitant and unreasonable rates. Plaintiff has alleged that the rates, as established in 2016 and perpetuated thereafter, include cost inflators—such as overstated indirect costs and disproportionate pension allocations—that collectively impose a burden far beyond the legitimate cost of service. The use of recent data does not undermine the claim because the FAC ties the overcharges to the original rate-setting period and uses current figures illustratively.

Whether the City can justify these charges will depend on the evidence presented later in the case. But at the pleading stage, Plaintiff's detailed and data-driven allegations are sufficient. Accordingly, the City's motion to dismiss Count X is denied.

In its March 25, 2024 Order, the Court dismissed Counts IX–XII of the Third Amended Complaint for lack of factual detail supporting a good-faith claim of rate discrimination or unreasonableness, noting the absence of allegations linking the challenged rates to their establishment period or to actual costs. *MTD 4th Amd. Comp.,* at 3–5.

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CONCLUSION

Accordingly, the City of Chicago's Motion to Dismiss Counts IX and X of the Fourth Amended Complaint pursuant to 735 ILCS 5/2-615 is hereby denied. This matter is set for status August 4, 2025 at 10:00AM.

Dated: __7/11/2025____________________________ ENTERED:

Hon. Judge Allen P. Walker

Associate Judge
Allen Price Walker

JUL 11 2025

Circuit Court - 2071

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EXHIBIT – 2

Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, 3

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

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KATHRYN FARMER., Individually, and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff, v. CITY OF CHICAGO, an Illinois Municipal Corporation, Defendant.	Case No. 2021 CH 04583 Judge Allen Price Walker Calendar No. 3

DEFENDANT'S ANSWER & AFFIRMATIVE DEFENSES TO PLAINTIFF'S FOURTH AMENDED COMPLAINT

The City of Chicago ("City") answers Plaintiff's Fourth Amended Complaint as follows:

INTRODUCTION

1. This is an action challenging a variety of unlawful taxes and charges the City imposes and collects from citizens whose properties in the City receive water and sewer services from the City. The City foists these illegal exactions upon its water and sewer customers in the City in order to collect—and then divert—hundreds of millions of dollars to general municipal purposes having nothing to do with providing water and sewer services.

Answer: The City admits this action was brought as a challenge to the City's water and sewer rates and taxes and admits that it charges for water and sewer services received in the City. The City denies this paragraph's remaining allegations.

2. The City also exempts tens of thousands of water and sewer customers from payment of water and/or sewer charges, which forces the non-exempt customers to pay more to cover the City's costs of providing water and sewer services to the exempt customers.

Answer: The City admits that, pursuant to ordinance, it exempts certain customers from some or all water and sewer charges. The City denies this paragraph's remaining allegations.

3. The City's actions have resulted in massive overcharges to its citizens for these most essential municipal services.

Answer: The City denies this paragraph's allegations.

4. Under governing water and sewer rate-making principles, the City's ordinances, and common law, the City may not treat its proprietary water and sewer funds as piggy-banks that

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finance the City's general governmental obligations. Simply put, the City is **required** to charge its water and sewer customers **only** for the water and sewer services and use the resulting revenues only for water and sewer purposes. *See* City Ordinance Section 3-12-010, City Ordinance Section 11-12-260.

Answer: The City admits it sells water and sewer services and is subject to the City's ordinances and the common law. The City denies that it treats the water and sewer funds as "piggy banks to finance the City's general governmental obligations." The City admits that Chicago Municipal Code section 3-12-010 states that "The revenues of the sewer revenue fund shall be reserved and utilized exclusively for the operation, maintenance, rehabilitation or reconstruction of the sewer system of the City of Chicago." The City denies that it has used water and sewer revenues for any improper purposes and denies this paragraph's remaining allegations.

5. Each year, the City purports to determine how much it must spend to provide water and sewer service to residents and businesses. This is the City's water and sewer "Revenue Requirement."

Answer: The City admits that as part of its annual budgeting process every City department prepares estimated operating and capital costs for upcoming year(s). The City denies this paragraph's remaining allegations.

6. The City uses this Revenue Requirement as a starting point for setting its Water and Sewer Rates (hereinafter, sometimes simply referred to as the "Rates" or the "Charges").

Answer: The City denies this paragraph's allegations.

7. In this case, Plaintiff alleges that the City has improperly and unlawfully set its Revenue Requirement too high because the City is (1) collecting more money than it needs to provide water and sewer service (i.e., more than its actual Revenue Requirement), and (2) is collecting that money from too few people, which necessarily overburdens the people who pay for the benefit of the people who do not pay, without any legal justification for determining who pays more and why.

Answer: The City admits that Plaintiff has alleged the City has improperly and unlawfully set its Revenue Requirement too high. The City denies this paragraph's remaining allegations.

8. In FY 2022 alone, the City overcharged its paying water customers by at least $96 million by both grossly inflating the Revenue Requirement and recovering the Revenue Requirement from too few customers. *See* ¶¶ 59 through 62, *infra*. The amount of this overcharge that the City diverted to non-water related purposes exceeds $76 million. There were similar overcharges included in the City's Sewer Rates.

Answer: The City denies this paragraph's allegations.

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9. A simplified analogy demonstrates the City's wrongdoing.

a. Imagine if the City decided to issue bonds to pay for a new stadium for the Chicago Bears at a cost of $76 million (interest and principal payments) per year.

b. Instead of using taxes or other revenue sources to pay the debt services on the bonds, the City directly allocated the $76 million annual cost to its Water Rates, thus forcing its water customers to fully fund the $76 million in annual costs to build the new stadium (a cost wholly unrelated to the City's water service costs). That would be an absurd abuse of power.

c. It is, however, no different from the circumstances facing Plaintiff and the Class. The overcharges Plaintiff complains about in this case are just as arbitrary, unreasonable, and unlawful as forcing Plaintiff and the Class to pay for a new football stadium by incorporating the cost into the Water Rates.

Answer: Subsections a. and b. of this paragraph contain a hypothetical situation to which no response is required. To the extent a response is required, City denies these allegations and denies this paragraph's remaining allegations.

10. Consider the following bar graph. The blue portion of each bar represents the total cost the City actually incurs to provide water service. The other portions represent the additional cost components the City includes in its water rates, which have nothing to do with providing water service:

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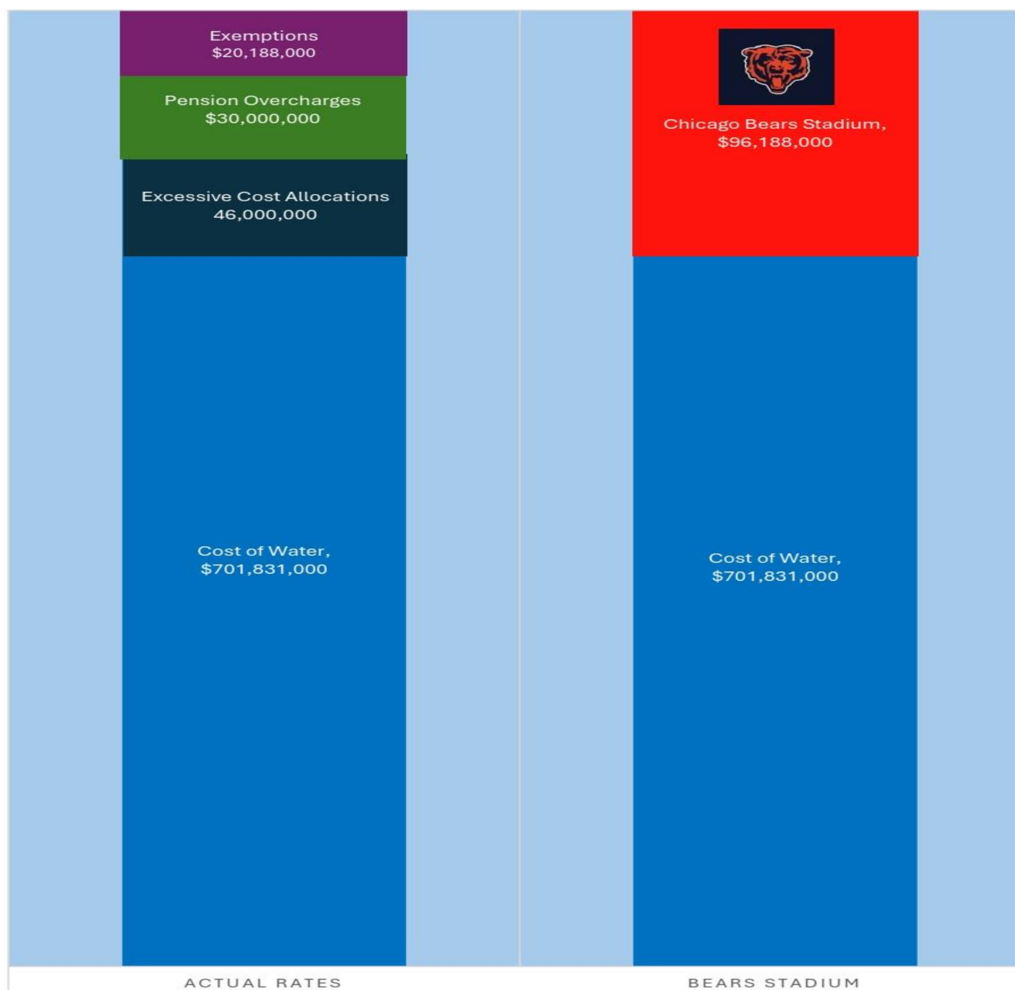

Answer: This paragraph contemplates a hypothetical situation, to which no response is required. To the extent a response is required, denies this paragraph's allegations.

11. By way of another example, if the City needs $100 to pay for water, but it then adds a random $10 expense, that increases the per ratepayer cost by adding an arbitrary charge unrelated to water service. Similarly, if the City needs $100 to pay for water, but then decrees that 10% of the residents do not have to pay for that water, its decree necessarily increases the per-rate payer cost to those who do pay.

Answer: This paragraph contemplates a hypothetical situation, to which no response is required. To the extent a response is required, the City denies this paragraph's allegations.

12. The City knows what its actual Revenue Requirement for water service is at the time it sets its Rates each year**, yet it still implements Rates that overcharge its water and sewer customers in the methods described above**—first by incorporating costs unrelated to water and sewer service (in violation of its own ordinances and proper ratemaking practices) and second by arbitrarily reallocating these inflated rates so as to benefit certain water and sewer customers to the financial detriment of others, but nevertheless with an overall benefit to the City.

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Thus, the City's Water and Sewer Rates are unreasonable and excessive at the time they are set, not merely in hindsight.

Answer: The City denies this paragraph's allegations.

13. The City is only able to implement and profit from these overcharges because of the unique status that municipal utilities enjoy in the State of Illinois, which allows them virtually unchecked power. Municipal utilities, like the City's Water and Sewer Department, enjoy completely unregulated monopolies over services that are essential to the health and welfare of the public. As the City informed prospective bond investors in 2023, "**[n]o regulation by any administrative agency applies to the Water System rates**." *See* Exhibit 1 hereto at p. 4 (emphasis added). Indeed, the City boasted in an April 2023 "Financial Update" that the City Council has "**unlimited home rule authority to raise rates**." *See* Exhibit 2 hereto at p. 13 (emphasis added).

Answer: The City admits that the quoted language appears in the sources cited. The City denies this paragraph's remaining allegations. The City further denies the allegations in footnote 2 to this paragraph. The City is able to set water and sewer rates pursuant its home rule authority. Limitations as to the reasonableness of rates do not lessen or preempt home rule authority.

14. Indeed, the City's water and sewer "customers" **must** buy their services and **must** pay the price set by the City's municipal monopoly. Customers have no realistic alternative. Residents whose homes and businesses are serviced by the City's water and sewer lines are required to hook up to those facilities. As a result, people who want to use their showers, sinks, and toilets must pay the City *whatever price* the City requires for that "privilege." And if they don't "pay up" for these indispensable services, the City ultimately will take their house or business through a forced tax sale.

Answer: The City admits that water service in the City is provided by the City's municipal water utility and that that Municipal Code of Chicago ("MCC") Section 18-29-701.2 states: "Every building in which plumbing fixtures are installed and every premises having drainage piping shall be connected to a public sewer, where available." The City further admits that customers are required to pay the rates for water and sewer service that are set by ordinance. The City denies this paragraph's remaining allegations.

15. This compulsory and, from the City's perspective, extraordinarily lucrative financial relationship, is virtually unheard-of in the private sector. Indeed, outside of the municipal utility monopoly context, one would be hard-pressed to identify any sellers of goods and services that: (1) provide an essential good or service that their customers must have to survive, (2) have a customer base that is required to buy from them and cannot buy from another provider, (3) have the unfettered ability to charge the captive customers any price they determine, *and* (4) have a security interest in their customer's real property in order to ensure the full payment of the charges they unilaterally impose.

Answer: The City admits that the City's waterworks system is the provider of water service to consumers of water in the City. The denies any implication that there is a "relationship"

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that is "extraordinarily lucrative" and denies any implication that the City has "unfettered ability" to charge its customer any price or that it has an inherent "security interest" in its customers' real property. The City lacks knowledge or information sufficient to form a belief as to the truth this paragraph's remaining allegations. Therefore, the City neither admits nor denies this paragraph's remaining allegations.

16. The Courts are the only line of defense for municipal utility customers. Plaintiff's challenge to the City's abuses of these awesome powers can be summarized as follows: **First**, Plaintiff challenges the "Water and Sewer Taxes" which are part of the "Water and Sewer Charges" imposed by the City. The City has extracted hundreds of millions of dollars from the payers of the Water and Sewer Taxes that it has used to finance the City's general governmental obligations unrelated to providing water and sewer services — namely, the funding of its general municipal pension obligations. Currently, the Water and Sewer Taxes imposed by the City exceed **$215 million** per year.

Answer: The City admits Plaintiff has challenged the City's water and sewer taxes. The City admits payments collected since the taxes were implemented have funded the City's Municipal Employees Annuity and Benefit Fund, as required by ordinance. The City admits that for the most current full year (2024), the Water and Sewer Taxes collected were more than $215 million. The City denies this paragraph's remaining allegations.

17. **Second**, independent of the Water and Sewer Taxes, the City's Water and Sewer Charges to Plaintiff and the Class have been unreasonably discriminatory because the City has illegally and arbitrarily exempted various types of similarly-situated water and sewer customers (owning or occupying tens of thousands of properties serviced by the City's water and sewer system) from their obligation to pay the City's Water and/or Sewer Charges (the "Exempt Customers"). This practice has resulted in dramatically higher Rates and Charges being assessed against Plaintiff and the Class (a/k/a the "Non-Exempt Customers"), who are not exempt from payment (the "Unjust Discrimination Claims" a/k/a the "Unreasonable Discrimination Claims"). Because of the Exemptions, Non-Exempt Customers pay over $50 million more per year for water and sewer services than they would pay in the absence of the Exemptions.

Answer: The City denies this paragraph's allegations.

18. **Third**, this action challenges the City's overcharges to Water and Sewer Customers and its improper transfer—without consideration—of tens of millions of dollars of revenues garnered from Water and Sewer Charges to the City's general corporate fund for general governmental use and to two of the City's pension funds to finance the City's obligations to those funds. The City accomplishes these overcharges and misappropriation of Water and Sewer Funds in at least two ways: (a) by grossly over-allocating the alleged indirect (but phantom) costs of other City departments to the Water and Sewer Fund (the "Excessive Cost Allocations"); and (b), by charging the Water & Sewer Funds tens of millions of dollars per year in additional phantom costs to allegedly cover the Water and Sewer Funds' proportionate share of the City's total annual contribution to the Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Annuity and Benefit Fund (the "Pension Overcharges").

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Answer: The City denies this paragraph's allegations.

19. By virtue of the annual inclusion of tens of millions of dollars of these phantom expenses, the City's Water and Sewer Rates and Charges have been, and continue to be, completely untethered to the City's actual costs of providing water and sewer services to its citizenry. Collectively, the claims arising out of the Excessive Cost Allocations and the Pension Overcharges are referred to herein as the "Exorbitant Rate Claims."

Answer: The City denies this paragraph's allegations.

20. Collectively, the (a) Water and Sewer Taxes, (b) the subsidy provided to the Exempt Properties through the City's unreasonable rate discrimination, (c) the Excessive Cost Allocations, and (d) the Pension Overcharges have transformed the City's Water and Sewer Funds into an illicit financial engine which unlawfully generates a massive General Fund and pension fund revenue stream — while simultaneously rendering the necessities of water and sewer service oppressively unaffordable for many of the most vulnerable Chicagoans.

Answer: The City denies this paragraph's allegations.

21. These "regressive" taxes and charges fall most heavily on the City's lower income residents. The hardships visited upon the lower income residents of Chicago were extensively documented in a recent report compiled by media outlet WBEZ (Exhibit 5 hereto), and with interactive graphics at: *https://interactive.wbez.org/waterdebt/*), which provided the following grim statistics: Chicago homeowners have racked up over $421 million dollars in water debt. More than 60% of the debt is concentrated in the city's majority Black ZIP codes. [Exhibit 5, pp. 6, 11.]

> The city's debt collection system has moved delinquent water bills into the hands of private debt collectors, with little transparency. At least $60 million of the city's water revenue has gone to pay private debt collectors. *Id.* p. 11.
>
> Chicagoans have had millions of dollars in earnings garnished from their paychecks to help settle water debt and many others have faced judgments and statutory liens in an effort to collect water debt. *Id.*

Answer: The City admits that Exhibit 5 contains the quoted language and described graphics and discusses the effect of taxes on certain City residents. The City denies this paragraph's remaining allegations.

SUMMARY OF THE CLAIMS BASED ON THE WATER AND/OR SEWER TAXES

22. Counts I through VIII of this Complaint challenge the Water and/or Sewer Taxes on various grounds. The claims in Counts I through VIII are collectively referred to herein as the "Unlawful Tax Claims."

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Answer: The Court granted summary judgment in the City's favor on counts I-VI on and dismissed Counts VII and VIII with prejudice. The City denies this paragraph's allegations.

23. Counts I and II of Complaint allege that the Water Taxes are unlawful taxes imposed by the City in violation of Illinois statutory law because they are sales taxes or other taxes "on the use, sale or purchase of tangible personal property based on the gross receipts from such sales or the selling or purchase price of said tangible personal property," and thus are preempted by 65 ILCS 5/8-11-6a.

Answer: The Court granted summary judgment in the City's favor on Counts I and II of the complaint. The City denies this paragraph's allegations.

24. Counts III-IV of the Complaint allege that in addition to violating 65 ILCS 5/8-11-6a, the Water and Sewer Taxes violate common law principles applicable to municipal utility rates because the City includes the Water and Sewer Taxes in its water and sewer rate structure and then diverts those tax revenues to purposes unrelated to providing water and sewer services, and therefore the resulting Water and Sewer Rates are unreasonable.

Answer: The Court granted summary judgment in the City's favor on Counts III-IV of the complaint. The City denies this paragraph's allegations.

25. Counts V and VI of the Complaint assert that the City, by incorporating the Water and Sewer Taxes into its water and sewer charge structure, has violated 65 ILCS 5/11-139-8, which requires that the City only "charge the inhabitants thereof **a reasonable compensation** for the use and service of the combined waterworks and sewage system and to establish rates for that purpose" (emphasis added).

Answer: The Court granted summary judgment in the City's favor on Counts V and VI of the complaint. The City denies this paragraph's allegations.

26. Counts VII and VIII of the Complaint assert that the Water and Sewer Taxes violate the Uniformity Clause of the Illinois Constitution, which provides: "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX, Sec. 2. The Water and Sewer Taxes violate the Uniformity Clause because (1) they are not based on a real and substantial difference between the people taxed and those not taxed, and (2) they do not bear a reasonable relationship to the object of the Taxes or to public policy.

Answer: The Court dismissed Counts VII and VIII with prejudice. The City denies this paragraph's allegations.

SUMMARY OF THE UNREASONABLE DISCRIMINATION CLAIMS

27. Count IX of the Complaint alleges that, independent of the Water and Sewer Taxes, the City's Water and Sewer Charges to Plaintiff and the Class have been unreasonably

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discriminatory because: (a) the City does not charge the Exempt Customers and therefore necessarily overcharges Plaintiff and the Class, and (b) there is no cost-based justification for creating a distinction between Plaintiff and the Class, on the one hand, and the Exempt Customers, on the other hand. Since September 2016, the unlawful Exemptions have forced Plaintiff and the Class to pay over $250 million more to the City for their water and sewer services than they would have paid in the absence of the Exemptions.

Answer: The City denies this paragraph's allegations.

SUMMARY OF THE EXORBITANT RATE CLAIMS

28. Count X of the Complaint alleges that the City's incorporation of the Excessive Cost Allocations and Pension Overcharges into its Water and Sewer Rates necessarily means that these Rates are excessive and that Plaintiff and the Class are inherently overcharged in each water and sewer bill.

Answer: The City denies this paragraph's allegations.

29. Since September 2016, because the City has fraudulently incorporated these phantom expenses and overcharges into the City's water and sewer rate structure, Plaintiff and the Class collectively have overpaid the City for water and sewer services by at least $350 million in addition to the $250 million overcharge for their water and sewer services under the Unreasonable Discrimination claim.

Answer: The City denies this paragraph's allegations.

30. In sum, through the foregoing wrongful rate practices, Plaintiff and the Class have been forced to pay unreasonable Water and Sewer Rates.

Answer: The City denies this paragraph's allegations.

SUMMARY OF THE RELIEF SOUGHT

31. The City must be enjoined from continuing to collect the Water and Sewer Taxes and must refund all Water and Sewer Taxes it has received since it began imposing the Water and Sewer Taxes in March 2017 as well as refund all Water and Sewer Taxes it receives during the pendency of this lawsuit.

Answer: The City denies this paragraph's allegations.

32. Moreover, the City should also be enjoined from continuing to unfairly discriminate against Plaintiff and the Class by arbitrarily excluding the Exempt Customers from the obligation to pay for water and sewer services and refund all Water and Sewer Charges it has received in excess of a lawful amount since September 9, 2016 – the date that is five years prior to the filing of this case – and any additional unlawful amounts it receives during the pendency of this lawsuit.

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Answer: The City denies this paragraph's allegations.

33. Lastly, the City should also be enjoined from grossly over-allocating the indirect costs of the other City departments to its Water and Sewer Fund (Excessive Cost Allocations) and enjoined from imposing and collecting the Pension Overcharges. The City should be required to refund all Water and Sewer Charges it has received in excess of a lawful amount since September 9, 2016 and any additional unlawful amounts it receives during the pendency of this lawsuit.

Answer: The City denies this paragraph's allegations.

VENUE AND JURISDICTION

34. Plaintiff is a water and sewer customer residing in the City who receives water and sewer service from the City, has directly paid the Water and Sewer Charges at issue, including the Water and Sewer Taxes, is a "customer" within the meaning of City Ordinance 3-80, and seeks to act as class representative for all similarly situated persons.

Answer: The City denies Plaintiff was a water or sewer customer before 2019. The City denies Plaintiff is a proper class representative. The City admits this paragraph's remaining allegations.

35. Defendant City of Chicago (the "City") is a home rule municipality located in Cook County, Illinois.

Answer: The City admits this paragraph's allegations.

36. Venue and jurisdiction are proper in the Cook County Circuit Court pursuant to 735 ILCS 5/2-103 because the City's principal offices are located in Cook County and because the actions which give rise to Plaintiff' claims occurred in Cook County.

Answer: The City admits venue and jurisdiction are proper but denies it engaged in any wrongdoing Plaintiff alleges in her pleadings.

THE CITY'S WATERWORKS SYSTEM

37. The City operates a water and sewer utility, the Chicago Waterworks System, under the statutory authority provided to it pursuant to 65 ILCS 5/11-139-1 *et seq*.

Answer: The City admits it operates a water and sewer utility, sometimes referred to as the Chicago Waterworks System. The City denies this paragraph's remaining allegations.

38. The City's water supply system serves customers within the City itself, as well as approximately 125 suburban communities, referred to as "wholesale customers." The total annual revenues received by the City from its the water supply system operations are roughly split equally between charges imposed upon the City customers and the wholesale customers.

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Answer: The City admits this paragraph's allegations.

39. The City's sewer system provides sewage and drainage collection and conveyance for a service area roughly 230 square miles inhabited by approximately 2.67 million people. The sewer system is not responsible for, and does not include any facilities for, the treatment or disposal of sewage. It is limited to collecting and conveying wastewater to the interceptor sewers of the Metropolitan Water Reclamation District (the "MWRD"), an independent government entity with exclusive responsibility for sewage treatment, sewage disposal and flood control in the City and neighboring suburbs. The MWRD finances its operations primarily through the imposition of an ad valorem tax in the area that it serves.

Answer: The City admits this paragraph's allegations.

40. The City's sewer system serves only customers within the City itself. All (or virtually all) of the revenues received by the City from its sewer system operations are paid by the sewer customers in the City. The City admits that "[t]here are no significant areas of the City without sewer service and, except for a very limited number of industrial users who have direct connections to the Water Reclamation District's interceptors, connection to the sewer system is the only feasible means of wastewater disposal for nearly all City users." *See* Exhibit 13 hereto (Preliminary Official Statement dated March 28, 2024 at p. 24).

Answer: The City denies that the quoted language appears in Exhibit 13. The City admits this paragraph's remaining allegations.

41. The City holds a monopoly over water and sewer service in the City, sells water and sewer services in a proprietary, not governmental, capacity and is subject to the same rules that apply to a privately owned utility—including the requirement that utility rates be reasonable and not exorbitant. *See e.g. Village of Niles v. City of Chicago*, 82 Ill App 3d 60, 68; 37 Ill Dec 142; 401 NE2d 1235 (1980); *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89, 94-95; 40 Ill Dec 164; 405 NE2d 1256 (1980).

Answer: The City admits the Department sells water and sewer services in a proprietary, not governmental capacity, and is subject to some of the same rules that apply to a privately owned utility, including the requirement that utility rates be reasonable and not excessive or exorbitant. The City denies this paragraph's remaining allegations.

42. The City has admitted that it "sells water and sewer services in a proprietary, not governmental, capacity and is subject to the same rules that apply to a privately owned utility – including the requirement that utility rates be reasonable and not exorbitant." *See* City's Answer to Paragraph 9 of the original Complaint. *See also Id*. at ¶ 12 ("The City admits that pursuant to governing common law, the Department's water and sewer rates may not be excessive").

Answer: The City admits this paragraph's allegations.

43. In addition, by law, the City is precluded from imposing unjustly discriminatory rates and charges on certain of its water and sewer customers. A utility rate scheme is unjustly

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discriminatory when differences in rates assessed to two groups of customers are not justified by differences in costs to serve those two groups of customers. *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89; 40 Ill Dec 164; 405 NE2d 1256 (1980). The test used for deciding the validity of the difference in rates is to determine whether the difference is reasonable, and not arbitrary, based on a consideration of such factors as differences in the amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs. If the difference in rates is not reasonably related to a difference in the costs of providing the service, there is unreasonable discrimination. *Austin View* at p. 99.

Answer: The City admits that under Illinois common law, water and sewer rates must be reasonable and not excessive. The City denies that operating costs are the only basis for determining whether a difference in rates is reasonable and not excessive and denies this paragraph's remaining allegations.

44. The City's ordinances, Chapter 11-12, entitled Water Supply and Service, govern the City's operation and maintenance of its waterworks system, including determining the rates for water and service. *See* Ordinance 11-12-260 *et seq*. The City's ordinance, Chapter 3-12-010 et seq., entitled Sewer Revenue Fund, governs the rates and charges for sewer service.

Answer: The City admits this paragraph's allegations.

45. 65 ILCS 5/11-139-8 authorizes the City to establish rates for water and sewer services to the City's water and sewer customers and imposes the express limitation that the City only "charge the inhabitants thereof a reasonable compensation for the use and service of the combined waterworks and sewage system and to establish rates for that purpose."

Answer: The City admits 65 ILCS 5/11-139-8 authorizes municipalities to establish rates for water and sewer services to their water and sewer customers, and that it imposes the express limitation that a municipality "charge the inhabitants thereof a reasonable compensation for the use and service of the combined waterworks and sewage system and to establish rates for that purpose." The Court has granted summary judgment on Plaintiff's claim that the limitations contained in 65 ILCS 5/11-139-8 restrict the authority of home-rule units. The City denies this paragraph's remaining allegations.

46. Pursuant to 65 ILCS 5/11-139-8 and governing common law, the City's water and sewer rate revenues cannot be excessive, and the charges imposed upon the City's water and sewer customers must be for the actual use of the City's water and sewer system. *See e.g. Ross v Geneva*, 43 Ill App 3d 976, 980-81; 2 Ill Dec 609; 357 NE2d 829 (1976); *Norwick v Winfield*, 81 Ill App 2d 197, 200; 225 NE2d 30 (1967).

Answer: The City admits that pursuant to governing common law, the Department's water and sewer rates may not be excessive. The City denies this paragraph's remaining allegations.

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47. The City's methodology for establishing Water and Sewer Rates is completely arbitrary. This allegation is demonstrated by the fact that eschewing industry rate-making standards, the City has never conducted a true "cost of service" study.

Answer: The City denies this paragraph's allegations.

48. Such "cost of service" studies are routinely utilized by municipal utilities to determine the "Revenue Requirements" of their water and sewer systems – *i.e.*, the costs and expenses the City incurs to operate, maintain and improve those systems – and to derive fair and equitable Rates and Charges to cover the Revenue Requirements.

Answer: The City lacks knowledge or information sufficient to form a belief as to the practices of other municipal utilities. The City neither admits nor denies this paragraph's allegations.

49. Instead of performing a "cost of service" study as industry standards would dictate, like clockwork, since June 2016, the City has merely increased its Water and Sewer Rates by the lesser of 5% or the rate of inflation every year. This fact alone demonstrates the arbitrary nature of the City's Rates—and specifically shows that the City's increases to its Water and Sewer Rates are completely untethered to the actual expenses of the City's Water and Sewer Funds.

Answer: The City admits that, pursuant to ordinance, it has increased its water and sewer rates by 5% or the rate of inflation, whichever is less, each year since 2016. The City denies this paragraph's remaining allegations.

50. In 2023, the City represented that, beginning in 2030, the City would start to charge its suburban water customers (but not water customers in the City) a "Cost-of-Service Water Rate" based upon the "M1 Manual" published by the American Water Works Association ("AWWA"). *See* Exhibit 14 hereto at p. 42. By doing so, the City again admitted facts that go to the core of Plaintiffs claims by acknowledging the efficacy of a "cost of service" study.

Answer: The City denies this paragraph's allegations.

51. Here, the City admits that the "**M1 Manual is considered to be the industry standard for setting water rates by public water suppliers nationally** and is used by peer entities such as Great Lakes Water Authority, Metropolitan Water District of Southern California, the City of Houston, the City of Philadelphia, San Francisco Public Utilities Commission, and San Diego County Water Authority." *Id.* (emphasis added). The City further admitted that:

> **<u>AWWA provides transparency</u>** to customers; cost of service requires detailed accounting of components of the system and allocates cost of service to each customer. *See* Exhibit 2 hereto at p. 23 (City's "Financial Update" dated April 23, 2023) (emphasis in original).

Answer: The City denies that the following quoted language ("M1 Manual is considered to be the industry standard for setting water rates by public water suppliers nationally and is used by peer entities such as Great Lakes Water Authority, Metropolitan Water District of

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Southern California, the City of Houston, the City of Philadelphia, San Francisco Public Utilities Commission, and San Diego County Water Authority." appears in the source cited (Ex. 14). The City admits that the following quoted language ("<u>AWWA provides transparency</u> to customers; cost of service requires detailed accounting of components of the system and allocates cost of service to each customer.") appears in the sources cited (Ex. 2). The City denies this paragraph's remaining allegations.

52. Notwithstanding the City's admissions, the City has never conducted a true cost-of-service study for its Water or Sewer Systems, much less utilized the M1 Manual or implemented rates and charges that were consistent with the methodology set forth in the M1 Manual. Stated simply, the City has never even attempted to devise Water and Sewer Rates that comply with the "industry standard."

Answer: The City admits it has not completed a cost of service study for its water and sewer systems. The City denies this paragraph's remaining allegations.

<u>THE REASONS THAT THE EXEMPTIONS AND THE OVERCHARGES HAVE CAUSED PLAINTIFF AND THE CLASS TO PAY EXORBITANT RATES</u>

53. The first step in establishing Water and Sewer Rates and Charges is to determine the total Revenue Requirement associated with the municipality's water supply system and sewage disposal system (i.e., the revenues necessary to cover the costs of the entire system). The Revenue Requirement is a summation of the operation, maintenance and capital costs that a utility must recover during the time period for which the Rates will be in place.

Answer: The City admits rates need to produce revenues necessary to cover the costs of the water and sewer system. The City denies any suggestion that the City has not taken the revenue needed to cover the costs into account in setting the rates and denies this paragraph's remaining allegations.

54. The City's ordinances require the City's Department of Water Management to prepare an annual budget ordinance setting forth the Rates for the water and sewer service for the coming year. *See, e.g.*, Ordinance Section 11-12-260 (Exhibit 3 hereto) ("The department shall … prepare an ordinance, for submission to the city council, establishing the rates to be charged for water service in the following year"); Ordinance Section 3-12-010 (Exhibit 4 hereto) (proving that "the sewer revenue fund shall be supported by sewer usage fees established from time to time by the city council").

Answer: The City denies the paragraph's selectively edited and inaccurately quoted language sets forth the City's obligations regarding setting rates for water and sewer services. The City denies the paragraph's remaining allegations.

55. Another City Ordinance Section 2-32-180 (Exhibit 6 hereto) confirms that the improper expenses that form the basis for Plaintiff's Exorbitant Rate claims necessarily are included in the City's Water and Sewer Rates on a prospective basis:

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The comptroller shall, on or before the first day of December of each year preceding the year for which the estimates are made, **submit to the city council a report of the estimates of the funds necessary to defray the expenses of the city government during the fiscal year about to begin**. **He shall in such report classify the different objects and branches of the city expenditures, giving, as nearly as may be, the amount required for each.** …

He shall, in such report, show the aggregate income of the preceding fiscal year from all sources, the amount of liabilities outstanding upon which interest is to be paid, and of bonds and city debts payable during the coming year, when due and where payable, **together with all such information as may be necessary to enable the city council to prepare and pass the annual appropriation ordinance in the manner prescribed by statute**, and so that the city council may fully understand the money exigencies and demands of the city **for the year for which appropriations are to be made**. [emphasis added].

Answer: The City admits that the quoted language appears in the source cited. The City denies this paragraph's remaining allegations.

56. The foregoing ordinance provisions make clear that all Water and Sewer expenses for each coming year must be reflected in the "annual appropriation ordinance" enacted by the City for each coming year. The improper charges that form the basis for the Exorbitant Rate claims **are** set forth in the City's annual appropriation ordinances.

Answer: The City admits that Water and Sewer Fund expenses are reflected in the City's annual appropriation fund ordinance and denies this paragraph's remaining allegations.

57. The City seemingly complies with the foregoing ordinance provisions in paragraphs 54 and 55 above by including line-item financial information for the Water and Sewer Fund in its Annual Appropriation Ordinances. The Rates and Charges imposed by the City pursuant to the Annual Appropriation Ordinance are intended to recover the Revenue Requirement for the coming year. The higher the Revenue Requirement, the higher the Rates and Charges imposed on paying customers have to be in order to recover the Revenue Requirement.

Answer: The City admits that its annual appropriation ordinances include line items for the Water and Sewer Funds. The City admits that its water and sewer rates are set at a level that, when taken with the other variables in its revenue-requirement formula, is sufficient to recover its revenue requirement each year. The City denies this paragraph's remaining allegations.

58. Importantly however, in establishing Rates, the City's Ordinances also prohibit the City from using water and sewer revenues for purposes unrelated to providing water and sewer service. *See* City Ordinance Section 3-12-010 ("The revenues of the sewer revenue fund shall be reserved and utilized **exclusively** for the operation, maintenance, rehabilitation or reconstruction of the sewer system of the City of Chicago") (emphasis added) and City Ordinance Section 11-12-260 ("The fees, charges, and rates established by said ordinance shall be sufficient in all times to

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pay the cost of operation and maintenance of the water system, to make principal and interest payments on any outstanding bonds, and to establish and maintain any reserve funds and accounts as may be covenanted for in bond ordinances authorizing the issuance of the bonds").

Answer: The City admits the quoted language appears in the sources cited. The City denies any suggestion that the City is using water and sewer revenues for any improper purpose and denies this paragraph's remaining allegations.

59. The Rates actually imposed by the City have traditionally garnered revenues consistent with the **purported** Revenue Requirements determined by the City. For example, in 2022, the City's budget for the Water Fund projected $777,831,000 in revenues from Water Charges and the City's financial statements for the Water Fund for that year show $779,814,000 in revenues from Water Charges. *See* Exhibit 7 hereto at p. 23 (excerpts from 2022 Annual Appropriation Ordinance) and Exhibit 8 hereto at p. 14 (excerpts from Water Fund 2022 Financial Statements).

Answer: The City admits that the Water Fund's total operating revenue in 2022 was $779,814,000 (Ex. 8). The City denies this paragraph's remaining allegations.

60. The problem is that the City grossly inflates its Revenue Requirement by including tens of millions of dollars of expenses **unrelated** to providing water and sewer services in contravention of City Ordinance Section 3-12-010 and City Ordinance Section 11-12-260. These improper, unrelated expenses are listed as line-items in the budgets of the Water and Sewer Funds which are included in the Annual Appropriation Ordinances and are **actually paid** by the Water and Sewer Funds to other City funds. *See* Exhibits 9 and 10 hereto (Summary General Ledgers for Water Fund and Sewer Fund for 2021 showing "actual YTD activity" and demonstrating that the Pension Overcharges and the Excessive Cost Allocations were actually paid from those Funds). Thus, there is no question that these improper unrelated expenses are intentionally included on a prospective basis annually in the City's Water and Sewer Rates and therefore are actually paid by Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

61. Then, the City causes Plaintiff and the Class (i.e., the Non-Exempt Customers) to pay the portion of the Revenue Requirement applicable to the cost of servicing Exempt Customers, which further increases the overcharges to Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

62. The following illustrates the minimum Water Overcharge to Plaintiff and the Class and the City's other customers for 2022 (this does not include Sewer Overcharges):

Total Budgeted Water Charge Revenues – $777,831,000. *See* Exhibit 7 hereto.
Total actual Water Charge Revenues – $779,814,000. *See* Exhibit 8 hereto.

Overcharges included in Water Rates:

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Excessive cost allocations – $46,000,000. *See* paras. 239-274 *infra*.
Pension overcharges – $30,000,000. *See* paras. 294-315 *infra*.

Actual Water Revenue Requirement for 2022 – $701,831,000

Value of exemptions (i.e., costs to serve Exempt Customers covered by Non-Exempt Customers – $20,188,000. *See* Exhibit 11 hereto at p. D021258.

Total charges to Non-Exempt customers in 2022 should have been – $681,643,000
Total 2022 Revenue Requirement Used By City – $777,831,000

Total Water Overcharge for 2022 – **$96,188,000**

Answer: The City denies this paragraph's allegations.

63. The foregoing facts amply demonstrate that "the rates exceed the legitimate costs of providing these services," and that "they were unreasonable or discriminatory **at the time of their establishment.**" *See* March 25 Order at p. 5 (emphasis added).

Answer: The City denies this paragraph's allegations.

64. The fact that, effective June 2016, the City implemented a policy of annually increasing its water and sewer rate by the rate of inflation does not translate to reasonable Rates or otherwise demonstrate that the Rates imposed were not discriminatory "at the time of their establishment" for a number of reasons.

Answer: The City denies this paragraph's allegations.

65. First, all of the Overcharges claimed in this Complaint were already included in the City's Rates as of January 2016 – before the City's new policy went into effect. *See* Exhibit 12 hereto (City's Annual Appropriation Ordinance for 2016 at pp. 267-268 and 332-333). *See also* Paragraphs 224-225, 288 and 297-298 *infra*. The City's application of an inflation factor in subsequent years merely continued the Overcharges that were already baked-into the Rates, albeit at ever increasing amounts.

Answer: The City denies this paragraph's allegations.

66. Second, the City's new policy did not obviate the requirements in its Ordinance requiring the Department of Water Management to "prepare an ordinance, for submission to the city council, establishing the rates to be charged for water service in the following year." Ordinance Section 11-12-260. Consistent with those requirements, the City's annual appropriation ordinances specifically include the Overcharges in the City's water and sewer fund budgets, which are recovered through the Rates and Charges paid by Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

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67. Third, the City admits that "the City Council may take action at any time to alter the then-current schedule of water rates." *See* Exhibit 13 hereto (Preliminary Official Statement dated March 28, 2024 at p. 3).

Answer: The City admits this paragraph's allegations.

68. Fourth, the City's Rate ordinance tying annual increases to the rate of inflation cannot trump the City's common law obligations to impose reasonable and nondiscriminatory rates. *See, e.g., Niles I*, 82 Ill App 3d at 68 ("Municipal officers . . . cannot discriminate in rates or make exorbitant and unjust rates to consumers . . . . **All their rates and charges fixed by ordinances or resolutions are subject to review by the courts** . . . .") (emphasis added) (quoting *Springfield Gas & Elec. Co. v. City of Springfield*, 292 Ill. 236, 253, 126 N.E. 739 (1920)). In fact, the City's failure to conduct a legitimate cost-of-service study – and its blind reliance on inflation rates instead of actual cost data to annually increase the Water and Sewer Rates – are themselves arbitrary, capricious and unreasonable practices.

Answer: The City admits that the quoted language appears in the authority cited. The City denies the rates are unreasonable and discriminatory and denies this paragraph's remaining allegations.

CLASS ALLEGATIONS

69. Plaintiff brings this action as a class action, pursuant to 735 ILCS 5/2-801 et seq., individually and on behalf of two proposed classes: (1) for Counts I through VIII a class consisting of all persons or entities who have received water and/or sewer services in the City and who/which are "purchasers" under Ordinance 3-80 and who/which have incurred or paid Water and/or Sewer Taxes on or after March 1, 2017 and (2) for Counts IX through X a class consisting of all persons or entities who have received water and/or sewer service within the City and who/which have incurred or paid Water and/or Sewer Rates and Charges on or after September 9, 2016 and who are not "Exempt Customers."

Answer: On September 2, 2022, The Court granted summary judgment in the City's favor on Counts I-VI of the complaint. The Court dismissed Counts VII and VIII with prejudice on March 25, 2024. The City thus denies that Counts I-VIII can be the basis for class allegations. The City further denies Plaintiff is a proper representative for water and sewer customers before 2019 and Plaintiff was not a water and sewer customer before 2019. The City denies it engaged in any wrongdoing and denies Plaintiff or any putative class members are entitled to any relief. The City admits that Plaintiff purports to be bringing class allegations pursuant to 735 ILCS 5/2-801 et seq.,

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

Answer: The City admits that the proposed members of the proposed class would be so numerous that joinder of all members would be impracticable.

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71. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff is a member of the Class she seeks to represent, Plaintiff was injured by the same wrongful conduct that injured the other members of the Class, and the City has acted wrongfully in the same basic manner as to the entire class.

Answer: The City lacks knowledge or information sufficient to admit or deny the allegations that Plaintiff's claims are typical of the claims of proposed members of the proposed class and that Plaintiff is a member of the class she seeks to represent. The City denies this paragraph's remaining allegations.

72. There are questions of law and fact common to all Class Members that predominate over any questions, which, if they even exist, affect only individual Class Members, including:

a. whether Ordinance 3-80, which establishes the Water and Sewer Taxes, is preempted by Illinois statute and thus unlawful and unauthorized;
b. whether the Water and/or Sewer Taxes imposed by the City are unlawful and unauthorized under Illinois common law;
c. whether the Water and Sewer Taxes are imposed for, or related to, the actual use of the City's waterworks and sewer systems;
d. whether the Water Taxes have been imposed in violation of 65 ILCS 5/8-11-6a;
e. whether the Water and Sewer Taxes violate the Uniformity Clause of the Illinois Constitution, Ill. Const. 1970, art. IX, Sec. 2;
f. whether the City's exemption of the Exempt Properties from payment of the Water and Sewer Rates and Charges constitutes unfair discrimination, rendering the City's Water and Sewer Rates unreasonably discriminatory;
g. whether the City grossly over-allocates the indirect costs of the City's other departments to the Water and Sewer Fund;
h. whether the City's unfair cost allocation methods have rendered the Water and Sewer Rates unreasonable or exorbitant;
i. whether the City's Pension Overcharge render the Water and Sewer Rates unreasonable or exorbitant; and
j. whether the City should be required to disgorge and refund to its water and sewer customers all Water and Sewer Taxes, and the other wrongfully collected Water and Sewer Charges described herein.

Answer: The City denies the allegations in this paragraph.

73. 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.

Answer: The City denies this paragraph's allegations.

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74. 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 lawsuit as a class action.

Answer: The City denies this paragraph's allegations.

COUNT I

ASSUMPSIT-MONEY HAD AND RECEIVED FOR VIOLATION OF 65 ILCS 5/8-11-6a

WATER TAX

[Summary Judgment was granted on Count I in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count I, the City incorporates it Answers to Complaint, Count I]

75. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, and 34-40, inclusive, as if fully set forth herein.

76. In 2016, the City was in dire financial straits due to the gross underfunding of the City's pension obligations. Actuaries for the City had reported that if the City did not increase its payments to the City's Municipal Employees' Annuity and Benefit Fund (the "Benefit Fund"), that the Benefit Fund would be out of money by 2025.

77. On September 14, 2016, the City's Council approved a tax on water and sewer usage in order to increase its payments to the Benefit Fund. As stated by the City:

> The Chicago City Council and Mayor Emanuel approved a four-year phase-in of a water and sewer utility tax. The revenue from this tax will be used to make certain mandated pension payments. These mandated pension payments will support the retirements of many municipal employees, including our snow plow drivers, our librarians, and CPS non-teaching staff, such as classroom aides. *See* Exhibit 14, the City's Water-Sewer Tax FAQ.

78. To implement the new tax, the City's Council passed Ordinance 3-80, entitled "Chicago Water and Sewer Tax." Under the ordinance, the tax is expressly imposed upon: "(1) the use and consumption in the City of water that is purchased from the Department of Water Management and (2) the transfer of wastewater to the City sewer system from property located in the City. The ultimate incidence and liability for payment of the tax is upon the Purchaser." *See* Exhibit 3, Ordinance 3-80 at § 3-80-030.

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79. Pursuant to Ordinance 3-80 the Water and Sewer Taxes were to be phased in over a period of four years. Exhibit 14, the City's Water-Sewer Tax FAQ; Exhibit 15, Ordinance 3-80 at § 380-040.

80. Specifically, starting in March 2017, the City began to impose the Water and Sewer Taxes at the rate of $.295 per 1,000 gallons of water and per 1,000 gallons of sewer—for a total of $.59 per 1,000 gallons of water-sewer use. Over the next three years the Water and Sewer Taxes climbed to $2.51 per 1,000 gallons of water and per 1,000 gallons of sewer used.

Rate per 1,000 gallons (approximately)

YEAR	TAX ON WATER PORTION	TAX ON SEWER PORTION	TOTAL TAX (WATER & SEWER)	Y-O-Y TAX RATE INCREASE
2017	$.295	$.295	$.59	7.7%
2018	$.64	$.64	$1.28	8.4%
2019	$1.005	$1.005	$2.01	8.2%
2020	$1.255	$1.255	$2.51	5.2%
2021	$1.255	$1.255	$2.51	0.0%

See Exhibit 14, the City's Water-Sewer Tax FAQ; Exhibit 15, Ordinance 3-80 at § 3-80-040.

81. If water-sewer customers, like Plaintiff, fail to pay the Water and Sewer Taxes, a penalty accrues at a rate of 1.25% per month. Exhibit 14, the City's Water-Sewer Tax FAQ; Exhibit 15, Ordinance 3-80 at § 3-80-060. Moreover, Article V of the City's Water and Sewer Ordinances, § 11-12-330 *et seq.* entitled Assessing and Collecting Charges permits the City to, among other actions: pursue unpaid water and sewer charges via collection action (§ 11-12-330); assess late payment penalties (§ 11-12-420); and authorizes the City to terminate service and shut off water should the customer fall into arrears on water bills that are unpaid after a period of 30 days (§ 11-12-480). *See* Exhibit 4 hereto.

82. In addition, state statutes provide the City with broad powers to enforce and collect unpaid water and sewer charges. 65 ILCS 5/11-139-8 creates a lien in favor of a municipality to secure payment of water and sewer charges, and further authorizes municipalities to bring civil actions to recovery unpaid water and sewer charges and gives the municipalities the right to recover their attorneys' fees in such actions. Payment of the Water and Sewer Taxes therefore is not voluntary.

83. The City began imposing the Water and Sewer Taxes upon its water and sewer customers expressly as a means of generating additional revenue to finance its general governmental obligation of funding its pension benefit obligations.

84. Thus, the Water and Sewer Taxes imposed by Ordinance No. 3-80 are not for or related to Plaintiff's actual use of the City's water and sewer system. Accordingly, the Water and Sewer Taxes are unlawful and unauthorized charges upon Plaintiff and those water and sewer customers in the City who/which have incurred or paid the Water and Sewer Taxes and are similarly situated.

85. Pursuant to Ill Const. art. VII § 6(a), the City is automatically conferred "home rule" status because it has a population of more than 25,000 residents.

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86. Traditional municipalities are political subdivisions of the state and may only exercise the authority the state expressly grants to them. In contrast, home rule municipalities like the City govern more independently from the state and may exercise any power and perform any function unless it is expressly prohibited from doing so by state law. *See generally* Ill Const. art. VII § 6 and specifically Ill Const. art. VII § 6 (i).

87. Thus, as a home rule municipality, the City enjoys legislative autonomy and has the power to tax, subject to express state laws that regulate the type of taxes the City may impose.

88. Illinois statute 65 ILCS 5/8-11-6a, entitled "Home Rule Municipalities; Preemption of Certain Taxes" provides in relevant part:

> Except as provided in Sections 8-11-1, 8-11-5, 8-11-6, 8-11-6b, 8-11-6c, 8-11-23, and 11-74.3-6 on and after September 1, 1990, no home rule municipality has the authority to impose, pursuant to its home rule authority, a retailer's occupation tax, service occupation tax, use tax, **sales tax or other tax on the use, sale or purchase of tangible personal property based on the gross receipts from such sales or the selling or purchase price of said tangible personal property**.
>
> Notwithstanding the foregoing, this Section does not preempt any home rule imposed tax such as the following:

****

> (7) other taxes not based on the selling or purchase price or gross receipts from the use, sale or purchase of tangible personal property.

****

This Section is a limitation, pursuant to subsection (g) of Section 6 of Article VII of the Illinois Constitution, on the power of home rule units to tax. [emphasis added].

89. The overarching legislative purpose of § 8-11-6a is to restrict a home rule municipality's power to tax. *See Iwan Ries & Co v City of Chicago*, 160 NE3d 916, 922 (2019) ("clear legislative intent to limit a home rule unit's authority to impose certain taxes").

90. The Water Tax is a tax on the purchase of tangible personal property—water—that is based on the cost of the amount of water purchased by the City's water customers, and thus is a tax based upon the gross receipts from the sale of, or the selling or purchase price of, water by the City to its water customers in violation of 65 ILCS 5/8-11-6a.

91. The City's Ordinance No. 3-80 is thus preempted by 65 ILCS 5/8-11-6a and as such, the Water Tax is an unlawful and unauthorized tax upon Plaintiff and those of the City's water customers that have incurred or paid the Water Tax and are thus similarly situated.

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92. 65 ILCS 5/8-11-6a restricts the City's power to tax, expressly prohibiting imposition of a use tax, sales tax or other tax on the use, sale, or purchase of tangible personal property based on the gross receipts from such sales or the sales price.

93. The Water Tax, first imposed by the City in March 2017, is a use tax, sales tax and/or other tax on the use, sale, and/or purchase of tangible personal property (water) that is also based on the gross receipts from such sales and/or the sales price.

94. 65 ILCS 5/8-11-6a preempts the Water Tax's enacting ordinance, Ord. No. 3-80.

95. The Water Tax is unlawful, invalid, and unauthorized under Illinois law, specifically 65 ILCS 5/8-11-6a.

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

97. 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.

98. By virtue of the City's imposition of the Water Tax, 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.

99. 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 Water Tax, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

100. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected through its unlawful imposition of the Water Tax.

COUNT II

UNJUST ENRICHMENT FOR VIOLATION OF 65 ILCS 5/8-11-6a

WATER TAX

[Summary Judgment was granted on Count II in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count I, the City incorporates it Answers to Complaint, Count II]

101. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, and 76-96, inclusive, as if fully set forth herein.

102. 65 ILCS 5/8-11-6a, restricts the City's power to tax, expressly prohibiting imposition of a use tax, sales tax or other tax on the use, sale, or purchase of tangible personal property based on the gross receipts from such sales or the sales price.

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103. The Water Tax, first imposed by the City in March 2017, is a use tax, sales tax and/or other tax on the use, sale, and/or purchase of tangible personal property (water) that is also based on the gross receipts from such sales.

104. 65 ILCS 5/8-11-6a preempts the Water Tax's enacting ordinance, Ord. No. 3-80.

105. The Water Tax is unlawful, invalid, and unauthorized under Illinois law, specifically 65 ILCS 5/8-11-6a.

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

107. By virtue of the City's imposition of the Water Tax, the City has collected amounts in excess of amounts it was legally entitled to collect.

108. 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 Water Tax, Plaintiff and the Class have conferred a benefit upon on [sic.] the City and it would be inequitable for the City to retain that benefit.

109. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected through its unlawful imposition and collection of the Water Tax.

COUNT III

ASSUMPSIT-MONEY HAD AND RECEIVED – UNREASONABLE WATER AND SEWER RATES

WATER AND SEWER TAXES

[Summary Judgment was granted on Count III in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count III, the City incorporates it Answers to Complaint, Count III]

110. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, and 76 through 96, inclusive, as if fully set forth herein.

111. Under Illinois common law, Water and Sewer Rates must be reasonable and all charges imposed must relate to the actual use of the water and sewer system. *See e.g. Village of Niles v. City of Chicago*, 82 Ill App 3d 60, 68; 37 Ill Dec 142; 401 NE2d 1235 (1980); *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89, 94-95; 40 Ill Dec 164; 405 NE2d 1256 (1980).

112. Water and Sewer Taxes are not for or related to Plaintiff's actual use of the City's water and sewer system, but are imposed to increase payments to the City's Municipal Employees' Annuity and Benefit Fund.

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113. The City's Water and Sewer Taxes, when incorporated into the City's Water and Sewer Rates, render these rates arbitrary, capricious, and unreasonable.

114. 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.

115. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

116. By virtue of the City's imposition of the Water and Sewer Taxes, 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.

117. 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 Water and Sewer Taxes, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

COUNT IV

UNJUST ENRICHMENT – UNREASONABLE WATER AND SEWER RATES

WATER AND SEWER TAXES

[Summary Judgment was granted on Count IV in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count IV, the City incorporates it Answers to Complaint, Count IV]

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118. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, and 76 through 96, inclusive, as if fully set forth herein.

119. Under Illinois common law, Water and Sewer Rates must be reasonable and all charges imposed must relate to the actual use of the water and sewer system. *See e.g. Village of Niles v. City of Chicago*, 82 Ill App 3d 60, 68; 37 Ill Dec 142; 401 NE2d 1235 (1980); *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89, 94-95; 40 Ill Dec 164; 405 NE2d 1256 (1980).

120. The Water and Sewer Taxes are not for or related to Plaintiff's actual use of the City's water and sewer system but are imposed to increase payments to the City's Municipal Employees' Annuity and Benefit Fund.

121. The City's Water and Sewer Taxes, when incorporated into the City's Water and Sewer Rates, render these rates arbitrary, capricious, and unreasonable.

122. 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 Water and Sewer Taxes, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

123. By virtue of the City's inclusion of the Water and Sewer Taxes in its water and sewer rates, the City has collected amounts in excess of the amounts it was legally entitled to collect.

124. The City has been unjustly enriched because it received the Water and Sewer Tax revenues to which it was not entitled, and it would be unfair for the City to retain the Water and Sewer Taxes under the circumstances.

125. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

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126. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT V

ASSUMPSIT-MONEY HAD AND RECEIVED – VIOLATION OF 65 ILCS 5/11-139-8

WATER AND SEWER TAXES

[Summary Judgment was granted on Count V in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count V, the City incorporates it Answers to Complaint, Count V]

127. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, and 76 through 96, inclusive, as if fully set forth herein.

128. 65 ILCS 5/11-139-8 authorizes the City to establish rates for water and sewer services to the City's water and sewer customers, and imposes the express limitation that the City only "charge the inhabitants thereof a reasonable compensation for the use and service of the combined waterworks and sewage system and to establish rates for that purpose."

129. By including the Water and Sewer Taxes in the City's water and sewer rates, the City has failed to charge its inhabitants "a reasonable compensation for the use and service of the combined waterworks and sewage system" in violation of 65 ILCS 5/11-139-8.

130. The City's Water and Sewer Taxes, when incorporated into the City's Water and Sewer Rates, render these rates arbitrary, capricious, and unreasonable.

131. 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.

132. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield*

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> (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

133. By virtue of the City's imposition of the Water and Sewer Taxes, 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.

134. 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 Water and Sewer Taxes, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

COUNT VI

UNJUST ENRICHMENT – VIOLATION OF 65 ILCS 5/11-139-8

WATER AND SEWER TAXES

[Summary Judgment was granted on Count VI in Plaintiff's original Complaint ("Complaint"). To the extent Plaintiff's improperly amended allegations are an attempt to preserve Count VI, the City incorporates it Answers to Complaint, Count VI]

135. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, 76 through 96, and 128 through 134, inclusive, as if fully set forth herein.

136. 65 ILCS 5/11-139-8 authorizes the City to establish rates for water and sewer services to the City's water and sewer customers and imposes the express limitation that the City only "charge the inhabitants thereof a reasonable compensation for the use and service of the combined waterworks and sewage system and to establish rates for that purpose."

137. By including the Water and Sewer Taxes in the City's water and sewer rates, the City has failed to charge its inhabitants "a reasonable compensation for the use and service of the combined waterworks and sewage system" in violation of 65 ILCS 5/11-139-8.

138. The City's Water and Sewer Taxes, when incorporated into the City's Water and Sewer Rates, render these rates arbitrary, capricious, and unreasonable.

139. 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 Water and Sewer Taxes, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

140. By virtue of the City's inclusion of the Water and Sewer Taxes in its water and sewer rates, the City has collected amounts in excess of the amounts it was legally entitled to collect.

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143. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

142. The City has been unjustly enriched because it received the Water and Sewer Tax revenues to which it was not entitled, and it would be unfair for the City to retain the Water and Sewer Taxes under the circumstances.

143. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT VII

ACTION FOR REPARATIONS-MONEY HAD AND RECEIVED FOR VIOLATION OF UNIFORMITY CLAUSE OF ILLINOIS CONSTITUTION

WATER AND SEWER TAXES

[Count VII has been dismissed with prejudice]

144. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, and 76 through 96, inclusive, as if fully set forth herein.

145. The Uniformity Clause of the Illinois Constitution provides: "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX, Sec. 2.

146. The Water and Sewer Taxes are not property taxes. For a nonproperty tax classification to survive scrutiny under the uniformity clause, the classification must (1) be based on a real and

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substantial difference between the people taxed and those not taxed, **and** (2) bear some reasonable relationship to the object of the legislation or to public policy. *Milwaukee Safeguard Ins. Coc. v. Selcke*, 179 Ill.2d 94, 98, 688 N.E.2d 68 (1997). The tax "must meet **both** prongs of the uniformity test to pass constitutional muster." *U.S.G. Italian Marketcaffe v. City of Chicago*, 332 Ill. App. 3d 1008, 1015, 775 N.E.2d 47 (1st Dist. 2002) (emphasis added).

147. The Uniformity Clause was intended to be a broader limitation on legislative power to classify for nonproperty tax purposes than the limitation of the equal protection clause (*Searle Pharmaceuticals, Inc. v. Dept. of Revenue*, 117 Ill.2d 454, 469, 512 N.E.2d 1240 (1987)) and was meant to insure that taxpayers would receive added protection in the state constitution based upon a standard of reasonableness that is more rigorous than that contained in the federal constitution (*Milwaukee Safeguard*, 179 Ill.2d at 102). As a result, the party attacking a tax classification is not required to negate every conceivable basis that might support it. *Searle*, 117 Ill.2d at 468. The reasonable relationship test requires some meaningful linkage between the tax and the object of the legislation establishing the tax.

148. The Water and Sewer Taxes violate the Uniformity Clause because (1) they are not based on a real and substantial difference between the people taxed and those not taxed, and (2) they do not bear a reasonable relationship to the object of the legislation or to public policy.

149. First, there is no "real and substantial" difference between water and sewer customers who pay the Taxes, and other groups of citizens and property owners in the City who do not pay the Taxes. The Taxes are used to fund the City's pension obligations owed to the Municipal Employees' Fund, which includes employees whose employment services benefit the City and its citizens generally. Water and Sewer customers do not cause or contribute to the City's need to fund pensions in any manner different than other citizens in the City who are not water and sewer customers, including but not limited to the owners and occupiers of properties (like vacant lots and parking lots) that do not have water and sewer service.

150. The City's decision to finance hundreds of millions of dollars of pension contributions to the Municipal Employees' Fund through taxes imposed only on water and sewer customers is completely arbitrary. The City clearly cannot justify the tax classification by arguing that the Taxes support **only** the pensions of employees of the Water Fund or Sewer Funds. Indeed, Water Fund employees represent just 6.4% of the covered payroll of all employees covered by the Municipal Employees' Fund and Sewer Fund employees represent just 3.1% of that covered payroll. Therefore, over 90% of the employees covered by the Municipal Employees' Fund – representing 90% of the expense of that Fund – are not associated with the Water or Sewer Funds.

151. Even worse for the City, the annual contributions to the Municipal Employees' Fund attributable to the Water and Sewer Funds are already funded by the City's water and sewer usage Charges, which are completely separate from the Water and Sewer Taxes. According to the City, the pension costs are to be allocated based upon each City fund's percentage of the total "covered payroll" of all City funds with employees in the Municipal Employees' Fund. For 2020, the total "covered payroll" of all of the applicable City funds was $1,861,905,000. *See* Exhibit 16 hereto. In 2022, for example, the City allocated $59,725,000 of the total City contribution to the Municipal Employees' Fund to the Water Fund. *See* Exhibit 7 hereto. That $59,725,000 – which,

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again, was **in addition to** the $200+ million in Water and Sewer Taxes currently being paid by the very same group of water and sewer customers – was incorporated into the City's Water Rates being paid by its water customers.

152. All properties and citizens in the City that are not water or sewer customers of the City are not subject to the Water and Sewer Taxes. While it may be tempting to equate the class of water and sewer customers in the City with the class of all property owners in the City, that would be a mistake. Among the Chicago citizens who do not pay Water and Sewer Taxes are owners of parking lots, vacant land and any other properties or structures that are not hooked up to the City's water and sewer system. Those properties receive the benefit of the City's increased pension funding for City employees in the Municipal Employees' Fund. Yet, the City proffers no justification for its exemptions extended to those properties and citizens.

153. In addition, there is no "real and substantial" difference between water and sewer customers who pay the Taxes and the Exempt Customers. Both groups receive the very same treated water from the City and both groups receive the very same sewage disposal services. The only difference between the two groups is that the City has arbitrarily chosen to excuse the Exempt Customers from their obligation to pay the Taxes.

154. Second, the City's method of imposing and collecting the Taxes does not bear a reasonable relationship to the object of the legislation or to public policy.

155. The "object" of the City's ordinance imposing the Water and Sewer Taxes is to finance pension benefits for general employees of the City. *See* "Water and Sewer Tax FAQ (Exhibit 14 hereto) ("The revenue from this tax will be used to make certain mandated pension payments" that "will support the retirements of many municipal employees, including our snow plow drivers, our librarians, and CPS non-teaching staff, such as classroom aides"); City Ordinance Section 3-80-070 (Exhibit 3 hereto) ("All proceeds resulting from the imposition of the tax imposed by this chapter, including any interest or penalties relating to the tax, shall be deposited in the City's Corporate Fund and shall be used to meet the City's funding obligations to the Municipal Employees' Annuity and Benefit Fund of Chicago").

156. A tax on only some water and sewer customers has no "reasonable relationship" to that object – *i.e.*, there is no linkage between water and sewer usage by the City's water and sewer customers who incur and pay the Water and Sewer Taxes and the City's obligation to fund the pensions. This is particularly true given that the amount of the Water and Sewer Taxes paid by the persons subject to the tax is based upon how much water they use. Not only does water usage in general have no reasonable relationship to the object of funding municipal pensions but the fact that the amount each water and sewer customer must contribute to the funding of the pensions based upon, for example, how long they shower every morning and/or how much they water their lawn makes the relationship even more attenuated. In sum, the class of taxpayers subject to the tax is not part of the class which is regulated or benefitted by the pension contributions financed with the tax proceeds and the measure of the Tax renders the claimed relationship even more unreasonable. This is particularly true given that water and sewer customers already finance the pension benefits of retired water and sewer employees through their water and sewer rates.

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157. In order to be "reasonably related" to the object of the Taxes, each payer of the Taxes need not personally benefit from the use of the tax proceeds and it is permissible for persons who do not pay the tax to benefit, but the class of taxpayers subject to the tax must be part of the class which is regulated or benefitted by the program financed (at least in part) with the tax proceeds.

158. The Water and Sewer Tax is unlawful, invalid, and unauthorized under Illinois law, specifically the Uniformity Clause.

159. As a direct and proximate result of the City's unlawful and improper conduct in imposing and collecting the Water and Sewer Taxes, the City has collected millions of dollars to which it is not entitled.

160. 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.

161. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

162. By virtue of the City's imposition of the Water and Sewer Taxes, 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 to recover back the amount of the illegal exaction.

163. 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 Water Tax, Plaintiff and the Class have conferred a benefit upon on [sic.] the City.

164. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected through its unlawful imposition of the Water Tax.

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COUNT VIII

UNJUST ENRICHMENT FOR VIOLATION OF UNIFORMITY CLAUSE OF THE ILLINOIS CONSTITUTION

WATER AND SEWER TAXES

[Count VIII has been dismissed with prejudice]

165. Plaintiff incorporates each of the preceding paragraphs 1, 16, 20 through 26, 31, 34 through 40, 76 through 96, and 145 through 164, inclusive, as if fully set forth herein.

166. The Water and Sewer Tax is unlawful, invalid, and unauthorized under Illinois law, specifically the Uniformity Clause.

167. As a direct and proximate result of the City's unlawful and improper conduct in imposing and collecting the Water and Sewer Taxes, the City has collected millions of dollars to which it is not entitled.

168. By virtue of the City's imposition of the Water and Sewer Taxes, the City has collected amounts in excess of amounts it was legally entitled to collect.

169. 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.

170. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

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

172. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected through its unlawful imposition and collection of the Water Taxes.

COUNT IX

UNJUST DISCRIMINATION IN WATER AND SEWER RATES AND CHARGES

173. Plaintiff incorporates each of the preceding paragraphs 1 through 21, and 27 through 74, inclusive, as if fully set forth herein.

Answer: The City incorporates its answers to each of the preceding paragraphs 1 through 21, and 27 through 74, inclusive, as if fully set forth herein.

174. This Count sets forth a single cause of action – unjust rate discrimination in violation of Illinois common law and 65 ILCS 5/11-139-8, which imposes the express limitation that the City only "charge the inhabitants thereof a reasonable compensation for the use and service of the combined waterworks and sewage system and to establish rates for that purpose."

Answer: The City admits that Count IX is a single cause of action. The City denies this paragraph's remaining allegations.

175. Separate and independent of the Water and Sewer Taxes, the City's Water and Sewer Charges to Plaintiff and the Class have been unreasonably discriminatory because the City has illegally exempted thousands of similarly-situated water and sewer customer locations from their obligation to pay the City's Water and Sewer Rates and Charges, which has resulted in dramatically higher Rates and Charges being assessed against Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

176. Plaintiff's unfair discrimination claims described in this Count are based upon common law principles (described in detail below) which prohibit unreasonable rate discrimination and not upon the equal protection provisions of the Illinois Constitution. *See, e.g., Greater Peoria Sanitary & Sewage Disposal Dist. v. Kellstedt*, 130 Ill. App. 3d 1002, 1004-1005, 474 N.E.2d 1267 (3d Dist. 1985) (explaining that common law unreasonable discrimination claims are different than equal protection claims and subject to a more lenient standard).

Answer: The City admits that the claims describing in the count purports to be based on the common law and not equal protection but denies that they adequately set forth a cause of action. The City denies the parenthetical's description of *Kellstedt*'s rule being that common-law unreasonable discrimination claims are "subject to a more lenient standard" than equal-protection claims are.

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177. Further, while the Uniformity Clause claims in Counts VII and VIII are based upon the City's imposition of the Water and Sewer **Taxes**, and therefore the "exemptions" that are part of the uniformity challenge are "exemptions" from those **Taxes**, the Unfair Discrimination Claims are based upon City exemptions of various users, including certain senior citizens, from payment of **water and/or sewer usage charges**. The Unfair Discrimination Claims are not judged by or subject to the standards of the Uniformity Clause, but rather by the common law principles and other limitations applicable to water and sewer charges imposed by municipal utilities.

Answer: The City admits that dismissed counts VII and VIII were based on Water and Sewer Taxes and further admits that this Count does not reference the Uniformity Clause. The City denies that the standards applicable to claims of discrimination under the Uniformity Clause are irrelevant to the claims in this count or that this paragraph accurately states the applicable standards for Plaintiff's claims.

178. The City is precluded from imposing unjustly discriminatory rates and charges on certain of its water and sewer customers. A utility rate scheme is unjustly discriminatory when differences in rates assessed to two groups of customers are not justified by differences in costs to serve those two groups of customers. *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89; 40 Ill Dec 164; 405 NE2d 1256 (1980). The test used for deciding the validity of the difference in rates is to determine whether the difference is reasonable, and not arbitrary, based on a consideration of such factors as differences in the amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs. If the difference in rates is not reasonably related to a difference in the costs of providing the service, there is unreasonable discrimination. *Austin View* at p. 99.

Answer: The City denies that this paragraph accurately states the elements of a rate discrimination claim. The City admits Plaintiff is complaining about the City's water and sewer rates but denies it engaged in any wrongdoing and denies this paragraph's remaining allegations.

179. The City's Ordinance creates a number of total and partial payment exemptions (the "Exemptions") for various types of properties which receive water and/or sewer services from the City (the "Exempt Customers"). The Exempt Customers include the City itself, the Chicago Public Schools, City College, certain hospitals and certain nonprofit organizations. Section 11-12-540 of the Ordinance (Exhibit 4 hereto) creates these exemptions and provides as follows:

> (a) The comptroller shall exempt from the payment of water rates the property enumerated in this subsection (a) if the account for such property is controlled by meter, as follows. If the account for such property is not controlled by meter, no exemption shall apply.
>
> (1) Any property of the State of Illinois that is used as an armory by the state or federalized national guard shall be exempt from payment of 100% of the water service charge.
> (2) All property owned or leased or occupied by the City of Chicago shall be exempt from payment of 100% of the water service charge, unless said City,

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either as lessee or lessor, shall enter into an agreement for the payment of rates by the other party.

(3) All property owned or leased or occupied by the Chicago Public Schools shall be exempt from payment of 100% of the water service charge, unless said entity, either as lessee or lessor, shall enter into an agreement for the payment of rates by the other party.

(4) All property owned or leased or occupied by the City Colleges of Chicago shall be exempt from payment of 100% of the water service charge, unless said entity, either as lessee or lessor, shall enter into an agreement for the payment of rates by the other party.

(5) Hospitals located within the corporate limits of the City that are operated by the Cook County government shall be exempt from payment of 100% of the water service charge.

(6) Except as otherwise provided in paragraph (5) of this subsection (a), not-forprofit disproportionate share hospitals located within the corporate limits of the City shall be exempt from payment of 60% of the water service charge in 2012, 40% of the water service charge in 2013, and at least 25% of the water service charge in 2014 and thereafter, if such not-for-profit hospital qualifies for a disproportionate share adjustment consistent with Section 148.120 of Subchapter d of Chapter I of Title 89 of the Illinois Administrative Code, as amended, codified at 89 Ill. Adm. Code § 148.120. Provided, however, that in 2014 and thereafter, if such disproportionate share hospital has net assets or fund balances of:

(i) Less than One Million Dollars ($1,000,000.00) at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such disproportionate share hospital shall be exempt from payment of 100% of the water service charge:

(ii) One Million Dollars ($1,000,000.00) or more but less than Ten Million Dollars ($10,000,000.00) at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such disproportionate share hospital shall be exempt from payment of 60% of the water service charge.

(7) Public museums shall be exempt from payment of 20% of the water service charge, if such public museum is eligible to receive funds for capital development under subdivision (7) of § 1-25 of the Department of Natural Resources Act, as amended, codified at 20 ILCS 801/1-1 et seq.

(8) Not-for-profit organizations as defined in subparagraph (8)(v) of this subsection (a), other than any entity identified in paragraphs (1) through (7) of this subsection (a), that adopt a water conservation plan and perform within the corporate limits of the city charitable work benefiting the public shall be exempt in 2013 and thereafter from payment of the water service charge for water supplied to premises owned and used and occupied exclusively by such not-for-profit organization, as follows:

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(i) If the not-for-profit organization has net assets or fund balances of less than One Million Dollars ($1,000,000.00) at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such not-for-profit organization shall be exempt from payment of 100% of the water service charge;
(ii) If the not-for-profit organization has net assets or fund balances of One Million Dollars ($1,000,000.00) or more but less than Ten Million Dollars ($10,000,000.00) at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such not-for-profit organization shall be exempt from payment of 60% of the water service charge;
(iii) If the not-for-profit organization has net assets or fund balances of Ten Million Dollars ($10,000,000.00) or more but less than Two Hundred Fifty Million Dollars ($250,000,000.00) at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such not-for- profit organization shall be exempt from payment of 25% of such water service charge;
(iv) If the not-for-profit organization has net assets or fund balances of Two Hundred Fifty Million Dollars ($250,000,000.00) or more at the end of the tax year or calendar year immediately preceding the calendar year in which the exemption from payment of the water service charge is being claimed, such not-for- profit organization shall be not be* entitled to any exemption from payment of the water service charge and shall be required to pay 100% of the water service charge.
(v) As used in this paragraph (8), the term "not-for-profit organization" means an Illinois corporation organized and existing under the General Not For Profit Corporation Act of 1986 in good standing with the State and having been granted status as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986.

(b) (1) The supply to all premises enumerated in this section on which water may be taken from the waterworks system of the City of Chicago shall be controlled by meter, and the cost of meter, its installation, connections and vaults thereof, and the erection, construction and maintenance thereof shall be paid for and be borne by the institution or owner thereof. Nothing contained in this paragraph shall be held to exempt property of the United States, of the State of Illinois, or of any of its political subdivisions except as hereinbefore mentioned.

(2) If, at the determination of the City, a vault is required to be built on the public right of way prior to the installation of a water meter at a location owned by a not-forprofit organization as defined in subparagraph (8)(v) of subsection (a) of this section, and such not-for- profit organization demonstrates to the satisfaction of the comptroller that the organization will suffer undue financial hardship if the organization is required to pay the costs associated with installing the vault and water meter, including any additional costs that may be incurred by the City in connection with the excavation of the associated structure, the comptroller may enter into a written installment plan agreement with such not- for-profit

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organization allowing the organization to pay such costs over an extended period of time in substantially equal installments. Failure to comply with the terms of the installment plan agreement may result, if applicable, in loss of the not-for-profit organization's exemption under paragraph (8) of subsection (a) of this section from payment of the water service charge.

Each installment plan shall be in a form prescribed by the comptroller, and shall state the organization's total indebtedness to the City for such costs, the amount of the initial installment, the amount of each subsequent installment, the date by which each installment is due, the penalty for delinquency under the installment plan, and such other provisions as the comptroller may require. Provided, however, that the comptroller may deny any application where it is determined that the applicant has committed fraud or has failed to make a good faith effort to comply with this section. Any recommendation, action or decision of the comptroller regarding the existence of financial hardship or the financial hardship process shall be within the sole discretion of the comptroller. Nothing in this subsection (b)(2) shall be construed to prohibit a not-for-profit organization from voluntarily making an initial minimum payment or monthly installment payment in an amount greater than provided in the installment plan agreement.

As used in this subsection (b)(2), the term "comptroller" means the comptroller of the City of Chicago or the comptroller's designee.

(c) The comptroller may fix such reasonable amounts of water as the comptroller, following consultation with the commissioner of water management, may deem to be sufficient for the requirements of said premises, and the exemption from payment of water rates shall be limited to said reasonable amounts so fixed. All use of water in excess of said reasonable amounts shall be paid for at the rates for metered water hereinafter fixed in Section 11-12-310.

(d) Accounts against the property of any entity exempted under the provisions of items (1), (2), (3), (4), (5), (6), (7) or (8) of subsection (a) of this section shall be kept in the usual manner. Upon receipt of the initial application for such exemption, such account, which shall be metered, shall be inspected by authorized personnel from the department of water management, who shall certify to the comptroller whether the entity so inspected is eligible for the exemption under this section being claimed by such entity.

Answer: The City admits that it provides exemptions from water and sewer taxes to certain individuals and entities in Chicago Municipal Code Section 11-12-540. The City denies that Section 11-12-540 contains the exact language quoted.

180. In all, over 6800 water accounts receive partial or total Exemptions from the payment of Water Charges. *See* Exhibit 11 hereto. The partial or total Exemptions are not based on a consideration of such factors as differences in the amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs to

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serve the Exempt Customers and the Non-Exempt Customers. *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89; 40 Ill Dec 164; 405 NE2d 1256 (1980).

Answer: The City lacks knowledge sufficient to form a belief as to truth of the allegations in the first sentence of this paragraph and therefore neither admits or denies the allegations. The City's investigation continues. The City denies that this paragraph sets forth the relevant factors for granting, by ordinance, partial or total exemptions from the payment of water charges and therefore denies this paragraph's remaining allegations.

181. First, the treated water provided to the Exempt Customers is of the same quality as the treated water provided to Non-Exempt Customers. Thus, the Exemptions from Water Charges cannot be justified on the grounds that the treated water supplied to Exempt Customers is less valuable or of a lower quality than the treated water provided to Non-Exempt Customers.

Answer: The City admits the first sentence of this paragraph. The City admits that a difference in water quality would not be a basis for the Exemptions. The City denies the implication that the City must justify the Exemptions based on a difference in service and denies the remaining allegations in this paragraph.

182. Similarly, the operations, maintenance and capital expenses incurred by the City to supply a gallon of water are the same for all water customers. The City's financial statements for its Water Fund identify the following types of operating and maintenance expenses: (1) "Source of Supply," (2) "Power and Pumping," (3) "Purification," (4) "Transmission and Distribution," (5) "Customer Accounting and Collection," (6) "Administrative and General," (7) "Central Services and General Fund Reimbursements," and (8) "Pension expense." *See* Exhibit 8 hereto.

Answer: The City denies that it calculates the operations, maintenance, and capital expenses needed to supply one gallon of water to one customer. The City admits that page 15 of the Annual Comprehensive Financial Report for the City of Chicago Department of Water Management Water Fund for the year ended December 31, 2022 (Ex. 8) lists the expenses Plaintiff cites, but that list of operating expenses is a mere summary of the Water Fund's operating expenses in total for that year and explains nothing about the costs of supplying water to different types of customers. To the extent further response is required, the City denies this paragraph's allegations.

183. The City's Source of Supply expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

184. The City's Power and Pumping expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

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185. The City's Purification expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

186. The City's Transmission and Distribution expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

187. The City's Customer Accounting and Collection expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculated expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

188. The City's Administrative and General expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

189. The City's Central Services and General Fund Reimbursement expenses on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

190. The capital costs associated with the City's Water System on a per gallon basis are the same for Exempt and Non-Exempt Water Customers.

Answer: The City denies that it allocates costs on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

191. The monetary value of the Exemptions from Water Charges is enormous:

Answer: The City denies this paragraph's allegations.

192. In 2017, the Exempt Properties received partial or total Exemptions from Water Charges in the total amount of $19,789,872.91.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

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193. In 2018, the Exempt Properties received partial or total Exemptions from Water Charges in the amount of $19,141,084.44.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

194. In 2019, the Exempt Properties received partial or total Exemptions from Water Charges in the amount of $19,096,680.69.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

195. In 2020, the Exempt Properties received partial or total Exemptions from Water Charges in the total amount of $15,665,355.84.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

196. In 2021, the Exempt Properties received partial or total Exemptions from Water Charges in the total amount of $20,188,266.78.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

197. The total monetary value of the Exemptions from Water Charges between January 1, 2017 and December 31, 2021 exceeds $93 million. *See* Exhibit 11 hereto.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

198. Section 3-12-020 of the Ordinance further exempts the Exempt Customers (fully or partially) from payment of Sewer Charges. *See* Exhibit 3 hereto. The total monetary value of all of these Exemptions between January 1, 2017 and December 31, 2021 exceeds $40 million. *See* Exhibit 11 hereto.

Answer: The City admits that Section 3-12-020 provides total and partial exemptions from payment of sewer charges to certain customers who are also exempt, totally or partially, from payment of water charges. The City lacks knowledge sufficient to form a belief as to the truth of this paragraph's remaining allegations and therefore does not admit or deny them. The City's investigation continues.

199. Finally, Section 3-12-050 totally exempts qualified sewer customers 65 and over from payment of the Sewer Charges (the "Senior Sewer Exemption"). *See* Exhibit 3 hereto. In order to receive the Senior Sewer Exemption, a person must (1) be 65 years of age or older, (2) be the owner of the residential unit receiving sewer service, (3) occupy the residence as his or her

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principal place of residence and (4) have a residence with a separate water meter or assessed account. *Id*.

Answer: The City admits this paragraph's allegations.

200. The Senior Sewer Exemption is in no way based on financial need – *i.e.*, wealth or income. In fact, it requires that the person claiming the exemption OWN the residence receiving sewer service and also use it as their principal residence. This means they are a homeowner (and not a renter), which is a further indication that they are not indigent. This also leads to the nonsensical result that an 85-year old low-income renter must pay for sewer services but a 65-year old high-income homeowner is Exempt from the obligation to pay for those same services.

Answer: The City denies the first sentence of this paragraph. The City admits that one of the necessary conditions for qualifying for the exemption is ownership of the property that would be assessed sewer charges. The City denies the remaining allegations of this paragraph, including the assertion that a person cannot be "indigent" simply because they own a home and the suggestion that a renter, rather than the renter's landlord, would necessarily be responsible for sewer charges for a rental property.

201. Persons who receive the Senior Sewer Exemption are included within the definition of "Exempt Customers" herein.

Answer: The City admits Plaintiff purports to include persons receiving the Senior Sewer Exemption in its defined term "Exempt Customers" as Plaintiff uses that term in this paragraph of the complaint.

202. Over 62,000 sewer customers of the City receive the Senior Sewer Exemption. Between January 1, 2017 and December 31, 2021, the monetary value of the Senior Sewer Exemption has exceeded $110 million. *See* Exhibit 11 hereto.

Answer: The City lacks knowledge sufficient to form a belief as to the truth of this allegation and therefore does not admit or deny it. The City's investigation continues.

203. Like the Exemptions for Water Charges, the partial or total Exemptions for Sewer Charges (including for customers who receive the Senior Sewer Exemption) are not based upon any differences in costs to serve the Exempt Customers and the Non-Exempt Customers. *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89; 40 Ill Dec 164; 405 NE2d 1256 (1980).

Answer: The City denies this paragraph accurately cites or summarizes the referenced authority. The City denies this paragraph accurately sets forth the process water customers seeking partial or total exemptions must undergo to be considered for and ultimately receive a partial or total exemption. The City admits Exemptions for Sewer Charges are not based on costs but denies a difference in costs is determinative in deciding whether Exemptions are illegal. *Village of Niles v. City of Chicago*, 201 Ill. App. 3d 651, 680 (1st Dist. 1980) ("if the rates charged to plaintiffs are not excessive, there is no unreasonable discrimination").

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204. First, the assumed characteristics of the sewage generated by Exempt Customers is the same as the assumed characteristics of the sewage generated by Non-Exempt Customers. Thus, the Exemptions cannot be justified on the grounds that sewage generated by Non-Exempt Customers is more costly to collect, convey or treat. This is particularly true because the City incurs no treatment costs for the sewage that originates in the City. All the City's sewage is ultimately conveyed to the Metropolitan Water Reclamation District of Greater Chicago (the "MWRD"), a public utility not affiliated with the City, which provides the treatment. The MWRD treatment costs for the inhabitants of Chicago (including Plaintiff and the Class) are not included in the City's Sewer Rates but are instead financed through separate property taxes.

Answer: The City denies the implication that the City must justify the Exemptions based on "assumed characteristics" and a difference in cost and therefore denies the allegations in the first two sentences of this paragraph. The City admits the MWRD provides the treatment for the City's sewage but denies that it makes anything "particularly true." The City admits that MWRD costs are financed by property taxes and not by the Sewer Fund.

205. The City's Sewer Fund incurs only the costs associated with collecting and conveying the sewage to the MWRD and operating, maintaining and improving the physical infrastructure (sewer pipes, etc.) that are used to collect and convey the sewage from structures in the City to the MWRD.

Answer: The City admits this paragraph's allegations.

206. The operations, maintenance and capital expenses incurred by the City to dispose of a gallon of sewage are the same for all customers. The City's financial statements for the Sewer Fund set forth the following types of operating and maintenance expenses: (1) "Repairs," (2) "General Fund Reimbursements," (3) "Pension Expense," (4) "Maintenance," (5) "Engineering," and (6) "Administrative and General." *See* Exhibit 17 hereto.

Answer: The City does not calculate the operations, maintenance and capital expenses to transfer waste on a per gallon basis and denies the allegations in the first sentence of this paragraph. The City admits that in the Statement of Revenues, Expenses, and Changes in Net Position for the Year Ended December 31, 2022 (Ex. 17), the listed expenses are included under "Operating Expenses."

207. The City's Repair expenses on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

208. The City's General Fund Reimbursement expenses on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

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209. The City's Pension Expense on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

210. The City's Maintenance expenses on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

211. The City's Engineering expenses on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

212. The City's Administrative and General expenses on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

213. The capital costs associated with the City's Sewer System on a per gallon basis are the same for Exempt and Non-Exempt Sewer Customers.

Answer: The City denies that it calculates expenses on a per gallon basis. To the extent further response is required, the City denies this paragraph's allegations.

214. The total monetary value of all of the Exemptions for 2017 through 2021 is as follows:

2017 -- $54,060,941
2018 -- $53,146,258
2019 -- $44,217,399
2020 -- $45,067,146
2021 -- $54,789,761 [Exhibit 11 hereto]

Answer: The City lacks knowledge sufficient to form a belief as to truth of the allegations in this paragraph and therefore neither admits or denies the allegations. The City's investigation continues.

215. The total monetary value of all of the Exemptions for the time period from January 1, 2017 through December 31, 2021 exceeds $250 million. Obviously, the harm to Plaintiff and the Class from the unlawful Exemptions has continued after December 31, 2021, and will continue until the Court prohibits the City from granting these illegal Exemptions.

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Answer: The City lacks knowledge sufficient to form a belief as to truth of the allegations in the first sentence in this paragraph and therefore neither admits or denies the allegations. The City's investigation continues. City denies this paragraph's remaining allegations.

216. The payment Exemptions provided by the City's Ordinances are arbitrary and capricious and in no way is the difference in Water and Sewer Rates and Charges reasonably related to any difference in the cost of providing service to the Exempt Customers. In all material respects, the Exempt Customers are similarly-situated to the Non-Exempt Customers.

Answer: The City denies its exemptions are arbitrary and capricious. The City admits that the Exemptions are not based on a difference in cost but denies that the Exemptions have caused unreasonable or excessive rates and denies this paragraph's remaining allegations.

217. The Exemptions are not based on a consideration of such factors as differences in the quality or amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs. Because the difference in rates created by the Exemptions is not reasonably related to a difference in the costs of providing the service, there is unreasonable discrimination.

Answer: . The City admits that the Exemptions are not based on a difference in costs but denies that the Exemptions have caused unreasonable or excessive rates The City denies it engages in "unreasonable discrimination" and denies this paragraph's remaining allegations.

218. "When it comes to the extent of plaintiffs' protection under their common law right, our supreme court has noted that consumers of municipally owned utilities 'are just as completely protected from exorbitant rates and unjust discrimination as the consumers are under the Public Utilities Act' [Ill. Rev. Stat. 1977, ch. 111 2/3, par. 1 *et seq*.]. (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 252-53, 126 N.E. 739, 746). *See also Greater Peoria Sanitary & Sewage Disposal Dist. v. Kellstedt*, *supra*, 130 Ill. App. 3d at 1004-1005 ("a city operating a utility is in the same position as a private utility and is precluded from unjust discrimination in ratemaking"). Thus, the test to be applied in determining whether there has been a violation of plaintiffs' common law right is **the same test** used to determine whether a privately owned utility company is acting in an unreasonably discriminatory manner in violation of the Public Utilities Act when it charges different rates to different consumers." *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89, 94-95; 40 Ill Dec 164; 405 NE2d 1256 (1980) (emphasis added).

Answer: The City denies that all the quoted language in the first sentence of this paragraph appears in the source cited. The City admits that the quoted language in the *Greater Peoria Sanitary* citation sentence appears in *Greater Peoria Sanitary*. The City admits that the language beginning from "Thus, the test to be applied" and ending with the closing quotation marks immediately before the *Austin View* citation appears in *Austin View*. The City admits that under common law, Plaintiff must establish that the rates are not excessive. The City denies this paragraph's remaining allegations.

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219. Section 9-241 of the Public Utility Act provides:

> **No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage**. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service. [220 ILCS 5/9-241 (emphasis added)]

Answer: The City admits that the quoted language appears in the source cited.

220. In *Mountain States Legal Foundation v. Public Utilities Commission*, 197 Colo. 56, 590 P.2d 495 (Colo. 1979) (Exhibit 18 hereto), the Colorado Supreme Court, interpreting a nearly identical provision of the Colorado Public Utilities Act, held that the Colorado Public Utilities Commission engaged in unlawful rate discrimination by requiring certain utilities to provide discounted rates to low-income elderly and disabled customers of the utilities: Section 40-3-106(1), C.R.S. 1973, prohibits public utilities from granting preferential rates to any person, and section 40-3-102, C.R.S. 1973, requires the PUC to prevent unjust discriminatory rates. **When the PUC ordered the utility companies to provide a lower rate to selected customers unrelated to the cost or type of the service provided, it violated section 40-3-106(1)'s prohibition against preferential rates. In this instance, the discount rate benefits an unquestionably deserving group, the low-income elderly and the low-income disabled. This, unfortunately, does not make the rate less preferential**. To find otherwise would empower the PUC, an appointed, non-elected body, to create a special rate for any group it determined to be deserving. The legislature clearly provided against such discretionary power when it prohibited public utilities from granting "any preference." In addition, section 40- 3-102, C.R.S. 1973, directs the PUC to prevent unjust discriminatory rates. Establishing a discount gas rate plan which differentiates between economically needy individuals who receive the same service is unjustly discriminatory. [197 Colo. at 59-60 (emphasis added).]

Answer: The City admits the cited authority held as alleged but denies that the cited authority involves a "nearly identical provision." The City admits the language beginning "Section 4-3-106(1), C.R.S.1973, prohibits public utilities" to the end of the paragraph appears in the source cited. The City denies the cited authority supports Plaintiff's claims. The City denies this paragraph's remaining allegations.

221. By arbitrarily exempting the Exempt Customers from payment of the Water and Sewer Charges, the City has established unfair preferences and therefore has unjustly discriminated against Plaintiff and the Class in violation of the City's common law obligations.

Answer: The City denies this paragraph's allegations.

222. Plaintiff and the Class have been harmed by the illegal discrimination because they have necessarily paid higher Water and Sewer Charges by being forced to subsidize the system costs associated with the Exempt Customers.

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Answer: The City denies this paragraph's allegations.

223. The City incurs costs in providing water and sewer services to the Exempt Customers, which costs necessarily are part of the City's actual Revenue Requirement for water and sewer services. Because the City does not receive payments from the Exempt Customers to cover those costs, those costs are necessarily covered by the Rates paid by the Non-Exempt Customers.

Answer: The City admits that it incurs costs to provide water and sewer services to all its customers, including customers exempt from water or sewer charges. The City denies this paragraph's remaining allegations.

224. The fact that, effective June 2016, the City implemented a policy of annually increasing its Water and Sewer Rates by the rate of inflation does not mean that the Rates were not discriminatory "at the time of their establishment" because, among other reasons, the Exemptions were already in place and therefore were part of the City's Rate structure long before June 2016. In fact, the Water and Sewer Exemptions have been in place since at least 2012. *See* Exhibit 19 hereto (December 12, 2012 amendment to Ordinance 11-12-540). The Senior Sewer Exemptions have been in place since at least 2014. *See* Exhibit 20 hereto (October 8, 2014 amendment to Ordinance 3-12-050).

Answer: The City admits that the water and sewer exemptions were in place before June 2016. The City admits that exemptions from water charges have been in place since at least 2012. The City admits that the exemption provided by Section 3-12-050 has been in place since at least 2014. The City denies that the rates were first established in June 2016 and denies this paragraph's remaining allegations.

225. The City's application of an inflation factor in subsequent years merely increased the monetary value of the Exemptions and therefore continued the Overcharges that were already baked into the Rates, albeit at ever increasing amounts.

Answer: The City denies this paragraph's allegations.

226. During the Class Period through 2021, the Exempt Customers have been excused from paying over $250 million that they should have paid for water and sewer services. If the City had charged the Exempt Customers during that period of time, the City would have been required to charge the Non-Exempt Customers over $250 million less during that period of time. By excusing the Exempt Customers from payment, the City has forced the Non-Exempt Customers to overpay for their water and sewer services by over $250 million.

Answer: The City denies that it has forced any customers to overpay for their water and sewer services at any time. The City lacks knowledge or information sufficient to form a belief as to the truth this paragraph's remaining allegations and thus neither admits nor denies this paragraph's remaining allegations. The City's investigation continues.

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227. The excessiveness of the City's charges to Plaintiff and the class—*i.e.*, the disfavored customers—is proven by the example the City itself provided at pp. 10-11 of its Motion to Dismiss (filed on July 21, 2022), which illustrates the unlawful subsidy almost perfectly. The City posits a water utility with annual costs of $100,000 and 100 residents, each of whom uses the same amount of water. Absent any exemptions, each of the 100 residents would pay $1000 for their water. If, however, as the City further posits, 20 of the 100 residents were exempt, "each of the 80 non-exempt residents would have to pay $1,250 a year in order to cover the department's costs." City Motion at pp. 10-11. While the implications of its example appear to be lost on the City, the example shows that, in the absence of the unfair discrimination each customer would pay $1000, but because of the unfair discrimination, the 80 disfavored Non-Exempt Customers must pay $1250 to cover the costs of providing water to the 20 Exempt Customers. The additional $250 is thus excessive because that amount does not pay for the water provided to the Non-Exempt Customers but instead pays for the water provided to the Exempt Customers.

Answer: The City denies this paragraph's allegations.

228. At the end of the day, it is just math. Given a certain Revenue Requirement for, say, the Water Fund, the fewer customers who must finance the Revenue Requirement, the more those customers must pay.

Answer: The City denies this paragraph's allegations.

229. 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.

Answer: The City denies this paragraph's allegations.

230. The City has been unjustly enriched by the Exemptions because, among other reasons, the City does not pay for the water and sewer services it receives for its own facilities. Because of the Exemptions, the City has not paid for millions of dollars of water and sewer services it has received during the Class Period. As a result, the costs associated with the City's own water and sewer services have been paid by the Non-Exempt Customers. Clearly, Plaintiff and the Class have conferred an unjust benefit on the City through such payments which the City should not be allowed to retain.

Answer: The City denies this paragraph's allegations.

231. Even if the City has not been unjustly enriched in the aggregate by the Exemptions, Illinois law still requires the City to refund the excess monies it collected from Non-Exempt customers. Because of the Exemptions, the City has funds which in right and justice belong to Plaintiff and the Class and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate. The right to the remedy of "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

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> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

Answer: The City admits that the quoted language appears in the source cited but denies that cited source supports Plaintiff's claims. The City denies this paragraph's remaining allegations

232. By virtue of the City's unfair discrimination, 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 to recover back the amount of the illegal exaction.

Answer: The City denies this paragraph's allegations.

233. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars from Plaintiff and the Class to which it is not entitled. By paying the Water and Sewer Rates and Charges, Plaintiff and the Class have conferred a benefit upon the City.

Answer: The City denies this paragraph's allegations.

COUNT X

UNREASONABLE AND EXORBITANT WATER AND SEWER RATES

234. Plaintiff incorporates each of the preceding paragraphs 1 through 21, and 27 through 74, inclusive, as if fully set forth herein.

Answer: The City incorporates its answers to each of the preceding paragraphs 1 through 21, and 27 through 74, inclusive, as if fully set forth herein.

235. This Count sets forth a single cause of action – unreasonable and exorbitant Rates imposed in violation of the common law and 65 ILCS 5/11-139-8, which imposes the express limitation that the City only "charge the inhabitants thereof a reasonable compensation for the use

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and service of the combined waterworks and sewage system and to establish rates for that purpose."

Answer: The City admits that this Count purports to state a common law claim for unreasonable and exorbitant rates. The City states that the Court has previously held that the quoted language in 65 ILCS 5/11-139-8 does not establish a cause of action against the City and denies this paragraph's remaining allegations.

236. A municipality, such as the City, which sells water and sewer service, does so in a proprietary rather than in a governmental capacity. The business of supplying water belongs to that class of enterprises upon which the public interest is impressed. The City is subject to the same rules that would apply to a privately owned utility including those forbidding unreasonableness and discrimination in utility rates.

Answer: The City admits it sells water and sewer services in a proprietary capacity and that some of the rules that apply to privately owned utilities apply to municipal utilities including a prohibition against discrimination that results in unreasonably excessive and exorbitant rates. The City admits the statement "The business of supplying water belongs to that class of enterprises upon which the public interest is impressed, which" is quoted from *Austin View Civic Ass'n v. City of Palos Heights.*, 85 Ill. App. 3d 89, 94 (1st Dist. 1980). The City denies this paragraph's remaining allegations.

237. Under Illinois common law, Water and Sewer Rates must be reasonable and all charges imposed must relate to the actual use of the water and sewer system. *See e.g. Village of Niles v. City of Chicago*, 82 Ill App 3d 60, 68; 37 Ill Dec 142; 401 NE2d 1235 (1980); *Austin View Civic Ass'n v City of Palos Hts*, 85 Ill App 3d 89, 94-95; 40 Ill Dec 164; 405 NE2d 1256 (1980). The City's Ordinances also impose this requirement. *See* City Ordinance Sections 3-12-010 and 11-12-260.

Answer: The City admits that, under Illinois common law, water and sewer rates must be reasonable and not excessive. The City denies the remaining allegations of this paragraph and denies the cited sources support Plaintiff's claims.

238. The City's Water and Sewer Rates have been unreasonable and exorbitant because (1) the City fraudulently allocates the alleged indirect costs of other City departments to its Water and Sewer Fund, recovers those phantom expenses through Water and Sewer Rates and then transfers those monies to other City funds to be used for purposes unrelated to the water and sewer system (the "Excessive Cost Allocations") and (2) the City overcharges the Water Fund and Sewer Fund tens of millions of additional dollars per year, purportedly to cover the Water Fund's and the Sewer Fund's proportionate share of the City's total annual contribution to the Municipal Employees' Annuity and Benefit Fund (the "Municipal Employees' Fund") and the Laborers' and Retirement Board Annuity and Benefit Fund (the "Laborers' Fund") which overcharges are also incorporated into the Water and Sewer Rates (the "Pension Overcharges").

Answer: The City denies this paragraph's allegations.

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THE EXCESSIVE COST ALLOCATIONS

239. The Excessive Cost Allocations are included in the City's Rates on a prospective basis and the City intends to collect the revenues associated with the Excessive Cost Allocations on an annual basis. In the absence of the Excessive Cost Allocations, the City's Water and Sewer Charges could be set to generate tens of millions of dollars less in annual revenues.

Answer: The City denies this paragraph's allegations.

240. The City has persisted in diverting hundreds of millions of dollars of water and sewer funds to uses unrelated to water and sewer utility services.

Answer: The City denies this paragraph's allegations.

241. For example, the City included $69,335,000.00 in its 2022 Water Fund budget "to reimburse the Corporate Fund for Indirect Costs Chargeable to the Fund." *See* Exhibit 7 hereto at p. 277.

Answer: The City admits this paragraph's allegations.

242. Similarly, the City included $37,658,000.00 in its 2022 Sewer Fund budget "to reimburse the Corporate Fund for Indirect Costs Chargeable to the Fund.

Answer: The City admits this paragraph's allegations.

243. The City's Water and Sewer Funds transfer money to the City's Corporate Fund annually to cover the allocations of purported indirect costs. In addition to the transfers "to reimburse the Corporate Fund for indirect costs chargeable" to the Water and Sewer Funds, the City also allocates tens of millions of dollars of "direct" expense of other City departments to the Water and Sewer Funds.

Answer: The City admits that the Water and Sewer Funds transfer money to the Corporate Fund to cover the indirect costs for services chargeable to the Water and Sewer Funds and admits that the City also allocates direct expense of other City Departments in varying amounts to the Water and Sewer Funds as shown in the annual Budget Ordinances. The City denies this paragraph's remaining allegations.

244. On a periodic basis, the City engages an outside consultant, Maximus, to prepare a "cost allocation plan." The purpose of a cost allocation plan is distribute the so-called "indirect" costs of "central services" departments to other City funds and departments which benefit from goods or services provided by the "central services" departments. Central services are those administrative units that mainly provide service to other government departments and not to the general public. Examples include finance, treasury, human resources, information technology and building maintenance.

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Answer: The City admits that it regularly engages Maximus as a consultant and that one of the services Maximus provides to the City is the preparation of indirect cost allocation plans for use in the City budgeting process. The City admits that "central services" refers to government services provided by government departments to other government departments and admits the departments in the last sentence are examples of departments that can provide "central services." The City admits that Maximus's full cost allocation plans in each year are prepared to enable the City to allocate central services costs to other city funds and departments. The City denies this paragraph's remaining allegations.

245. Maximus prepared a Central Services Cost Allocation study (which was completed in 2022 but covered the year 2020). Maximus determined that, at most, the City may properly allocate $21,709,348 in indirect "central services" costs (as opposed to the $69 million the City actually allocated) to the Water Fund and may only allocate $1,509,684 in indirect "central services" costs (as opposed to the $37 million the City actually allocated) to the Sewer Fund for 2022. *See* Exhibit 21 hereto at page C-6.

Answer: The City denies the allegations of this paragraph.

246. Thus, for **just 2022**, even after applying a 2% annual inflation factor to Maximus' 2020 indirect cost calculation, the City has allocated over $46 million in phantom "indirect costs" to the Water Fund and has further allocated over $35 million in phantom "indirect costs" to the Sewer Fund. There are similar phantom cost allocations in prior years.

Answer: The City denies this paragraph's allegations.

247. Collectively, the Excessive Cost Allocations to the Water and Sewer Funds for 2017 through 2023 that were funded by the Rates and Charges imposed just upon water and sewer customers in the City (including Plaintiff and the Class) and other customers exceeded $400 million.

Answer: The City denies this paragraph's allegations.

248. It potentially can be appropriate to charge and recover from the Water and Sewer Funds the so-called "indirect" costs of "central services" departments which provide goods and services to the Water and Sewer Funds. Central services are those administrative units that mainly provide service to other government departments and not to the general public. Examples include finance, treasury, human resources, information technology and building maintenance. The problem is that the City's transfers are grossly excessive because they do not reflect the proper "indirect" costs that should be attributable to the Water and Sewer Funds.

Answer: The City admits that "central services" refers to government services provided by government departments to other government departments and admits the departments in the last sentence are examples of departments that can provide "central services." The City admits that it is appropriate to allocate to the Water and Sewer Funds the indirect costs of departments that provide services to the Water and Sewer Funds. The City denies this paragraph's remaining allegations.

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249. The City's allocation of phantom "indirect expenses" violates well-established principles of water and sewer utility rate-making. The American Water Works Association's policy statement on Financing, Accounting and Rates states that '**Water and wastewater utility funds should not be diverted to uses unrelated to water and wastewater utility services**. Reasonable taxes, payments in lieu of taxes, and/or payments for services rendered to the water utility by a local government or other divisions of the owning entity may be included in the utility's revenue requirements after taking into account the contribution for fire protection and other services furnished by the utility to the local government or to other divisions of the owning entity' (AWWA 2015)." [AWWA Manual of Water Supply Practices M1 (Seventh Ed) (the "M1 Manual") at p. 13 (emphasis added)]]

Answer: The City admits that the quoted language, without the bold typeface, appears in the General Concepts section of the M1 Manual at p. 13. The City denies this paragraph's remaining allegations.

250. "Accordingly, payments made to a municipality's general fund should reimburse the general fund for the **necessary cost** of goods and/or services required by the water utility to provide water service." *Id*. (emphasis added).

Answer: The City admits that the quoted language, without the bold typeface, appears in the M1 Manual at p. 13.

251. The City admitted that the "**M1 Manual is considered to be the industry standard for setting water rates by public water suppliers nationally** and is used by peer entities such as **Great Lakes Water Authority, Metropolitan Water District of Southern California, the City of Houston, the City of Philadelphia, San Francisco Public Utilities Commission, and San Diego County Water Authority." *See* Exhibit 1 at p. 42 (emphasis added). The City stated:**

> **<u>AWWA provides transparency</u>** to customers; cost of service requires detailed accounting of components of the system and allocates cost of service to each customer. *See* Exhibit 2 hereto at p. 23 (City's "Financial Update" dated April 23, 2023) (emphasis in original).

Answer: The City admits that in the Official Statement (Ex. 1), it made the quoted statement, without the bold typeface. The City admits that in the Financial Update (Ex. 2), included the quoted statement. The City denies this paragraph's remaining allegations.

252. Notwithstanding the City's admissions, the City has never conducted a true cost-of service study for its Water or Sewer Systems, much less utilized the M1 Manual or implemented rates and charges that were consistent with the methodology set forth in the M1 Manual. Stated simply, the City has never even attempted to devise Water and Sewer Rates that comply with the "industry standard."

Answer: The City admits that it has not finalized a cost of service study and denies this paragraph's remaining allegations.

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253. A major reason the City's cost allocations are excessive is because the City allocates tens of millions of dollars of the expenses of its Police and Fire Departments to the Water and Sewer Fund each year. The methodology used to derive the cost allocations is set forth in certain Full Cost Allocation Plans authored by Maximus, which are separate from the Central Services Cost Allocation Plans.

Answer: The denies this paragraph's allegations.

254. The Cost Allocation Plans have historically been based on the City's actual financial results and then used to compile future budgets. For example, the Cost Allocation Plans the City used for its 2022 Budget were prepared by Maximus based upon the City's results for 2019. *See* Exhibit 22 hereto. The City applies a 2% annual inflation factor to the prior years' numbers in order to reflect presumed increases in costs in later years. *See* Exhibit 29 hereto. The City annually transfers to other City funds all or substantially all of the amounts that Maximus determines are allocable to the Water and Sewer Funds.

Answer: The City admits the allegations in the first two sentences of this paragraph except that it denies Exhibit 22 makes any reference to allocations for the City's 2022 budget. The City denies the allegations in the third sentence of this paragraph. The City admits that the Water and Sewer Funds reimburse the Corporate Fund for indirect costs and that the amounts are determined using Maximus's reports. The City denies this paragraph's remaining allegations.

255. Maximus allocates the police and fire costs to the Water and Sewer Fund based upon the "Plant Value" of the City's water and sewer infrastructure assets as a percentage of the City's "full property value." Using this methodology, the City allocates 1.327% of certain purported Police and fire expenses to the Water Fund and 0.9929% of certain purported Police and Fire expenses to the Sewer Fund. *See* Exhibit 22 at p. C-639, C-642 and C-736.

Answer: The City admits that this paragraph accurately summarizes the referenced portions of the cited exhibit, and admits this paragraph describes the process used to allocate police and fire funds to the Water and Sewer Funds for year 2019. The City denies this paragraph's remaining allegations.

256. For 2019, Maximus allocated $35.8 million of police expenses and $13.1 million of fire department expenses to the Water Fund, and further allocated $26.8 million of police expenses and $9.8 million in fire expenses to the Sewer Funds. *See* Exhibit 22 hereto at pp. C-643 and C-737. All or substantially all of these amounts were included in the Water and Sewer Rates, and the revenues derived were actually transferred from the Water and Sewer Funds to the City's Corporate Fund. Because these funds were not restricted, or even earmarked, the City was able to use the monies for general municipal purposes.

Answer: The City admits the paragraph's first sentence accurately summarizes Maximus's determinations on the cited pages of Exhibit 22 to the complaint. The City admits that the indirect costs for Police and Fire in Exhibit 22 were among the costs used to determine amounts to be transferred to the Corporate Fund in 2022. The City admits that the funds

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were not restricted but denies any implication that the funds were used improperly. The City denies this paragraph's remaining allegations.

257. The City's allocation of police and fire expenses to the Water Fund and the Sewer Fund is illegal and improper for the following reasons.

Answer: The City denies this paragraph's allegations.

258. First and foremost, the allocation of **any** police and fire expense to the Water and Sewer Funds is arbitrary and capricious because it is improper ratemaking to allocate the costs of funds or departments which serve the general public to enterprise funds. Maximus itself has recognized this. In a presentation it authored, Maximus included in "unallowed costs," the "General Costs of Government," which are the "costs of other general types of government services normally provided to the general public, **such as fire and police**, unless provided for as a direct cost under a program statute or regulation." *See* Exhibit 23 hereto.

Answer: The City denies this paragraph's allegations.

259. In addition, the City already directly allocates over $1 million of police expenses annually to the Water Fund. *See* Exhibit 24 hereto (excerpts from City's 2023 Water Fund budget) at p. 279. This amount – determined by the City via an unknown methodology – presumably reflects the fair value of the services provided by the Police Department to the Water Fund. As Maximus has stated (Exhibit 22 at p. A-4), directly-paid costs must be credited in the cost allocation methodology, but the City does not do so.

Answer: The City admits that the 2023 Budget Ordinance appropriated $1,470,301 from the Water Fund under the line item "Transfer for Services Provided by the Department of Police." The City denies this paragraph's remaining allegations.

260. It is also arbitrary and capricious for the City to create non-existent departments – *i.e.*, "Police General" and "Fire General,"— pack those departments with billions of dollars of police and fire expenses, and then allocate a percentage of those costs to <u>only</u> the Water and Sewer Funds. Maximus states that the purpose of the Full Costs Allocation Plan is to allocate the costs of "central services departments" to other departments (*see* Exhibit 22 at p. A-4), but the Police Department and the Fire Department are in no sense "central services departments" providing indirect services to the Water and Sewer Fund.

Answer: The City denies this paragraph's allegations.

261. Second, assuming that the allocation of **some** police and fire expense to the Water and Sewer Funds is appropriate, the City's methodology for allocating those costs is arbitrary and capricious because it does not result in a fair allocation to Water and Sewer. This is true for at least two reasons: (1) the methodology uses a nonsensical assumption about asset values to allocate police and fire expenses to the Water and Sewer Funds and (2) the alleged police and fire expenses allocated to the Water and Sewer Fund are grossly inflated.

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Answer: The City denies this paragraph's allegations.

262. Initially, the Maximus methodology uses the total water and sewer "plant value" as a percentage of the total value of all real property in the City. *See* Exhibit 22 at pp. C-639 and C-647. But that is a nonsensical methodology because the purpose of cost allocation is to allocate the costs in reasonable proportion to each benefited fund's actual use of the service.

Answer: The City admits that the Water and Sewer Funds cost-allocation analysis in the cited exhibit was based on "the ten-year historical average of utility plant value for the Water and the Sewer Funds to the City's full market value, adjusted for the current Water and Sewer fund size relative to the historical ten-year average fund size." Ex. 22, p. C-639. The City denies this paragraph's remaining allegations.

263. Maximus states that the allocations should be made using "a statistical measure that is relevant to the service provided and the benefit received." 2019 Maximus Report (Exhibit 22 hereto) at p. A-4. *See also Id*. ("Consideration is given to determining the measurement that most appropriately demonstrates its relationship to the receiving units").

Answer: The City denies the allegation that Exhibit 22 states how allocations *should* be made when it states how the allocations *were* made. The full sentence Plaintiff quotes reads: "The costs are then broken into subparts or activities such that each activity can be allocated on a statistical measure that is relevant to the service provided and the benefit received." Ex. 22, p. A-4. Additionally, the sentence preceding the sentence Plaintiff quotes in parentheses provides critical context: "MAXIMUS evaluates available statistical measurements to establish the most equitable and meaningful basis for allocating each activity within each Central Service Department. Consideration is given to determining the measurement that most appropriately demonstrates its relationship to the receiving units." Ex. 22, p. A-4. Ultimately, pages A-1 through A-6 of Exhibit 22 are an explanation of Maximus's allocation methodology, not a statement of allocation rules, and the City denies the suggestion that the statements on those pages should be interpreted as anything other than an explanation of Maximus's allocation methodology. The City denies this paragraph's remaining allegations.

264. The City's allocation of police and fire expenses to the Water and Sewer Funds has no connection to any service provided or benefit received by those Funds. There is no basis to believe that the Water and Sewer Funds "use" $60 million worth of police services and $35 million of fire services every year. In comparison, the City has over 200 full-time police officers dedicated to O'Hare Airport, yet the City charges the Water Fund more than twice the amount that the City charges O'Hare for police "services." *See* Exhibit 7 hereto at p. 12 (showing Police Department charges of $27,559,020 to O'Hare for 2022).

Answer: The City denies this paragraph's allegations, including the allegation that Exhibit 7 has information about how many police officers were dedicated to O'Hare Airport in 2022 or includes the amount alleged for police charges.

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265. Further, assuming that the allocation of **some** police and fire expense to the Water and Sewer Funds is appropriate, the City's methodology for allocating those costs is arbitrary and capricious for several reasons.

Answer: The City denies this paragraph's allegations.

266. First, the City uses inflated budget numbers for both the Police and Fire Departments in allocating a percentage of each budget to the Water and Sewer Funds. For example, the Maximus cost allocation plan for 2019 allocates a portion of purported expenses the City characterizes as "Police General" to the Water Fund. The City allocates 1.327 percent of the "Police General" expenses to the Water Fund. Thus, the higher the total "Police General" expenses, the higher the allocation of those expenses to the Water Fund. The City, through Maximus, allocates expenses from the following City departments in the following amounts:
"Emerg Mngmt & Comm 58" -- $58,705,450
"Police-Administration" -- $10,586,804
"Police-Patrol Svcs" -- $2,114,954,119
"Police-Detectives" -- $358,635,803
"Police-Organized Crime" -- $156,601,398
Total -- **$2,699,483,575** [Exhibit 22 hereto at p. C-640]

Answer: The City admits Maximus's 2019 full cost allocation contains the calculation of Police General expenses at page C-640. The City denies this paragraph's remaining allegations.

267. The City thus allocates $2.7 billion in purported annual Police Department costs to "Police General."

Answer: The City admits Maximus calculated $2,699,483.575, which is approximately $2.7 million, was to be allocated for Police-General in the 2019 full cost allocation plan Maximus. The City denies this paragraph's allegation as to other years and denies any implication that the allocation in 2019 was incorrect.

268. The City's financial statements for 2019, however, paint a very different picture.

Answer: The City denies this paragraph's allegations.

269. According to Maximus' own cost allocation plan, based on the City's financial statements, here are the City's corresponding <u>actual costs</u> for these same departments for 2019:
"Emerg Mngmt & Comm 58" -- $25,379,768
"Police-Administration" -- $113,679,641
"Police-Patrol Svcs" -- $1,094,154,983
"Police-Detectives" -- $194,339,632
"Police-Organized Crime" -- $85,206,499
Total -- $1,512,760,523 [Exhibit 22 at p. C-16]

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Answer: The portion of Ex. 22 cited in this paragraph makes no reference to "actual cost" but is an excerpt from the Summary of Allocated Costs. The City admits the quoted portions were taken directly from the cited section of Exhibit 22 but denies that Plaintiff has accurately characterized those cited portions' meaning and thus denies this paragraph's allegations.

270. The total costs the City stuffs into its fictitious "Police General" department are grossly inflated because (1) the City includes hundreds of millions of annual pension fund contributions in the expenses; and (2) the City "double-dips" by including certain police expenses twice in the calculation.

Answer: The City denies this paragraph's allegations.

271. The inclusion of pension fund contributions in the calculation is improper because the City already funds those contributions through dedicated tax revenues and through direct contributions from other funds, including the O'Hare Airport Fund and the Midway Airport Fund. The inclusion of the same expenses twice has the effect of charging Water and Sewer customers twice to recover the same purported cost, further increasing the overcharge.

Answer: The City denies this paragraph's allegations.

272. Further, the types of police-related costs the City includes in its allocations to the Water Fund are on their face ridiculous and unfounded. For example, the City charges Water and Sewer customers over $3.3 million per year to pay the costs of the Police Department's Organized Crime Division (approximately 2.3% of $156,601,398)—a charge that is completely untethered to reality unless the mafia had somehow infiltrated the City's water and sewer system, and this infiltration somehow necessitated the dedication of the resources of this division. But clearly, the City's Water and Sewer Department has had no need for the investigative services of the City's Organized Crime Division.

Answer: The City denies this paragraph's allegations.

273. The City imposes similar overcharges based upon fictitious and duplicative "Fire General" charges.

Answer: The City denies this paragraph's allegations.

274. In addition to the improper "indirect" cost allocations, the City also fraudulently inflates the cost allocations by **directly** charging portions of the budgets of other departments to the Water and Sewer Funds. These allocations ostensibly are intended to reflect direct services provided by those other departments to the Water and Sewer Funds. But these direct allocations, like the indirect allocations, are grossly inflated because they do not reflect the fair value of any services provided by those departments to the Water and Sewer Funds.

Answer: The City denies this paragraph's allegations.

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275. For example, the City includes the costs of **19** full time employees of the OIG in the Water and Sewer Fund budgets (12 to the Water Fund and 7 to the Sewer Fund). The total cost is **$2 million** per year, paid by W&S customers through their water and sewer rates.

Answer: Th City admits that some of its budgets include the costs of 19 employees of the OIG in the Water and Sewer Fund budgets (12 to the Water Fund; 7 to the Sewer Fund). The City denies this paragraph's remaining allegations.

276. The OIG is basically the "watchdog" for the entire City, charged with ferreting out bad behavior by the City's employees, agents and representatives. The OIG's "mission" is described as follows: "OIG's mission is to promote economy, effectiveness, efficiency, and integrity in the administration of programs and the operation of City government. OIG accomplishes its mission through investigations of misconduct, performance audits, evaluations and reviews, data analysis and visualization, and other inquiries."

Answer: The City admits this paragraph's allegations.

277. Allocation of $2 million of annual OIG costs to W&S could only be justified if the OIG actually devoted 19 full time employees to "investigations of misconduct, performance audits, evaluations and reviews, data analysis and visualization, and other inquiries" relating to the Water and Sewer Funds. But this is clearly not the case.

Answer: The City denies this paragraph's allegations.

278. The OIG issues quarterly reports detailing its activities.

Answer: The City admits the OIG issues quarterly reports. The City denies the quarterly reports fully detail the OIG's activities.

279. The OIG reports divide its activities into four categories: (1) Intakes, (2) Investigations, (3) Public Safety, and (4) Reports and Monitoring Activity.

Answer: The City denies that all OIG reports are divided into these four categories and thus denies this paragraph's allegations.

280. Intakes are reports of misconduct by City officials and employees. The OIG typically refers intakes it deems worthy of further consideration to the affected City department.

Answer: The City admits that an intake can include the reports stated in first sentence of this paragraph. The City admits the OIG occasionally will refer an intake to a separate department. The City denies this paragraph's remaining allegations.

281. Investigations are OIG investigations into the conduct of City officers, employees, and other entities, including contractors, subcontractors, and lobbyists. "Sustained Administrative Investigations" are detailed in the reports.

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Answer: The City admits the OIG has authority pursuant to ordinance to conduct investigations into City officers, employees, and other entities, including contractors, subcontractors, and lobbyists. The City admits the OIG issues reports containing summaries of its sustained administrative investigations. The City denies this paragraph's remaining allegations.

282. The OIG's Public Safety activities consist of conducting independent, objective evaluations and reviews of Chicago Police Department, Civilian Office of Police Accountability ("COPA") and the Police Board, as well as inspections of closed disciplinary investigations conducted by COPA and the Police Department's Bureau of Internal Affairs.

Answer: The City admits that the "Public Safety" section of the OIG Quarterly Reports detail the OIG's recent efforts conducting independent, objective evaluations and reviews of CPD, COPA, and the Police Board, as well as inspections of closed disciplinary investigations conducted by COPA and CPD's Bureau of Internal Affairs. The City denies this paragraph's remaining allegations.

283. Reports and Monitoring Activity consists of (a) audits and follow-ups, (b) advisories and department notification letters, and (c) other reports and activities.

Answer: The City admits that the OIG Quarterly Reports' "Reports and Monitoring Activity" sections contain sub-sections called "Audits and Follow-Ups," "Advisories and Department Notification Letters," and "Other Reports and Activities," in addition to a sub-section called "Monitoring Employment Actions." The City denies this paragraph's remaining allegations.

284. Here are what the reports reveal about the activities of the OIG relating to Water and Sewer:

1. Fourth Quarter 2022
   A. Intakes – **1,842** received. **6** referred to Department of Water Management
   B. Investigations – **227** open investigations. **None** identified relating to Water or Sewer
   C. Public Safety – **No** activities identified relating to Water or Sewer
   D. Reports and Monitoring Activity – OIG monitored **one** "hiring sequence" of the Department of Water Management.
2. First Quarter 2023
   A. Intakes – **2,397** received. **14** referred to Department of Water Management
   B. Investigations – **231** open investigations. **One** identified as relating to Water or Sewer. A W&S employee was caught living outside of the City, in violation of residency restrictions.
   C. Public Safety – **No** activities identified relating to Water or Sewer
   D. Reports and Monitoring Activity – **No** activities identified relating to Water or Sewer.
3. Second Quarter 2023
   A. Intakes – **1,986** received. **2** referred to Department of Water Management
   B. Investigations – **242** open investigations. **None** identified as relating to Water or Sewer.
   C. Public Safety – **No** activities identified as relating to Water or Sewer

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D. Reports and Monitoring Activity – OIG monitored **2** "hiring sequences" of the Department of Water Management.

4. Third Quarter 2023
   A. Intakes – **2098** received. **None** referred to the Department of Water Management.
   B. Investigations – **249** open investigations. **One** identified as relating to Water or Sewer. Another W&S employee was caught living outside of the City, in violation of residency restrictions.
   C. Public Safety – **No** activities identified as relating to Water or Sewer.
   D. Reports and Monitoring Activity – **No** activities identified as relating to Water or Sewer.

Answer: The City denies that the four quarterly reports referenced in this paragraph accurately capture all of the OIG's functions related to City personnel and departments involved in ensuring the City's provision of water and sewer services to its customers. The City admits that the Fourth Quarter 2022 OIG Quarterly Report shows the OIG had 1,482 intakes, six of which it referred to the Department of Water Management. The City admits that the Fourth Quarter 2022 OIG Quarterly Report shows the OIG had 227 open investigations, none of which are identified as specifically relating to water or sewer operations or personnel. The City admits that in the "Public Safety" section of the Fourth Quarter 2022 OIG Quarterly Report, neither of the summaries of the two selected Public Safety reports concerned water or sewer operations or personnel. The City admits that in the "Public Safety" section of the Fourth Quarter 2022 OIG Quarterly Report, nothing in the "Review of Closed Disciplinary Investigations" sub-section, which details BIA and COPA cases, is noted as concerning any water or sewer operations or personnel. The City admits that in the "Reports and Monitoring Activity" section of the Fourth Quarter 2022 OIG Quarterly Report, one of the summaries of the three selected reports concerned water or sewer operations or personnel.

The City admits that the First Quarter 2023 OIG Quarterly Report shows the OIG had 2,397 intakes, 14 of which it referred to the Department of Water Management. The City admits that the First Quarter 2023 OIG Quarterly Report shows the OIG had 231 open investigations, one of which is identified as specifically relating to a Department of Water Management employee violating the City's residency requirement. The City admits that in the "Public Safety" section of the First Quarter 2023 OIG Quarterly Report, nothing in the summary of the selected Public Safety report concerned water or sewer operations or personnel. The City admits that in the "Public Safety" section of the First Quarter 2023 OIG Quarterly Report, nothing in the "Review of Closed Disciplinary Investigations" sub-section, which details BIA and COPA cases, is noted as concerning any water or sewer operations or personnel. The City admits that in the "Reports and Monitoring Activity" section of the First Quarter 2023 OIG Quarterly Report, none of the summaries of the two selected reports concerned water or sewer operations or personnel.

The City admits that the Second Quarter 2023 OIG Quarterly Report shows the OIG had 1,986 intakes, two of which referred to the Department of Water Management. The City admits that the Second Quarter 2023 OIG Quarterly Report shows the OIG had 242 open investigations, none of which are identified as specifically relating to water or sewer

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operations or personnel. The City admits that in the "Public Safety" section of the Second Quarter 2023 OIG Quarterly Report, none of the summaries of the three selected Public Safety reports concerned water or sewer operations or personnel. The City admits that in the "Public Safety" section of the Second Quarter 2023 OIG Quarterly Report, nothing in the "Review of Closed Disciplinary Investigations" sub-section, which details BIA and COPA cases, is noted as concerning any water or sewer operations or personnel. The City admits that the "Reports and Monitoring Activity" section of the Second Quarter 2023 OIG Quarterly Report shows that the OIG monitored two "interview sets" in the Department of Water Management.

The City admits that the Third Quarter 2023 OIG Quarterly Report shows the OIG had 2,098 intakes, none of which it referred to the Department of Water Management. The City admits that the Third Quarter 2023 OIG Quarterly Report shows the OIG had 249 open investigations, one of which is identified as specifically relating to a Department of Water Management employee violating the City's residency requirement. The City admits that in the "Public Safety" section of the Third Quarter 2023 OIG Quarterly Report, none of the summaries of the three selected Public Safety reports concerned water or sewer operations or personnel. The City admits that in the "Public Safety" section of the Third Quarter 2023 OIG Quarterly Report, nothing in the "Review of Closed Disciplinary Investigations" sub-section, which details BIA and COPA cases, is noted as concerning any water or sewer operations or personnel. The City admits that in the "Reports and Monitoring Activity" section of the Third Quarter 2023 OIG Quarterly Report, none of the summaries of the three selected reports concerned water or sewer operations or personnel.

The City denies this paragraph's remaining allegations.

285. So, to summarize, in the one-year period ending September 30, 2023, the OIG referred only **22** intakes to the Department of Water Management, identified only **2** investigations relating to water and sewer, had **zero** public safety activities involving water and sewer, and identified only **3** instances of reports and monitoring activity relating to W&S. Yet water and sewer customers paid $2 million to support the OIG.

Answer: The City denies that the four quarterly reports referenced in paragraphs 284 and 285 accurately capture all of the OIG's functions related to City personnel and departments involved in ensuring the City's provision of water and sewer services to its customers. The City admits that from the fourth quarter of 2022 to the third quarter of 2023, the OIG referred 22 intakes to the Department of Water Management and had two open investigations identified as specifically relating to Department of Water Management employees. The City admits that from the fourth quarter of 2022 to the third quarter of 2023, none of the selected Public Safety reports published in the Quarterly Reports concerned water or sewer operations or personnel, that one of the Reports and Monitoring summaries concerned water or sewer operations or personnel, and that the OIG monitored two "interview sets" in the Department of Water Management. The City denies this paragraph's remaining allegations.

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286. And it gets worse. The OIG published in January 2023 its "Audit and Program Review Section Annual Plan." The Plan identified "potential projects for the upcoming fiscal year" which were "based on OIG's prioritization criteria." The Plan shows that the OIG did not plan **any** audit or program review activities for all of 2023 relating to water and sewer. So, the City not only did not actually conduct any audits of the Water and Sewer Fund in the last year, but the City never even **planned** to conduct any such audits. Yet, 5 full time employees were supposedly dedicated to "audit and program review" of the Water and Sewer Funds.

Answer: The City denies the annual plan referenced in this paragraph accurately captures all the OIG's functions related to City personnel and departments involved in ensuring the City's provision of water and sewer services to its customers. The City admits that in January 2023 the OIG published its Audit and Program Review Section 2023 Annual Plan. The City admits that the Plan identified potential projects for the upcoming fiscal year based on OIG's prioritization criteria. The City admits that while the Plan shows that the OIG's audit and review agenda, subject to change, included an audit to determine "whether the City responds appropriately to [water-usage] overbilling cases and also [to] examine the City's management of water service disconnection for vacant properties," it did not include any audit or program review activities relating to the Water or Sewer Funds for 2023. The City denies this paragraph's remaining allegations.

287. The OIG divides its personnel into six categories: (1) Operations, (2) Legal, (3) Investigations, (4) Audit and Program Review, (5) Public Safety Audit, and (6) Information Technology and Analytics.

Total "Legal" employees -- 24

Total "Legal" employees charged to W&S – 6

Percent charged to W&S – 24%

Total "Audit and Program Review" employees – 16

Total "Audit and Program Review" employees charged to W&S – 5

Percent charged to W&S – 31% (yet no audits done)

Total "Investigations" employees – 28

Total "Investigations" employees charged to W&S – 5

Percent charged to W&S – 18% (yet only 2 investigations)

Answer: The City admits the OIG does categorize its employees into the six categories listed. The City lacks knowledge sufficient to form a belief as to the truth of the remaining allegations in this paragraph as this paragraph contains no information as to where this data originated.

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288. The fact that, effective June 2016, the City implemented a policy of annually increasing its water and sewer Rates by the rate of inflation does not mean that the Rates were reasonable "at the time of their establishment" because the Excessive Cost Allocations were already included in the City's Rates long before June 2016 – before the City's new policy went into effect. *See* Exhibit 12 hereto (City's Annual Appropriation Ordinance for 2016 at pp. 267-268 and 332-333) and Exhibit 25 hereto (Maximus cost allocation plan utilizing actual 2015 expenditures and showing Excessive Cost Allocations for Police and Fire). The City's application of an inflation factor in subsequent years merely continued the Overcharges that were already baked-into the Rates, albeit at ever increasing amounts.

Answer: The city denies the "Rates" (as used in this paragraph of the complaint) were established in 2016 and denies that the 2016 Appropriations Ordinance and the 2015 Maximus cost allocation plan establish that cost allocations that were in effect when the rates were established. The City denies this paragraph's remaining allegations.

289. The City's over-allocation of the City's purported general fund expenses is fraudulent because it has no factual basis, grossly inflates the Water and Sewer Rates imposed upon Plaintiff and the Class, and as such, necessarily renders these Rates as arbitrary, capricious and unreasonable.

Answer: The City denies this paragraph's allegations.

290. With respect to the Exorbitant Rate Claims, the City's own ordinances confirm that the City is precluded from imposing Water Rates to finance the general costs of government unrelated to providing water and sewer services. In this regard, City Ordinance Section 3-12-010 provides that "revenues of the sewer revenue fund shall be reserved and utilized exclusively for the operation, maintenance, rehabilitation or reconstruction of the sewer system of the City of Chicago." *See* Exhibit 3 hereto. Further, with respect to Water Rates and Charges, City Ordinance Section 11-12-260 provides:

> **11-12-260 Annual statement – Rate establishment.**
>
> At the close of each fiscal year, the department of water management shall prepare a statement of the revenues and expenditures of the water system of the city and a balance sheet thereof. The department shall then prepare an ordinance, for submission to the city council, establishing the rates to be charged for water service in the following year. **The fees, charges, and rates established by said ordinance shall be sufficient in all times to pay the cost of operation and maintenance of the water system, to make principal and interest payments on any outstanding bonds, and to establish and maintain any reserve funds or accounts as may be covenanted for in bond ordinances authorizing the issuance of outstanding bonds**. [Exhibit 4 hereto]

Answer: The City admits that the quoted language appears in the sources cited. The City denies that it imposed water rates for any improper purpose and denies this paragraph's remaining allegations.

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291. In *Ross v. Geneva*, 43 Ill. App. 3d 976, 357 N.E.2d 829 (1976), the Court held that a charge imposed on a municipal electric utility's customers to finance a parking garage was an unlawful exaction. The court described the nature of the contested charge as follows:

> [T]he charge made of each commercial user is, with minor variations in the formula, directly linked to the amount of electricity used by the commercial customer. The narrow question presented by this case is, therefore, whether a municipally owned utility has the authority to charge its commercial electric customers a fee, based on their electrical consumption, to be used solely for city parking facilities.

Answer: The City admits that the quoted language appears in the source cited at page 979. The City denies this paragraph's remaining allegations and denies the cited source supports Plaintiff's claims.

292. In holding that the charge was illegal, the *Ross* court relied upon a state statute, which closely mirrored the City's Ordinance Section 11-12-260. The Court found that, because the statute – like the City's Ordinance here – required the municipality to use utility charges only for utility purposes, the city there could not finance the parking garage with utility charges. The Court stated:

> The charging for services was formerly governed by section 49 -- 12 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, ch. 24, par. 49 -- 12) which has been succeeded by section 11 -- 117 -- 2 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 11 -- 117 -- 12). Both sections contain the following language:
>
> "The *charges fixed for the product supplied or the service rendered* by any municipality *shall be sufficient at least* to bear all costs of *maintenance* and *operation*, to meet *interest charges* on the bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or *sinking fund* to meet all unpaid bonds or certificate at maturity." (Emphasis added.)
>
> **We find no statutory authority whatever therein to charge fees for the creation of an isolated fund unrelated to the cost of the products supplied or the services rendered. The parking fund in this case is just such an unrelated, isolated fund.** The trial court correctly found the ordinances purporting to create it void for want of statutory authority. [Emphasis added]

Answer: The City admits that the authority cited contains substantially the same language as quoted. The City admits that the language of the statute at issue in *Ross* is similar to the language of Section 11-12-260. The City denies this paragraph's remaining allegations and denies the cited source supports Plaintiff's claims.

293. Plaintiff and the Class have been harmed by the City's practice of grossly over allocating indirect costs from the City's general fund budgets to the Water and Sewer Funds. Initially, they have necessarily paid higher Water and Sewer Charges and have been forced to

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subsidize tens of millions of dollars of general fund expenses that should be paid for through general taxation revenues. The City's practice has unjustly enriched the City at the expense of Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

THE PENSION OVERCHARGE

294. Separate and apart from the wrongdoing described in the foregoing paragraphs, the City overcharges the Water Fund and Sewer Fund tens of millions of additional dollars per year, purportedly to cover the Water Fund's and the Sewer Fund's proportionate share of the City's total annual contribution to the Municipal Employees' Annuity and Benefit Fund (the "Municipal Employees' Fund") and the Laborers' and Retirement Board Annuity and Benefit Fund (the "Laborers' Fund").

Answer: The City denies this paragraph's allegations.

295. The Pension Overcharges are included in the City's Rates on a prospective basis and the City intends to collect the revenues associated with the Pension Overcharges on an annual basis.

Answer: The City denies this paragraph's allegations.

296. In the absence of the Pension Overcharges, the City's Water and Sewer Charges could be set to generate tens of millions of dollars less in annual revenues.

Answer: The City denies this paragraph's allegations.

297. The fact that, effective June 2016, the City implemented a policy of annually increasing its water and sewer rate by the rate of inflation does not mean that the Rates were not unreasonable or discriminatory "at the time of their establishment" because the Pension Overcharges claimed in this Complaint were already included in the City's Rates as of January 2016 – before the City's new policy went into effect. *See* Exhibit 12 hereto (City's Annual Appropriation Ordinance for 2016 at pp. 24-25).

Answer: The City denies this paragraph's allegations.

298. The City's application of an inflation factor in subsequent years merely continued the Pension Overcharges that were already baked-into the Rates, albeit at ever increasing amounts.

Answer: The City denies this paragraph's allegations.

299. The Water and Sewer Funds annually transfer money to the Municipal Employees' Fund and the Laborers' Fund to cover the required annual contributions set forth in the City's budgets, which budgeted contributions greatly exceed the amounts the Water and Sewer Funds should be contributing to the Funds.

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Answer: The City admits that the Water and Sewer Funds annually transfer money to the Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Annuity and Benefit Fund to cover the funds' shares of the statutorily required annual contributions. The City denies the Water and Sewer Funds' budgeted contributions exceed the amounts the Funds should be contributing to the pension funds. The City denies this paragraph's remaining allegations.

300. This "Pension Overcharge" to the Water and Sewer Funds, which is then incorporated into the Water and Sewer Rates, is wholly independent from and imposed in addition to the wrongful and inflated cost allocations described above. The Pension Overcharge is also wholly independent from and imposed in addition to the Water and Sewer Taxes, which also finance the City's contributions to the Municipal Employees' Fund.

Answer: The City denies it overcharged the funds for their contribution to the City's pension liability and thus denies this paragraph's allegations.

301. Here, pension costs for the Municipal Employees' Fund and the Laborers' Fund are to be allocated based upon each department's percentage of the total "covered payroll" of all departments with employees in the Municipal Employee's Fund and the Laborers' Fund.

Answer: The City admits that the annual allocation of the City's Municipal Employees Fund's and Laborer's Fund's pension liability to the Water and Sewer Funds has its basis in the Funds' proportionate shares of the total covered payroll of the employees in those funds for the year at issue. The City denies this paragraph's remaining allegations.

302. For example, the City's financial statements provide that the Water Fund's allocation to the City's net pension liability should be "determined based on the rates of Water Fund salaries within each corresponding pension plan to the total budgeted salaries for 2020 and 2019." *See* Exhibit 26 hereto at pp. 42-43 (2020 Water Fund financial statement excerpts).

Answer: The City admits that the quoted language quoted appears in the source cited and admits that the source states how the Water Fund's allocation to the City's net pension liability in 2019 and 2020 should be and was determined.

303. As of December 31, 2020 and 2019, the Water Fund's proportion was 6.6% and 7.2% of the Municipal Employees plan, respectively. *See* Exhibit 26 hereto at p. 43. These percentages are used to determine the Water Fund's percentage of the total City contribution to the Plan.

Answer: The City admits that the first sentence is quoted directly from page 43 of Exhibit 26. The City admits that the percentages represent the Water Fund's percentage shares of the City's total required contribution to the Plan. The City denies this paragraph's remaining allegations.

304. For 2022, the City's budget forecasted that the total contributions to the Municipal Employees Fund to be $967,016,000. *See* Exhibit 7 hereto at p. 4.

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Answer: The City admits that, for 2022, $967,016,000 was the City's statutorily required contribution to the Municipal Employees' Annuity and Benefit Fund in 2022. The City denies this paragraph's remaining allegations.

305. In 2022, the City allocated $59,725,000 to the Water Fund (Exhibit 7 at p. 277) which represents approximately 6.2% of the **total** contributions and thus, seemingly approximates the appropriate Water Fund percentage.

Answer: The City admits that $59,725,000 was appropriated from the Water Fund for the Municipal Employees' Annuity and Benefit Fund in 2022. The City admits that $59,725,000 is approximately 6.2% of $967,016,000. The City denies this paragraph's remaining allegations.

306. However, the City's allocation is grossly excessive because it fails to consider that almost $500 Million of the $967 Million of total annual contributions to the Municipal Employees Fund is contributed from taxes (including the Water and Sewer Taxes) and employee contributions. *See* Exhibit 28 hereto at p. 25.

Answer: The City denies that Exhibit 28 contains a page 25. The City denies its allocations are grossly excessive. In particular, the City denies that the Water and Sewer Funds' allocation should be based on anything less than the City's 2022 liability to the Municipal Employees' Fund and denies this paragraph's remaining allegations.

307. Here, specifically, only $470 Million is being contributed by the City using its operating funds. Put another way, only $470 Million is being contributed from the City itself from non-tax sources—and thus, the proper amount that should be allocated among the various City funds, including the Water Fund and the Sewer Fund, for contribution to the Municipal Employees Fund is $470 Million.

Answer: The City denies this paragraph's allegations.

308. When the appropriate amount of $470 Million is used for the contribution calculation, the Water Fund's proportionate share of its contribution for 2022 is dramatically reduced. Indeed, the allocation to the Water Fund drops to just $29,177,200, instead of $59,725,000. This means that for 2022, the City's Pension Overcharge to the Water Fund exceeded $30 Million. Even if one used the 6.6% percentage set forth in the financial statements, the 2022 Pension Overcharge to the Water Fund exceeded $28 million.

Answer: The City denies this paragraph's allegations.

309. Again, the pension costs are to be allocated based upon each City fund's percentage of the total "covered payroll" of all City funds with employees in the Municipal Employees' Fund. For 2020, the total "covered payroll" of all of the applicable City funds was $1,861,905,000. The total covered payroll of the Water Fund was $123,184,000 or 6.6% of the total "covered payroll" of all applicable City funds. Therefore, the Water Fund at most should have been allocated 6.6%

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of the total contribution to the Fund **<u>not covered by tax revenues</u>** – *i.e.,* 6.6% of $470,600,000 or $31,059,600.

Answer: The City denies this paragraph's allegations.

310. The City's budget documents show that the City is over-allocating pension costs to enterprise and other funds (e.g., the Water Fund, Sewer Fund, Midway Fund, O'Hare Fund and the Emergency Communication Fund) in order to reduce the pension cost allocation to the City's Corporate Fund. The total covered payroll of the Corporate Fund and other funds not listed above represents over 80% of the total covered payroll of all City funds with employees in the Municipal Employees' Fund. Again, the total covered payroll of the Water Fund is just 6.6% of the total. Yet, in 2021, the City allocated just $49,773,000 of the pension costs for the Municipal Employees' Fund to the Corporate Fund, while it allocated $36,954,000 of those costs to the Water Fund. *See* Exhibit 27 hereto at p. 27.

Answer: The City denies the allegation that the Corporate Fund's allocation was the total amount that the Corporate Fund contributed to the City's statutorily-required pension liability in 2021 and denies this paragraph's remaining allegations.

311. The City's records show that between January 1, 2018 and December 31, 2022, the Pension Overcharges for the Municipal Employees' Fund to just the Water Fund total over $110 million. At least half of that amount was funded by Rates and Charges paid by water customers in the City (*i.e.,* Plaintiff and the Class).

Answer: The City this paragraph's allegations.

312. A computation of the Pension Overcharges for the Municipal Employees Fund to just the Water Fund since 2018 (assuming the Water Fund is properly charged 6.6% of the total pension charges not covered by tax revenues or employee contributions) is based upon Exhibit 28 hereto and appears below:

2018

Total City Contribution – $402,200,000
Total Contribution Funded by Taxes – $247,022,000
Total Remaining Contribution To Be Funded By All City Departments -- $155,178,000
Water Fund required 6.6% Contribution -- $10,241,748
Water Fund Actual Contribution – $24,451,000
Overcharge to Water Fund -- **$14,209,252**

2019

Total City Contribution – $471,002,000
Total Contribution Funded by Taxes -- $298,840,000
Total Remaining Contribution to be funded By All City Departments -- $172,162,000
Water Fund required 6.6% Contribution -- $11,362,692

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Water Fund Actual Contribution – $30,353,000
Overcharge to Water Fund -- **$18,990,308**

2020

Total City Contribution – $524,534,000
Total Contribution Funded By Taxes -- $341,274,000
Total Remaining Contribution to be funded by All City Departments -- $183,260,000
Water Fund required 6.6% Contribution -- $12,095,160
Water Fund Actual Contribution – $33,014,000
Overcharge to Water Fund -- **$20,918,840**

2021

Total City Contribution – $582,886,000
Total Contribution Funded by Taxes and Employee Contributions-- $415,431,000
Total Remaining Contribution to be funded by All City Departments -- $167,455,000
Water Fund required 6.6% Contribution -- $11,052,030
Water Fund Actual Contribution – $36,954,000
Overcharge to Water Fund -- **$25,901,970**

2022

Total Contribution – $967,016,000
Total Contribution Funded by Taxes and Employee Contributions -- $496,416,000
Total Remaining Contribution to be funded by All City Departments - $470,600,000
Water Fund required 6.6% Contribution -- $31,059,600
Water Fund Actual Contribution – $59,725,000
Overcharge to Water Fund -- **$28,665,400**

Answer: The City denies this paragraph's allegations.

313. These overcharges have continued through filing of this Complaint, and will continue in the future unless enjoined by this Court.

Answer: The City denies this paragraph's allegations.

314. The City also imposes additional overcharges to the Water Fund relating to the Laborers' Fund, because that Fund also is tax-supported and the City's allocations do not consider those tax revenues.

Answer: The City denies this paragraph's allegations.

315. In addition, the City imposes similar Pension Overcharges to fund contributions to both the Municipal Employees' Plan and the Laborers' Plan by the Sewer Fund. Finally, the City also includes tens of millions of dollars in unexplained "indirect" pension costs in the Water and

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Sewer Rates, further increasing the amount of the Pension Overcharge. All of those Overcharges were funded by Rates and Charges paid by sewer customers in the City.

Answer: The City this paragraph's allegations.

316. Inclusion of the Pension Overcharges (which are untethered to the actual cost of providing water and sewer service) in the Water and Sewer Rates necessarily renders these Rates arbitrary, capricious and unreasonable.

Answer: The City denies this paragraph's allegations.

317. Plaintiff and the Class have been harmed by the City's practice of including the Pension Overcharges in the Water and Sewer Rates. Plaintiff and the Class have necessarily paid higher Water and Sewer Charges and have been forced to over-subsidize the City's pension expenses. The City's practice has unjustly enriched the City at the expense of Plaintiff and the Class.

Answer: The City denies this paragraph's allegations.

318. The City's Excessive Allocations and Pension Overcharges, when incorporated into the City's Water and Sewer Rates, render these rates arbitrary, capricious, and unreasonable because the City's rates include cost components that are untethered to the customer's actual use of the water and sewer system.

Answer: The City denies this paragraph's allegations.

319. Plaintiff and the Class have been harmed by the City's Excessive Allocation and Pension Overcharge practice. Plaintiff and the Class have necessarily paid higher Water and Sewer Charges and have been forced to subsidize general fund expenses that should be paid for through general taxation revenues.

Answer: The City denies this paragraph's allegations.

320. The City has been unjustly enriched by the Excessive Cost Allocations and the Pension Overcharges because the City has been able to use those monies – hundreds of millions of dollars – to fund governmental functions and activities unrelated to providing water and sewer services. In the absence of the Excessive Cost Allocations and/or the Pension Overcharges, the City would be required to find other sources of funding for the functions and activities paid for by the revenues generated by the Excessive Cost Allocations and the Pension Overcharges. Instead, the City has impermissibly foisted those costs upon its Water and Sewer customers, including Plaintiff and the Class. Plaintiff and the Class therefore have conferred an unjust benefit upon the City and the City should not be allowed to retain that benefit.

Answer: The City denies this paragraph's allegations.

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321. Even if the City has not been unjustly enriched, Illinois law still requires the City to refund the excess monies it collected from Plaintiff and the Class. Because of the Excessive Cost Allocations and Pension Overcharges, the City has funds which in right and justice belong to Plaintiff and the Class and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate. The right to "reparations" under these circumstances was recognized by the Court in *West v. City of Batavia*, 155 Ill. App. 3d 925, 508 N.E.2d 1124 (2d Dist. 1987):

> We agree with plaintiff that a cause of action for reparations may lie against a municipally owned utility. **At common law, there existed a right to recover reparations for unreasonable charges by a utility or common carrier**. (*Terminal R.R. Association v. Public Utilities Com.* (1922), 304 Ill. 312, 317, 136 N.E. 797; *Chicago, Burlington & Quincy R.R. Co. v. Jones* (1894), 149 Ill. 361, 374.) **This action was based upon the theory that the defendant had funds which in right and justice belonged to the plaintiff and which it ought to restore because it received the funds by charging a rate in excess of the lawful rate.** (*A.L. Jones Co. v. Chicago, Milwaukee & St. Paul Ry. Co.* (1919), 213 Ill. App. 283, 288.) Although the common law right to recover reparations from a public utility has been superseded by the Public Utilities Act … that act was not intended to apply to municipally owned utilities (*Springfield Gas & Electric Co. v. City of Springfield* (1920), 292 Ill. 236, 240, 126 N.E. 739, *aff'd* (1921), 257 U.S. 66, 66 L. Ed. 131, 42 S. Ct. 24). **We conclude that a cause of action for reparations may lie against Batavia based upon the operation of its utility**. [155 Ill. App. 3d at 928 (emphasis added).]

Answer: The City denies it has collected excess monies from Plaintiff or the putative class, denies it has charged an unlawfully excessive rate. The City admits that the authority cited contains substantially the same language as quoted. The City denies the cited authority supports Plaintiff's claims. The City denies the remaining allegations of this paragraph.

322. 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 Water and Sewer Rates and Charges, Plaintiff and the Class have conferred a benefit upon on the City.

Answer: The City denies this paragraph's allegations.

AFFIRMATIVE DEFENSES

First Defense: Lack of Standing

1. Plaintiff was not a City water and sewer customer prior to 2019.

2. "A challenge to standing in a civil case is an affirmative defense." *U.S. Bank, N.A. v. Kosterman*, 2015 IL App (1st) 133627, ¶ 10.

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3. The doctrine of standing requires that a party have a "real interest" in the resolution of the case. *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996).

4. Because Plaintiff was not paying water or sewer rates before 2019, she does not have a real interest in the resolution of this case to the extent it concerns water and sewer rates for years before 2019, and therefore, does not have standing to challenge the City's water or sewer rates for years 2016, 2017 and 2018.

Second Defense: Statute of Limitations

1. The statute of limitations on Plaintiff's claims is five years.

2. Plaintiff cannot seek relief for claims prior to 2019 because she was not a City water and sewer customer prior to 2019.

3. Claims about water and sewer rates in 2016, 2017 and 2018 are now more than five years old

4. Plaintiff's claims for 2016, 2017, and 2018 are barred by the statute of limitations.

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Dated: September 9, 2025

Respectfully submitted,

Mary Richardson-Lowry, Corporation
Counsel for the City of Chicago

By:

Attorney No. 90909

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/s/ Scott M. Crouch
/s/ Sunny Tompkins Baxter

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Counsel for Defendant, City of Chicago

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

KATHRYN FARMER, Individually,	)	
and as Representative of a Class of	)	
Similarly-Situated Persons and Entities,	)	Case No. 2021 CH 04583
	)	
Plaintiff,	)	
v.	)	
CITY OF CHICAGO, an Illinois	)	Judge Allen Price Walker
Municipal Corporation,	)	
	)	
Defendant.	)	

AFFIDAVIT PURSUANT TO 735 ILCS 5/2-610(B)

I, Susan Jordan, state as follows:

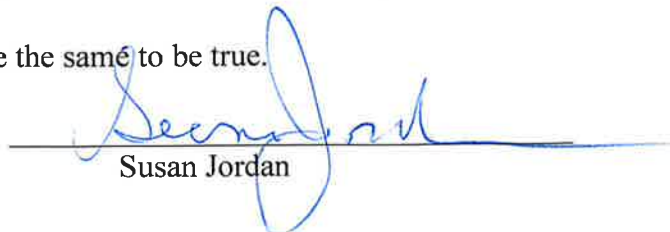
1. I am Deputy Corporation Counsel for the Revenue Litigation Division of the City of Chicago ("City") Department of Law. I represent the City in this matter and speak on its behalf in this affidavit.

2. The City's Answer to the Plaintiff's Fourth Amended Complaint ("Complaint') contains responses to several of Plaintiff's allegations that state the City lacks knowledge sufficient to admit or deny the allegations contained in the Complaint.

3. The City's statements in its Answer that it lacks knowledge sufficient to admit or deny the allegations contained in the Complaint are true.

4. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify by my signature below that the statements set forth in this instrument are true and correct, except as to matters herein stated to be on the information and belief, and as to such statements, I certify that as aforesaid I verily believe the same to be true.

Date: 9/9/25



Susan Jordan

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EXHIBIT – 3

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Harmon v. Shell Oil Co.

United States District Court for the Southern District of Texas, Galveston Division

September 6, 2023, Decided; September 6, 2023, Filed, Entered

CIVIL ACTION NO. 3:20-cv-00021

Reporter
2023 U.S. Dist. LEXIS 157163 *; 2023 WL 5758889

CHARLES HARMON, et al., Plaintiffs. v. SHELL OIL COMPANY, et al., Defendants.

Prior History: Harmon v. Shell Oil Co., 2021 U.S. Dist. LEXIS 66312, 2021 WL 1232694 (S.D. Tex., Mar. 30, 2021)

Counsel: **[*1]** For Charles Harmon, individually and as representatives of a class of participants and beneficiaries of the Shell Provident Fund 401(k) Plan, Plaintiff: Michael A. Wolff, Schlichter Bogard & Denton LLP, St. Louis, MO; Robert M Tramuto, LEAD ATTORNEY, Jones Granger et al, Houston, TX; Heather Lea, Jerome J Schlichter, Sean E Soyars, Troy A Doles, Schlichter Bogard et al, St. Louis, MO; Joel D Rohlf, Schlichter Bogard Denton LLP, St. Louis, MO; Matthew E Layden, Scott A. Bumb, PRO HAC VICE, SCHLICHTER BOGARD & DENTON LLP, St. Louis, MO.

For Brian D. Coble, individually and as representatives of a class of participants and beneficiaries of the Shell Provident Fund 401(k) Plan, David E. Lawrence, individually and as representatives of a class of participants and beneficiaries of the Shell Provident Fund 401(k) Plan, Plaintiffs: Michael A. Wolff, LEAD ATTORNEY, PRO HAC VICE, Schlichter Bogard & Denton LLP, St. Louis, MO; Heather Lea, Jerome J Schlichter, Sean E Soyars, Troy A Doles, Schlichter Bogard et al, St. Louis, MO; Joel D Rohlf, Schlichter Bogard Denton LLP, St. Louis, MO; Matthew E Layden, Scott A. Bumb, PRO HAC VICE, SCHLICHTER BOGARD & DENTON LLP, St. Louis, MO; Robert M Tramuto, **[*2]** Jones Granger et al, Houston, TX.

For Asur M. Vallejos, individually and as representatives of a class of participants and beneficiaries of the Shell Provident Fund 401(k) Plan, Plaintiff: Michael A. Wolff, LEAD ATTORNEY, PRO HAC VICE, Schlichter Bogard & Denton LLP, St. Louis, MO; Heather Lea, Jerome J Schlichter, Sean E Soyars, Troy A Doles, Schlichter Bogard et al, St. Louis, MO; Joel D Rohlf, Schlichter Bogard Denton LLP, St. Louis, MO; Scott A. Bumb, PRO HAC VICE, Schlichter Bogard & Denton LLP, St. Louis, MO; Robert M Tramuto, Jones Granger et al, Houston, TX.

For Shell Provident Fund 401(k) Plan, Consol Plaintiff: Jerome J Schlichter, Schlichter Bogard et al, St Louis, MO; Robert M Tramuto, Jones Granger et al, Houston, TX.

For Shell Oil Company, Defendant: Alex C. Lakatos, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown, LLP, Washington, DC; Michael Patrick Lennon, Jr, LEAD ATTORNEY, Mayer Brown LLP, Houston, TX; Ankur Mandhania, Mayer Brown LLP, San Francisco, CA; Nancy G Ross, PRO HAC VICE, Mayer Brown LLP, Chicago, IL.

For FMR LLC, Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Edwina Bullard Clarke, PRO HAC VICE, Alison V Douglass, **[*3]** Goodwin Procter LLP, Boston, MA; Jaime A. Santos, William Jay, Goodwin Procter LLP, Washington, DC; James R Carroll, Skadden Arps et al, Boston, MA.

For Trustees of Shell Provident Fund, Defendant: Alex C. Lakatos, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown, LLP, Washington, DC; Michael Patrick Lennon, Jr, LEAD ATTORNEY, Mayer Brown LLP, Houston, TX; Ankur Mandhania, Mayer Brown LLP, San Francisco, CA; Michelle N. Webster, PRO HAC VICE.

For Fidelity Management and Research, LLC, Consol Defendant: Noelle M Reed, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, TX; Alison V Douglass, Goodwin Procter LLP, Boston, MA; James R Carroll, Skadden Arps et al, Boston, MA.

For Financial Engines Advisors, LLC, Interested Party: Elizabeth L Woods, Sarah M. Adams, LEAD ATTORNEYS, Groom Law Group Chartered, Washington, DC; Joseph A. Lazazzero, LEAD ATTORNEY, Littler Mendelson P.C., Boston, MA.

Judges: ANDREW M. EDISON, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ANDREW M. EDISON

Opinion

MEMORANDUM AND RECOMMENDATION

Pending before me is Plaintiffs' Motion for Class Certification.

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Dkt. 159. Having reviewed the briefing, the record, and the applicable law, I recommend that the Motion for Class Certification be **GRANTED [*4]** .

BACKGROUND

Plaintiffs Charles Harmon ("Harmon"), Brian Coble ("Coble"), and David Lawrence ("Lawrence") (collectively, "Plaintiffs") are current or former employees of Shell Oil Co. ("Shell") and beneficiaries of Shell's defined contribution 401(k) retirement plan, the Shell Provident Fund 401(k) Plan (the "Plan").

The Plan is among the largest 401(k) plans in the country, with more than 30,000 participants and more than $10 billion in assets. From around 1999 until the end of September 2020, the Plan offered participants four tiers of investment options:

- Tier 1 contains target date funds that automatically reallocate assets over time in an increasingly conservative posture as the fund's target retirement date approaches.
- Tier II contains a number of index funds.
- Tier III contained more than 300 investment options, including all of Fidelity's mutual funds. Shell removed Tier III from the Plan at the end of September 2020.

- Tier IV gives participants access to individual brokerage accounts and the ability to purchase thousands of investment options. The Plan contracts with Financial Engines Advisors LLC ("Financial Engines") to provide managed account services to those Plan participants **[*5]** who elect to use these optional services.

Plaintiffs brought this lawsuit under 29 U.S.C. § 1132(a)(2)-(3), asserting that Shell, Trustees of the Plan, and various Fidelity entities[1] breached their fiduciary duties in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. §§ 1001-1461.

In March 2021, Judge Jeffrey V. Brown dismissed all claims against the Fidelity entities. *See* Dkt. 138. He also dismissed several of Plaintiffs' claims against Shell and Trustees of the Plan (collectively, the "Shell Defendants"). *See* Dkt. 139. The remaining four counts in this lawsuit allege (1) breach of fiduciary duties related to unreasonable recordkeeping fees (Count I); (2) breach of fiduciary duties related to Plan investments (Count II); (3) breach of fiduciary duties related to unreasonable managed account fees (Count III); and (4) prohibited transactions between the Plan and Shell (Count VIII). I will briefly describe each remaining claim.

Count I: Fidelity Investments Institutional Operations Company Inc. ("Fidelity") is the Plan's recordkeeper. In that role, Fidelity (1) maintains participant accounts; (2) processes contributions, withdrawals, and distributions; (3) enrolls and terminates participants; and (4) prepares required disclosures.

From January 21, 2014 **[*6]** (the beginning of the purported class period) through the end of 2020, Fidelity provided recordkeeping services to the Plan for a flat annual rate of $30 per participant. This amount was paid with revenue sharing from certain investments in Tier III. "Revenue sharing" is an arrangement allowing funds to share a portion of the fees that they collect from investors with entities that provide services to the funds. The practical effect of this fee structure, Plaintiffs insist, was that investors in certain Tier III mutual funds were responsible for paying the $30 recordkeeping fee on behalf of all Plan participants.

After Tier III was removed from the Plan, revenue sharing from Tier III funds could no longer provide the source for the $30 annual payment to Fidelity. Beginning in January 2021, each Plan participant was assessed an annual $60 fee. Half of the fee was earmarked to cover Fidelity's recordkeeping fee, and the other half was targeted to cover certain administrative expenses.

Plaintiffs claim that Fidelity has received additional compensation through revenue sharing from Financial Engines, the company that provides managed account services. Plaintiffs claim that the revenue sharing **[*7]** from Financial Engines has resulted in an enormous amount of additional recordkeeping compensation to Fidelity beyond its stated $30 annual per participant fee.

In Count I, Plaintiffs maintain that the Shell Defendants breached their fiduciary duties by failing to "monitor the amount of the revenue sharing received by the Plan's recordkeeper, determine if those amounts were competitive or reasonable for the services provided to the Plan, use the Plan's size to reduce fees, or obtain sufficient rebates to the Plan for the excessive fees paid by participants." Dkt. 84 at 81-82.

Count II: Plaintiffs allege that the Shell Defendants breached their fiduciary duties by failing to monitor the Tier III investments in the Plan. "By retaining every investment within Tier III," Plaintiffs contend that the "Shell Defendants retained an investment structure that was contrary to prudent investment practices and the actions and practices of other knowledgeable and diligent fiduciaries of similar defined contribution plans." *Id.* at 84.

[1] The Fidelity entities include FMR LLC; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Operations Company Inc.; Fidelity Investments Life Insurance Company; Fidelity Personal Trust Company FSB; and Fidelity Personal and Workplace Advisors LLC.

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According to Plaintiffs, those who invested in Tier III funds were not the only ones damaged by this allegedly imprudent investment strategy. Plaintiffs argue that retaining **[*8]** Tier III funds "also affected the fees of the investment options in other tiers." Dkt. 188 at 11. "Once Tier II was removed, the fees of the Tier I and II funds declined substantially, demonstrating that Tier III harmed all [Plan] participants by driving up the fees charged to Tier I and Tier II investments until its removal." *Id.*

Count III: Managed accounts, like those made available by Tier IV, offer Plan participants the chance to obtain investment advice and professional management of their assets. As noted, the Plan contracted with Financial Engines to provide managed account services. In exchange for a fee, Financial Engines would assist Plan participants in creating and/or managing custom portfolios tailored to their specific needs. In Count III, Plaintiffs challenge the amount of the fees paid to Financial Engines. Plaintiffs insist that the Shell Defendants breached their fiduciary duties by failing to conduct regular requests for proposals to determine the market rate for managed account services, and that this failure resulted in excessive managed account fees.

Count VIII: Shell created a Trustee Support Unit to provide support services to the Plan, including (1) the engagement **[*9]** of third-party service providers; (2) handling claims for benefits; and (3) overseeing regulatory reporting and financial controls. Count VIII alleges that the Shell Defendants engaged in prohibited transactions under ERISA by improperly paying certain Plan-related administrative expenses using rebates that Fidelity paid Shell. According to Plaintiffs, the "Shell Defendants dealt with the assets of the Plan in their own interest and for their own account by diverting rebates to the Plan for reimbursement of employee salaries and fringe benefits and other expenses instead of recovering that revenue sharing for the Plan and Plan participants." Dkt. 84 at 93.

PROPOSED CLASSES

Plaintiffs have moved to certify the following two classes under Federal Rule of Civil Procedure 23(b)(1):

> **Class 1 (Counts I, II, and VIII)**: All participants and beneficiaries of the Shell Provident Fund 401(k) Plan from January 21, 2014, through the date of judgment, excluding the Defendants.
>
> **Class 2 (Count III)**: All participants and beneficiaries of the Shell Provident Fund 401(k) Plan who utilized the Plan's managed account services from January 21, 2014, through the date of judgment, excluding the Defendants.

Dkt. 159 at 14. The Shell Defendants do not **[*10]** oppose the Class 2 definition.

Plaintiffs request that Lawrence, Coble, and Harmon be appointed as class representatives of Class 1. They ask that Lawrence and Coble be appointed as class representatives of Class 2. Finally, Plaintiffs ask that Schlichter, Bogard & Denton LLP be appointed as class counsel.

LEGAL STANDARD

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). "Class actions permit representative plaintiffs to litigate their claims on behalf of members of the class not before the court." *Caliste v. Cantrell*, No. 17-6197, 2018 U.S. Dist. LEXIS 43338, 2018 WL 1365809, at *1 (E.D. La. Mar. 16, 2018). "The purpose of a class action is to avoid multiple actions and to allow claimants who could not otherwise litigate their claims individually to bring them as a class." *Id.* (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)). Many courts have held that ERISA breach of fiduciary claims "are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases); *see also In re Enron Corp.*, No. 01-3913, 2006 U.S. Dist. LEXIS 43145, 2006 WL 1662596, at *14 (S.D. Tex. June 7, 2006) (same).

Rule 23 governs class certification. Under Rule 23(a), Plaintiffs must satisfy four requirements—numerosity, commonality, typicality, and adequacy of representation—for a class action to proceed. *See* Fed. R. Civ. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Numerosity requires a showing that "the class is so **[*11]** numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Commonality requires a showing that "there are questions of law or fact common to the class." *Id.* 23(a)(2). Typicality refers to the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id.* 23(a)(3). Adequacy mandates a showing that the representative party and the named class counsel "will fairly and adequately protect the interests of the class." *Id.* 23(a)(4).

Even where the four Rule 23(a) requirements are satisfied, certification is permitted only if there is an additional showing that the class action fits into at least one of three specified categories set forth in Rule 23(b). *See Wal-Mart*, 564 U.S. at 345.

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These categories are: (1) cases in which prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudication; (2) cases in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class," so that final injunctive or declaratory relief is appropriate with respect to the class as a whole; or (3) cases in which "questions of law or fact common to class members predominate over any questions affecting only individual members" **[*12]** and the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b).

The Fifth Circuit recently addressed, in the context of an ERISA action, the "rigorous analysis" required to certify a class action under Rule 23. *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545 (5th Cir. 2020) (quoting *Wal-Mart*, 564 U.S. at 351). The Chavez panel emphasized that Rule 23 is not a pleading standard, explaining that district courts will often have to look beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law" to determine whether certification is appropriate in a given case. *Id.* at 546 (quotation omitted). The Fifth Circuit also instructed district courts to rigorously consider both Rule 23(a)'s four prerequisites and the Rule 23(b) class type before certifying a class. *See id.* Plaintiffs have the burden of showing that Rule 23's requirements are met. *See* *Wal-Mart*, 564 U.S. at 350-51.

Moreover, "[s]tanding is an inherent prerequisite to the class certification inquiry." *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001). This is because the standing inquiry "determines the court's fundamental power even to hear the suit." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002). To satisfy standing under Article III of the U.S. Constitution, three elements must be met. "First, the plaintiff must have suffered an 'injury in fact'an invasion of a legally protected interest which is (a) concrete and particularized, **[*13]** and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (cleaned up). "Second, there must be a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation omitted).

"To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) (emphasis added).

ANALYSIS

A. THE SHELL DEFENDANTS' STANDING ARGUMENTS FAIL

The Shell Defendants first object to class certification under Rule 23 on the grounds that (1) Plaintiffs do not have standing to be named as class representatives in the manner that Plaintiffs have requested; and (2) the Class 1 definition would include many absent class members who lack standing, which Defendants argue is impermissible under Fifth Circuit guidance.

1. Standing of Class Representatives

In their class certification briefing, the Shell Defendants did not contest that Lawrence has standing on all remaining counts in this litigation. This is probably because Lawrence **[*14]** appears to be the quintessential class representative for Counts I, II, III, and VIII. He was a Plan participant during the putative class period who invested in Tier III and used Financial Engines' managed account services.

At oral argument, the Shell Defendants questioned, for the first time, the scope of Lawrence's standing on Count I (recordkeeping fees). Specifically, the Shell Defendants queried whether Lawrence invested in any of the Tier III funds that paid Fidelity's fees through revenue sharing. The Shell Defendants further argued that even if Lawrence invested in Tier III funds that paid Fidelity's fees, his standing on Count I should be limited to the time period in which he invested in those funds. I gave Plaintiffs permission to supplement the record to respond to this argument. Plaintiffs did so. *See* Dkt. 247.

As evidenced by Plaintiffs' supplemental briefing and evidence, Lawrence invested in at least 13 Tier III funds that paid revenue sharing between January 21, 2014 and November 2018. *See id* at 1-3. Although this time period does not cover the **entire class period**, Article III standing does not require a participant to allege injury for the **entire class period**. *See* *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591-93 (8th Cir. 2009) ("[T]he district **[*15]** court erred in concluding that [the plaintiff] lacked standing to maintain claims for the period before he began participating in the Plan."). "[B]ecause [Lawrence] has alleged actual injury to his own Plan account," he "has satisfied the requirements of Article III." *Id.* at 592.

Having concluded that Lawrence has standing for Class 1, I am not required to assess whether Coble or Harmon are proper class representatives for Class 1. It is well-established that the standing inquiry requires "at least one" plaintiff to demonstrate standing. *Horne v. Flores*, 557 U.S. 433, 445, 129 S. Ct. 2579, 174

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L. Ed. 2d 406 (2009). If one plaintiff has standing, I need not consider whether the other named plaintiffs have standing to maintain the suit. *See* *Rumsfeld v. Forum for Acad. & Inst'l Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (holding that the Court "need not consider the standing issue as to" other plaintiffs when one plaintiff has Article III standing); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S. Ct. 555, 50 L. Ed. 2d 450 & n.9 (1977) (holding that "we have at least one individual plaintiff who has demonstrated standing" and that "[b]ecause of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *Prado- Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("[I]t is well-settled that prior to the certification of a class, **[*16]** and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.").

As to Class 2, the Shell Defendants acknowledge that Lawrence and Coble, both of whom used Financial Engines' managed account services, have standing for Class 2.

Accordingly, I find that Lawrence has standing to represent Class 1 and Class 2, and Coble has standing to represent Class 2. Having found that at least one individual plaintiff has standing for each proposed class, I may continue with the class certification analysis.

2. Fifth Circuit Precedent Does Not Preclude Class Certification Where Absent Class Members Lack Standing

The Shell Defendants next argue that I cannot certify Class 1 because the proposed class definition encompasses "huge blocks" of absent class members who lack standing. Dkt. 171 at 13. As a refresher, Plaintiffs' proposed definition for Class 1 (which covers Counts I, II, and VIII) is:

> All participants and beneficiaries of the Shell Provident Fund 401(k) Plan from January 21, 2014, through the date of judgment, excluding the Defendants.

Dkt. 159 at **[*17]** 14. This definition, the Shell Defendants argue, impermissibly sweeps in Plan participants who either (1) did not invest in Tier III funds that were assessed fees used to pay for recordkeeping or Plan-related administrative expenses; or (2) invested in Tier III funds that performed favorably. These Plan participants, the Shell Defendants claim, have not suffered an Article III injury and thus do not have standing.

To start, Plaintiffs emphasize that the Shell Defendants are mistaken in their belief that only those who invested in Tier III funds have suffered harm as a result of the Plan's decision to retain Tier III during most of the class period. Plaintiffs' expert witness Dr. Edward S. O'Neal estimates that the Plan's decision to keep Tier III in place until the end of September 2020 forced Tier I and II investors to incur an additional $6.3 million in Tier I and II fees that would have been eliminated had Shell removed Tier III at the start of the class period. *See* Dkt. 213-12 at 9; *see also* Dkt. 213-5 at 49 (Expert witness Donald C. Stone: "When Tier III was finally removed from the Plan in September 2020, because of the large amount of assets that moved into Tier I and Tier II, **[*18]** the Plan was able to reduce its fees on many Tier I and Tier II funds."). Given this, it seems clear to me that Plaintiffs have adequately alleged that those who did—and did not—invest in Tier III suffered an Article III injury as a result of the mere existence of the Tier III funds. All such unnamed class members thus have standing.

That leaves the Shell Defendants' argument that, even assuming the decision to retain Tier III was imprudent, not all those who invested in Tier III necessarily were damaged as a result of that decision. Some Plan participants, the Shell Defendants observe, might have invested in Tier III funds that increased in value. Plaintiffs have a quick retort. Even if the particular Tier III funds in which absent class members invested increased in value, Plaintiffs claim that "the measure of loss applicable under ERISA section 409 requires a comparison of what the Plan actually earned on the [imprudent] investment with what the Plan would have earned had the funds been available for other Plan purposes." Dkt. 188 at 12-13 (quoting *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985)). Retaining Tier III, Plaintiffs maintain, caused the Plan participants, as a whole, to lose over $70 million "compared to what those assets would have **[*19]** earned in an alternative, prudent lineup." Dkt. 84 at 28.

Still, it is entirely possible that a particular individual happened to invest in Tier III funds that outgained an alternative, prudent lineup of funds. Take a far-fetched hypothetical: assume an individual invested in a particular Tier III fund that increased by 10,000 percent. That would unquestionably be a superior return to an otherwise alternative, prudent lineup. Because the Class 1 definition might include these hypothetical individuals who actually benefited from investing in Tier III funds, the Shell Defendants argue that class certification is improper. The Shell Defendants maintain that I cannot certify a class that contains any absent class members who do not have standing. I disagree.

There are two competing approaches to evaluating absent class members' standing at the class certification stage: the Seventh Circuit's *Kohen* test or the slightly more exacting *Denney* test from the Second Circuit.

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The Kohen test points out that it is "almost inevitable" that "a class will . . . include persons who have not been injured by the defendant's conduct . . . because at the outset of the case many of the members of the class may be **[*20]** unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). According to Kohen, however, the "possibility" or "inevitability" of class members lacking standing "does not preclude class certification." *Id.* As such, Kohen focuses its Article III inquiry on named plaintiffs only. The Third and Eleventh Circuits have embraced the Kohen view that every class member is not required to demonstrate standing before a court certifies a class. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) ("A plaintiff need not prove that every member of the proposed class has Article III standing prior to certification."); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 366 (3d Cir. 2015) ("We decline [the defendant]'s invitation to impose a requirement that all class members possess standing.").

The slightly less permissive Denney test scrutinizes the class definition to ensure that no class members lack Article III standing. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). The Denney standard does not, however, require that each member of a class submit evidence of individual standing; rather, it demands that the class "be defined in such a way that anyone within it would have standing." *Id.* at 264.

It appears that the Fifth Circuit has already adopted the Kohen test. *See Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009). In Mims, the Fifth Circuit affirmed the certification of a class that potentially covered members who were ineligible for a discount **[*21]** on a title insurance policy that was the basis for all of plaintiffs' claims. *See id.* at 307-08. The Fifth Circuit stated that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Id.* at 308 (citing *Kohen*, 571 F.3d at 677). Although this statement was made in the context of analyzing Rule 23 rather than Article III, the Mims court earlier stated that "[t]here is no serious question that the plaintiffs have standing" after explicitly analyzing only "the named plaintiffs." *Id.* at 302.

Several recent Fifth Circuit panels have suggested that the Fifth Circuit "has not yet decided whether standing must be proven for unnamed class members, in addition to the class representative." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020); *see also In re Deepwater Horizon*, 785 F.3d 1003, 1019 (5th Cir. 2015) ("We have not directly addressed how to evaluate [absent class member] standing for the purposes of class certification."). Those statements are at odds with Mims's holding affirming a class definition that potentially included class members without standing. It is firmly entrenched that "one panel of [the Fifth Circuit] cannot disregard, much less overrule, the decision of a prior panel." *F.D.I.C. v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998). Accordingly, if the Fifth Circuit wants to overrule Mims at some future date, so be it. But for now, **[*22]** I must follow Mims. Accordingly, the fact that Plaintiffs' proposed class definition may encompass some absent class members without standing does not preclude class certification.

Although a class certainly "should not be certified if it is apparent that it contains *a great many* persons who have suffered no injury at the hands of the defendant," I cannot presently make that assessment. *Kohen*, 571 F.3d at 677 (emphasis added). The Shell Defendants cursorily assert that not all Tier III participants might have suffered harm. What I do know from the class certification submissions is that Plaintiffs believe the Plan lost over $70 million due to the utilization of Tier III investments. Once a class is certified, Plaintiffs will have to conduct the necessary damage calculations, plaintiff by plaintiff, to determine whether each class member who invested in Tier III suffered damages. The Shell Defendants might very well offer their own damage calculations. "[A]t some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief." *Cordoba*, 942 F.3d at 1274; *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021) ("Every class member must have Article III standing in order to recover individual **[*23]** damages."). This just does not need to be done at the initial class certification stage.

B. PLAINTIFFS SATISFY THE RULE 23(A) REQUIREMENTS

The Shell Defendants concede that Plaintiffs' claims satisfy the numerosity, commonality, and typicality factors under Rule 23(a). Indeed, Plaintiffs' claims easily satisfy these requirements.[2] As to numerosity, joinder would be highly impracticable because the Plan had over 10,000 participants and proposed class members during the class period. As to commonality, the evidence necessary to determine whether the Shell Defendants breached their fiduciary duties and the losses the Plan sustained relate to the Plan itself, and thus are the same for all Plan

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[2] My "obligation . . . to conduct a rigorous analysis of Rule 23's requirements . . . is not dispensed with by the parties' stipulation to certification or failure to contest one or more of Rule 23's requirements." *Ward v. Hellerstedt*, 753 F. App'x 236, 244 (5th Cir. 2018) ("'[T]he court [is] bound to conduct its *own* thorough . . . inquiry.'" (quoting *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002))).

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participants. As to typicality, each class representative's claims "have the same essential characteristics of those of the putative class." *Stirman*, 280 F.3d at 562 (quotation omitted).

The Shell Defendants contest only the adequacy requirement under Rule 23(a)(4), arguing that the class is rife with intra-class conflict. Rule 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). It "serves to uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and **[*24]** conflicts of class counsel." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 & 626 n.20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). "Numerous courts have held that intraclass conflicts may negate adequacy under Rule 23(a)(4)." *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 315 (5th Cir. 2007). Yet, there is no real conflict here that precludes class certification.

The Shell Defendants' argument is that Plaintiffs' case theory pits class members who invested in certain Tier III funds against class members who invested only in Tiers I, II, and IV. Underlying Count I is Plaintiffs' contention that certain Tier III investors unfairly shouldered the burden of paying the $30 annual per participant recordkeeping fee on behalf of all Plan participants. Similarly, the Count VIII prohibited transaction claim asserts that certain Tier III funds paid for all of the Plan's administrative expenses, with those Plan participants who invested only in Tiers I, II, and IV avoiding their fair share of administrative expenses. "It is hard to imagine," the Shell Defendants assert, "that absent class members, who did not invest in Tier III would (or could) be satisfied with being represented by a Named Plaintiff such as Mr. Lawrence, who did, and whose counsel has maligned such absent members as free riders, unfairly leaching benefits from Named Plaintiffs like Mr. Lawrence." Dkt. **[*25]** 171 at 17.

This argument is not persuasive. As Plaintiffs point out, "if Shell were *continuing* to charge all fees to Tier III only, there could be antagonism between participants who wished to continue this arrangement and those who desired change." Dkt. 188 at 16. But that is not the situation at hand. At the end of September 202o, Shell eliminated Tier III and the practice of charging only Tier III investors for recordkeeping and administrative fees incurred by all Plan participants. "Thus, the relief sought, recovery from *Shell* of excessive fees previously paid, cannot possibly harm any class member." *Id.*; *see also* *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 814 (7th Cir. 2013) (finding "no risk that any [class member] who benefited from [the defendant]'s imprudent management would have her Plan assets reduced as a result of this lawsuit"); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 2017 U.S. Dist. LEXIS 137738, 2017 WL 3730552, at *3 (M.D.N.C. Aug. 28, 2017) (rejecting claimed conflict because defendants failed to "provide[] any explanation of how a class member could possibly be harmed if damages were recovered on behalf of the Plan").

Adequacy is only defeated when there is a "fundamental" conflict "going to the specific issues in controversy." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (quotation omitted). Adequacy is not defeated by "merely speculative or hypothetical" conflicts. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010). It is clear that **[*26]** there is no fundamental conflict that prohibits Lawrence or Coble from representing the class. The economic interests and objectives of Lawrence and Coble do not differ significantly from the economic interests and objectives of unnamed class members. Notably, the Shell Defendants fail to articulate how the relief sought by Plaintiffs *from the Shell Defendants* could possibly harm putative class members. No class member faces the risk of having to disgorge any money to the Plan. In short, Lawrence and Coble—and all class members—share a common goal of establishing the liability of the Shell Defendants.

Accordingly, Plaintiffs have satisfied their burden of showing that the Rule 23(a) requirements are satisfied.

C. PLAINTIFFS' CLASSES MAY BE CERTIFIED UNDER RULE 23(B)(1)

In addition to satisfying the four requirements of Rule 23(a), a proposed class must fit one of the types of class actions listed in Rule 23(b). Here, Plaintiffs argue that class certification is warranted under either Rule 23(b)(1) or Rule 23(b)(3). Tellingly, the Shell Defendants do not contest class certification under Rule 23(b), saying nary a word about Rule 23(b) in their 24-page brief opposing class certification.

Rule 23(b)(1)(A) provides for class certification where "prosecuting separate actions by or against individual **[*27]** class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). ERISA fiduciary breach actions "are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough*, 589 F.3d at 604.

I agree with Plaintiffs that "[a]llowing thousands of individuals to pursue separate actions on behalf of the Plan could result in varying adjudications on numerous issues, resulting in conflicting and incompatible standards of conduct for [the Shell Defendants]." Dkt. 159 at 31. For example, Plaintiffs seek to "remove the fiduciaries who have breached their fiduciary duties

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and enjoin them from future ERISA violations." Dkt. 84 at 96. As the Fifth Circuit posited in Langbecker, a "judgment removing the fiduciaries in one lawsuit would be inconsistent with a judgment in another permitting them to stay." 476 F.3d at 318. Plaintiffs also ask the Court to "reform the Plan to obtain bids for recordkeeping and to pay only reasonable recordkeeping expenses" and "reform the Plan to obtain bids for managed account services and to pay only reasonable managed account service fees." Dkt. 84 at 97. **[*28]** A judgment that reforms the Plan in one case would be inconsistent with a judgment in another case not requiring reformation. Accordingly, I find that "[c]ertification under Rule 23(b)(1)(A) is . . . warranted" to avoid "contradictory rulings" and "inconsistent dispositions that would prejudice the [Shell Defendants]." *Enron Corp.*, 2006 U.S. Dist. LEXIS 43145, 2006 WL 1662596, at *15.

Because I find that certification under Rule 23(b)(1)(A) is proper, I do not reach the Plaintiffs' arguments regarding Rule 23(b)(1)(B) or Rule 23(b)(3).

D. Plaintiffs' Counsel Satisfy Rule 23(G)'s Requirements

Finally, Plaintiffs seek appointment of their current counsel from Schlichter, Bogard & Denton LLP as class counsel under Rule 23(g). Under Rule 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g). In appointing class counsel, courts must consider (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law; and" (4) "the resources that counsel will commit to representing the class." *Id.* 23(g)(1)(A). Class counsel has a duty to "fairly and adequately represent the interests of the class." *Id.* 23(g)(4).

I find that Schlicter, Bogard & Denton LLP satisfies **[*29]** the requirements of Rule 23(g). The firm has represented Plaintiffs from the inception of this lawsuit. It has been appointed as class counsel in 34 ERISA fiduciary breach class actions and has succeeded in obtaining monetary settlements and affirmative relief in many cases. *See* Dkt. 159-26 at 3, 6. Moreover, the firm has been recognized "as a pioneer and the leader in the field of retirement plan litigation." *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701, 2015 U.S. Dist. LEXIS 93206, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015). The firm maintains that it "will commit all financial and personnel resources needed to effectively represent the class." Dkt. 159-26 at 6, 9. Therefore, I recommend that Schlicter, Bogard & Denton LLP be appointed as class counsel for both classes.

CONCLUSION

For the reasons stated above, I recommend that the Motion for Class Certification (Dkt. 159) be **GRANTED** and the following classes be certified under Rule 23(b)(1)(A):

> **Class 1 (Counts I, II, and VIII)**: All participants and beneficiaries of the Shell Provident Fund 401(k) Plan from January 21, 2014, through the date of judgment, excluding the Defendants.
>
> **Class 2 (Count III)**: All participants and beneficiaries of the Shell Provident Fund 401(k) Plan who utilized the Plan's managed account services from January 21, 2014, through the date of judgment, **[*30]** excluding the Defendants.

I recommend that Lawrence be appointed as the class representative for Class 1 (Counts I, II, and VIII).[3] I further recommend that Lawrence and Coble be appointed as class representatives for Class 2 (Count III).

I also recommend that Plaintiffs' current counsel from Schlichter, Bogard & Denton LLP be appointed as class counsel for both classes.

The parties have 14 days from service of this Memorandum and Recommendation to file written objections. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections will preclude appellate review of factual findings and legal conclusions, except for plain error.

SIGNED this 6th day of September 2023.

/s/ Andrew M. Edison

ANDREW M. EDISON

UNITED STATES MAGISTRATE JUDGE

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[3] Harmon also requests appointment as a class representative for Class 1. Defendants have raised a number of concerns regarding Harmon's standing. *See* Dkt. 171 at 9-11. I need not address those concerns. Because Lawrence is an **adequate class representative** for Class 1, I decline to consider Harmon as an additional class representative at this juncture. Should Lawrence prove unsuitable, the Court can revisit Harmon's adequacy as a class representative at such time.

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EXHIBIT – 4

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STATE OF MICHIGAN

IN THE CIRCUIT FOR THE COUNTY OF OAKLAND

LAURENCE WOLF,
Individually and as trustee of
LAURENCE G. WOLF CAPITAL
MANAGEMENT AGREEMENT
DATED MARCH 7, 1990
LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES, and
WOLF PROPERTIES,
Individually, and as representatives
of a class of similarly situated persons
and entities,

Case No. 14-138464-CZ
Hon. Colleen O'Brien

Plaintiffs,

v

CITY OF FERNDALE,
a municipal corporation,

Defendant.
____/

OPINION AND ORDER

This matter is before the Court on Plaintiffs' motion for class certification pursuant to MCR 3.501. This Court heard oral argument and took the motion under advisement.

This case arises from the allegations that Defendant City of Ferndale (the "City") has violated the Headlee Amendment to the Michigan Constitution and Ferndale Ordinance Section 22-65. Plaintiffs challenge a mandatory debt service charge (the "Kuhn Facility Debt Charge") and a mandatory stormwater disposal charge (the "Stormwater Charge") imposed by the City on users of its water and sanitary sewage disposal services. With respect to Count I – Violation of Headlee Amendent, Plaintiffs

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ask this Court to define the class to include all persons or entities which have paid the City for water and sanitary service at any time in the one year preceding the filing of this lawsuit or which pay Defendant for water and sanitary sewer service during the pendency of this action. With respect to Count II – Unjust Enrichment, Plaintiffs ask this Court to define the class to include all persons or entities which have paid Defendant for water and sanitary sewer service at any time in the six years preceding the filing of this lawsuit or which paid for water and sanitary service during the pendency of this action. Plaintiffs further ask this Court to certify this action to be a proper class action with Plaintiffs certified as Class Representatives and Kickham Hanley PLLC designated Class Counsel.

Defendant responds that this Court should deny Plaintiff's motion because class certification of this case is inappropriate. Defendant contends that this is not a storm water case and the portions of the water and sewer fees at issue are not "storm water" fees.

Certification of a class is controlled by court rule. "Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry v Dow Chemical Co*, 484 Mich 483, 496 (2009). That rule provides as follows:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

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> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

"These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Henry, supra* at 488. "The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification." *Michigan Ass'n of Chiropractors v Blue Cross Blue Shield of Mich,* 300 Mich App 577, 586 (2013). A party seeking class certification is required to provide this court with information sufficient to establish each prerequisite for class certification under MCR 3.501(A)(1) is satisfied. *Henry, supra at 488.* The certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. *Id.* at 502. The court is to independently determine that the plaintiff has at least alleged a statement of basic facts and law which are adequate to support the prerequisites. *Id.* at 505. The court may make its determination on the pleadings alone, only if such pleadings set forth sufficient information that satisfies the court that each prerequisite is in fact met. Id. at 502. Where the pleadings are insufficient, the court is to look to additional information beyond the pleadings to determine whether class certification is proper. *Id.* at 503. However, at the class certification stage of the proceedings, a court is to avoid making determinations on the merits of the underlying case. *Id.* at 488. The court is to "analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case. *Id.* at 504.

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Numerosity

This factor was addressed in *Zine v Chrysler Corp*, 236 Mich App 261, 287-288 (1999).

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiffs must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [Citations omitted]

The Court finds that Plaintiffs have met their burden in establishing the numerosity factor. Here, Plaintiffs propose to certify a 10,000 member class comprised of "all persons who have paid the City for water and sanitary sewage disposable services during the relevant class periods." This is supported by the City's Water and Sewer Fund Report dated February 10, 2014 stating that the City has approximately 9,789 water and sanitary users. Certainly, joinder of the proposed class members would be impracticable.

Furthermore, Plaintiffs have defined the class so potential members can be identified. Here, the class is defined as each and every water and sewer customer who paid the City for water and sewer services during the applicable period. In support, Plaintiff points out that the City admits that the charges at issue are incorporated in the water and sanitary sewer rates that are paid by each water and sewer customer.

The City argues that Plaintiffs cannot show that its proposed class is ascertainable without resorting to time-consuming, individualized inquiries into the identity of each class member, which defeats the purpose of a class action. However,

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the City overlooks its own detailed records showing the amount of water and sanitary sewer charges paid by each class member at all relevant times. The evidence shows that the City has precise records regarding the imposition and collection of the charges wherein the identity of the class members can be readily ascertained. Moreover, Defendant's own finance director testified that Defendant's computer system "is capable of accurately generating a complete billing and payment history for each customer" for the relevant time periods.

Commonality

The City does not address this factor. Under this factor, Plaintiffs must establish that "all members of the class had a common inquiry that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599 (2002). In other words, Plaintiffs must show that issues of fact and law common to the class predominate over issues subject to only individualized proof. *Duskin v Dep't of Human Services*, 304 Mich App 645, 654 (2014).

In this case, the common facts relevant to the class are that each member paid water and sanitary sewer rates imposed by the City. The common issue of law is whether such rates included unlawful charges. If those charges are unlawful under any of the legal theories pleaded by the Plaintiffs, the charges are unlawful as to each and every member of the class. While there will be individualized damages, the Court does find this to be predominate. Accordingly, Plaintiffs have demonstrated all members of the class have a common injury that can be demonstrated with generalized proof, rather than evidence unique to each class member. *Tinman v Blue Cross & Blue Shield*, 264 Mich App, 563-564 (2004). Thus, the commonality factor has been met.

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Typicality

The City does not address this factor. Under this factor, the class representatives' claims must have the same "essential characteristics" as the claims of the other members of the class. *Neal v James*, 252 Mich App 12, 21 (2002), overruled in part on other grounds by *Henry, supra* at 505 n 39. The claims, even if based on the same legal theory, must all contain a common "core of allegation." *Neal, supra* at 21. In this matter, the claims of the Plaintiffs not only raise the same legal issues but also arise from the common course of conduct of the City; namely, the water and sewer charges. Accordingly, the Court finds that the typicality requirement has been met by Plaintiffs.

Adequacy

The City does not address this factor. This factor requires a showing that the class representatives "can fairly and adequately represent the interests of the class as a whole". *Neal, supra* at 22. There must be a showing that there are no conflicts of interest between the representative plaintiff and the class and that there is a likelihood of vigorous prosecution of the case by competent counsel. *Id.* Here, there is no evidence of any conflicts of interest between Plaintiffs and the class. Moreover, the Court is satisfied that Plaintiffs' counsel is well qualified and will adequately represent the class. Accordingly, the Court finds that the adequacy requirement has been met.

Superiority

This factor requires Plaintiffs to demonstrate that "maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(1)(e). "In deciding this factor, the court may consider the practical problems that can arise if the class action is allowed to

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proceed." *A&M Supply, supra* at 601, citing *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414, n 6 (1987). The relevant concern is whether "the issues are so disparate" that a class action would be unmanageable. *A&M Supply, supra* at 602, citing *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-506 (1989).

Furthermore, under MCR 3.501(A)(2), the Court is to consider the following factors:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i)inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

The City argues that the class is not a "superior" method given the City's conduct in this matter, and the harm to the purported class members in relation to the potential

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aggregate damages. However, the City does not explain what the conduct is or the harm purportedly imposed upon class members.

Contrary to Plaintiffs' arguments, the Court finds that Plaintiffs have established superiority. Again, the relevant concern is whether "the issues are so disparate" that a class action would be unmanageable. *A&M Supply, supra* at 602. Here, there are not disparate issues. The issue here is the legality of the City's water and sewer charges. Clearly, a class action would be superior and more manageable than adjudications of separate actions brought by all the individuals who have paid for water and sewer in the City. This is especially so in light of the fact that the same evidence and legal issues would necessarily be presented in the individual cases.

Plaintiff argues that Headlee already provides individual class members with an incentive to bring their own claims and thus undermines the need for class certification. However, the test is the superiority of a class action versus individual suits. The Court is not persuaded that because each class member could bring suit under Headlee and recover attorneys' fees would prevent this Court from addressing the claims in a class action suit. As noted in *Bolt v City of Lansing*, 238 Mich App 37 (1999)(Bolt II), a case such as this is "exactly the kind of dispute that the class action procedure was designed to handle." *Id.* at 41.

The City further argues that class certification could have ruinous consequences to the City. However, the Court finds no reason to consider the possibility of such consequences as an additional factor under MCR 3.501(A)(1)(e).

Finally, the City argues that class certification has little relationship to the actual individual damages suffered by each class member. However, the fact that each class

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member has suffered a small loss has been recognized as a reason to grant, not deny, certification. See *Male v Grand Rapids Education Association*, 98 Mich App 742 (1980).

THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is GRANTED.

IT IS SO ORDERED.

Dated: OCT 10 2014

/s/ Judge Colleen A. O'Brien
Hon. Colleen A. O'Brien AG

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EXHIBIT – 5

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KELLY GOTTESMAN, individually, and as representative of a class of similarly-situated persons and entities,

Plaintiff,

-v-

CITY OF HARPER WOODS, a Michigan municipal corporation,

Defendant.

Case No. 17-014341-CZ

Hon. Susan L. Hubbard

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 3/22/2018

PRESENT: SUSAN HUBBARD
Circuit Judge

This civil matter is before the Court on a motion for class certification filed by Plaintiff, Kelly Gottesman, against Defendant, City of Harper Woods ("the City"). For the reasons stated below, the Court grants the motion.

I. <u>FACTUAL AND PROCEDURAL BACKGROUND</u>

The City operates a sewer system to provide a sanitary system to its inhabitants and to collect and treat rain and snow runoff. This system consists of two sets of pipes. One set of pipes collects and conveys sanitary sewage for treatment and another set of pipes collects stormwater, which drains into the Milk River Resevoir where it "commingles" with the sanitary sewage. The

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combined collection is conveyed to a treatment plant after which it is sent into local waterways. The City establishes the rates for the stormwater charges through legislative action, and the revenues generated by stormwater charges are deposited into the City's Storm Drain Fund. Under the City Ordinance § 27-110, the City imposes stormwater charges on all property owners. The ordinance provides:

> All owners of real property within the city, other than the city itself, shall be charged for the use of the stormwater system based on the amount of impervious area which is estimated and determined to be contributory to the stormwater system. The impact of the stormwater from the property on the system shall be determined on the basis of the flat rates contained in this article.
>
> Except as provided hereinafter below, all real property shall be subject to the stormwater service charge regardless of whether privately or publicly owned. Publicly owned land open to the general public for recreation or operated for municipal purposes shall not be subject to stormwater service charges.

"The City charges residential and commercial property owners for stormwater management on the basis of Residential Equivalent Units ("REU"). City Ordinance § 27-100, defines "Residential Equivalent Unit" as follows: 'That area of residential property defined to be impervious to account for the dwelling unit, garage, storage buildings or sheds, driveways, walks, patios, one-half of the street frontage and other impervious areas as calculated to be an average by randomly sampling fifty (50) residential parcels that area being determined to be three thousand two hundred fifty (3,250) square feet.'" [Plaintiff's Complaint, p 4, ¶ 15]. The value of an REU is set by the City Council through the City's annual budget process. For Fiscal Year 2016-17 budget, the value of one REU is $210. Annually, the City bills for just under $2 million in stormwater charges.

Ordinance § 27-120 provides a calculation method of billing for stormwater system usage and is based on either square footage or land area. Ordinance § 27-125 provides the billing

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method for vacant property and residential parcels with less than 3,500 square feet in total land area. Finally, billing for stormwater service charges are included as a user charge on tax bills issued for annual property taxes. Institutional and other properties that do not receive tax bills, receive special billings issued at the time of the annual property tax billing. Ordinance §27-130.

Plaintiff filed a complaint against the City for allegedly impermissibly imposing stormwater service charges on all City property owners. According to Plaintiff, the City has mischaracterized these charges as "user fees." Plaintiff asserts that the City began imposing these stormwater charges in 1992 without voter approval. He contends that these stormwater charges are, in reality, "taxes," which violate the Headlee amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31.[3] In his complaint, Plaintiff alleges that, by imposing the stormwater charges, the City violated the Headlee Amendment, the

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MCL 600.308a provides that a claim for a Headlee Amendment violation may be brought in the court of appeals or in the circuit court:

> (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
>
> ***
>
> (4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. ...

3

Michigan Constitution of 1963, Article 9, Section 31 provides in relevant part:

> 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. ...

Under Section 32, "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit."

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City violated MCL 141.91,[1] the stormwater charges are unreasonable, and the City violated City Ordinance Section 27-120. Plaintiff makes claims for money had and received and for unjust enrichment for these violations. Along with the complaint, Plaintiff filed the instant motion for class certification. Plaintiff and the City have agreed to class certification. The Court, however, will address the propriety of class certification and will do so without addressing the merits of Plaintiff's lawsuit. *Henry v Dow Chem Co*, 484 Mich 483, 503; 772 NW2d 301 (2009).

II. STANDARDS FOR CLASS CERTIFICATION

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

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[1] 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.
>
> [Emphasis added].

"Ad valorem" is a Latin phrase meaning "according to the value" and, with respect to taxation, is defined as a tax "proportional to the value of the thing taxed." AD VALOREM, Black's Law Dictionary (10th ed. 2014).

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These factors are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." Strict adherence to the class certification requirements is required. *Henry, supra* at 499-500. "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Id* at 500.

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

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"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

III. ANALYSIS

As explained above, the Court must consider whether Plaintiff has established that he has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1).

A. Numerosity

"Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

For the claim that stormwater charges violate the Headlee Amendment, Plaintiff has defined the class "to include all persons or entities which have paid or incurred the stormwater charge at any time in the one year preceding the filing of this lawsuit and/or at any time during the pendency of this action (the "Headlee Class Period")." [Complaint, p 17]. Regarding the claims for money had and received and unjust enrichment for violation of MCL 141.91, unreasonable water and sewer rates, and violation of the city ordinance, Plaintiff has also defined the class to be all "persons or entities which have paid or incurred the Stormwater Charge at any time in the six years preceding the filing of this lawsuit and/or at any time during the pendency of this action." [Id, p 18].

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Because water and sewer charges are charged against the property and not the payors, the class is ascertainable through the City's property records. However, the owner of each parcel of property is assessed stormwater charges annually and is included as a user charge on tax bills issued for the annual property taxes. Ordinance § 27-130. Hence, through tax billing, the class is ascertainable and, given the City's approximately 6600 properties, the class is ascertainable.

There is no minimum number of members that is required for class certification. As long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense indicate that the class is large," *Zine, supra*, the "numerosity" factor will be satisfied. Clearly, common sense dictates that approximately 6600 property owners,[2] [Plaintiff's Supplemental Brief, Exhibit 1, City Manager Randolph Skotarczyk, Deposition Transcript, p 50-51], comprise a large enough class of persons where joinder is impracticable such that it satisfies the "numerosity" requirement for class certification.

B. Commonality

Whether or not there are common questions of fact is a factor which must be satisfied for class certification to be proper. The true essence of the "commonality" factor was described in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563–64; 692 NW2d 58 (2004):

> The court in *Sprague* also stated, "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague, supra* at 397. A plaintiff seeking class-action certification must be able to demonstrate that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class

2 Approximately 5,377 are residential units. According to Mr. Skotarczyk, this number may vary from time to time because of demolition and construction.

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> member.... [T]he question is ... whether 'the common issues [that] determine liability predominate.' " *A & M Supply Co v Microsoft Corp,* 252 Mich App 580, 600; 654 NW2d 572 (2002) (citations omitted).
>
> [Emphasis added].

Thus, to satisfy the "commonality" factor, the injury alleged must be demonstrated with generalized rather than individualized proof. Under the court rule, the "commonality" factor refers to "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). See also *Smith v Dept of Human Services Dir*, 297 Mich App 148; 822 NW2d 616 (2012) app gtd in part, decision vacated in part 493 Mich 926; 825 NW2d 65 (2013) and vacated in part, app dis in part sub nom. *Smith v Dept of Human Services*, 828 NW2d 18 (Mich 2013). Requiring the Court to determine the "commonality" factor helps to provide a practical approach to litigation by numerous parties. *Id.*

The questions involved in the instant action are whether the stormwater charges are taxes, which violate the Headlee Amendment and MCL 141.91, rather than user fees, and whether the charges are arbitrarily imposed and not based on usage of the stormwater system. These questions may be answered with generalized proof that the stormwater charges are imposed on all members of the class and that the common injury is taxation rather than user fees imposed on all class members. *Tinman, supra.* These questions are "questions of law and fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). Therefore, the "commonality" factor is satisfied.

C. <u>Typicality</u>

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the claims of the class at large. As does commonality, typicality

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requires that the class representatives share a common core of allegations with the class as a whole." *Duskin v Dept of Human Services,* 304 Mich App 645, 656-657; 848 NW2d 455, 464 (2014) [Internal quotation marks and footnote omitted].

The Court must determine if Plaintiff has the "same essential characteristics" as the other City property owners and whether he shares "a common core of allegations as the class." *Id.* Like all other property owners in the City, the named representative, Kelly Gottesman, is required to pay and has paid the stormwater charges imposed by the City. The allegations of the named representative share the same essential characteristics of the claims of the proposed class. All proposed class members are allegedly being charged for stormwater service. The charges allegedly amount to a "tax" on all members, which violates the Headlee amendment and MCL 141.91. These stormwater charges are allegedly calculated in a way similar to the calculation for ad valorem taxes and are not based on usage of the stormwater system. Finally, all proposed class members are being harmed by the City because it has allegedly been unjustly enriched by collecting the funds without voter approval. The core allegations and core legal issues are the same for all who have paid these stormwater charges because these charges are purported to be an unfair "tax" on all property owners who need a stormwater system and constitute a revenue raising mechanism. The core allegation of suffering harm as the result of the City's imposition of a "tax" through its stormwater charges in violation of the Headlee Amendment and MCL 141.91 is the same for the entire proposed class. Thus, the class representative "share[s] a common core of allegations with the class." *Id.* Therefore, the "typicality" requirement in MCR 3.501(A)(1) is satisfied.

D. Adequacy

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"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657. Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes eighteen cases cited by Plaintiff. [Plaintiff's Supplemental Brief, Exhibit 13]. Counsel also has litigated at least five cases in which it prosecuted class action Headlee Amendment claims. [Id, p 16]. Furthermore, there are no apparent "antagonistic or conflicting interests" among class members. *Id.* The Court is satisfied that counsel will adequately and vigorously pursue the action on behalf of the proposed class members.

E. Superiority

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;

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> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

For purposes of the "superiority" factor, the trial court asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action. The primary concerns then are practicality and manageability. *Hill v City of Warren*, 276 Mich App 299; 740 NW2d 706 (2007). "The superiority and commonality requirements are related because "'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.'" *Duskin, supra* at 658, quoting *Zine, supra* at 289 n 14. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503.

The Court finds that there are no individualized questions of fact except with regard to the various sizes of properties and types of properties, e.g., commercial, residential, and vacant. The common questions of fact and law are whether or not the City improperly and without voter approval imposed stormwater charges, whether the charges amount to a "tax" and act as a revenue source, and whether these stormwater charges violate the Headlee Amendment and MCL 141.91. If each individual property owner were to sue separately, the cost of litigation would be enormous. There is also a risk that individual suits would "be dispositive or "substantially impair or impede" the ability to protect the interests of others who are not parties

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in a particular suit. MCR 3.501(A)(2). See also *Bolt v City of Lansing*, 238 Mich App 37, 59; 604 NW2d 745 (1999) (When a landowner brought an original action against the city, alleging that the city's stormwater service charges were disguised as a tax and alleged a violation of the Headlee Amendment, the Court of Appeals stated, "Indeed, this type of case is clearly the kind of litigation that should be pursued as a class action. This would not be burdensome. To the contrary, the principal legal issue in this case is especially suited for class treatment."). Therefore, in the Court's view, a class action lawsuit is a superior method of adjudication for Plaintiff's claims.

IV. CONCLUSION

Class certification is appropriate only when all factors in MCR 3.501(A)(1) are satisfied. *Henry, supra* at 500. Without addressing the merits of the instant lawsuit, the Court finds that Plaintiff has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1). Accordingly, certification of Plaintiff's proposed class is appropriate.

On the basis of the foregoing opinion;

IT IS ORDERED that Plaintiff's motion for class certification is hereby **GRANTED.**

IT IS SO ORDERED.

DATED:

/s/ Susan Hubbard 3/22/2018

Circuit Judge

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EXHIBIT – 6

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LISTING OF CERTIFIED CLASS ACTIONS
IN WHICH KICKHAM HANLEY ACTED AS CLASS COUNSEL

1. *Herrada v. Blockbuster, Inc.*, Case No. 99-923662-CP (Wayne County Circuit Court)
2. *Durant v. Hallmark Entertainment*, Case No. 99-75471 (E. D. Mich.)
3. *In re Lason, Inc. Securities Litigation*, Case No. 99-CV-76079 (E.D. Mich.)
4. *Smith v. Gilbert*, Case No. 99-911664-CZ (Wayne County Circuit Court)
5. *Mingo v. City of Detroit*, Case No. 00-013030-CZ (Wayne County Circuit Court)
6. *Durant v. ServiceMaster Co.*, Case No. 01-CV-40007 (E.D. Mich.)
7. *McEntee v. Incredible Technologies, Inc.*, Case No. 03-336168-CP (Wayne County Circuit Court)
8. *Saban Rent-a-Car v. Arizona Department of Revenue*, Case No. 2010 001089 (Arizona Tax Court)
9. *Wolf v. City of Detroit*, Case No. 11-006737 (Wayne County Circuit Court)
10. *Kozyra v. Oakland Township*, Case No. 2014-138158-CZ (Oakland County Circuit Court)
11. *Wolf v. City of Ferndale*, Case No. 2014-138464-CZ (Oakland County Circuit Court)
12. *Schroeder v. City of Royal Oak,* Case No. 2014-138919-CZ (Oakland County Circuit Court)
13. *Wolf v. City of Birmingham,* Case No. 2014-141608-CZ (Oakland County Circuit Court)
14. *Deerhurst Condominium Owners Association v City of Westland*, Case No. 15-006473-CZ (Wayne County Circuit Court)
15. *Bohn v City of Taylor,* Case No. 15-013727-CZ (Wayne County Circuit Court)
16. *United House of Prayer v City of Detroit,* Case No. 15-009083-CZ (Wayne County Circuit Court)
17. *Kish v. City of Oak Park*, Case No. 2015-149751-CZ (Oakland County Circuit Court)
18. *Michigan Warehousing Group LLC v. City of Detroit*, Case No. 15-010165-CZ (Wayne County Circuit Court)

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19. *Youmans v. Charter Township of Bloomfield,* Case No. 2016-152613-CZ (Oakland County Circuit Court)

20. *Shoner v. Charter Township of Brighton*, Case No. 2016-29165-CZ (Livingston County Circuit Court)

21. *Mason v. Charter Township of Waterford*, Case No. 2016-152441-CZ (Oakland County Circuit Court)

22. *Gottesman v. City of Harper Woods*, Case No. 17-014341-CZ (Wayne County Circuit Court)

23. *Patrick v. City of St. Clair Shores,* Case No. 2017-003018-CZ (Macomb County Circuit Court)

24. *Ralph Staelgraeve v. Charter Township of Shelby,* Case No. 2018-001775-CZ (Macomb County Circuit Court)

25. *Daniel Brunet v. City of Rochester Hills,* Case No. 2018-164764-CZ (Oakland County Circuit Court)

26. *United House of Prayer v. City of Detroit*, Case No. 19-002074-CZ (Wayne County Circuit Court)

27. *General Mill Supply v. Great Lakes Water Authority*, Case No. 18-011569-CZ (Wayne County Circuit Court)

28. *Macomb Retail Center LLC v. City of Roseville*, Case No. 19-5299-CZ (Macomb County Circuit Court)

29. *Stephens v. Charter Township of Delta*, Case No. 19-919-CZ (Eaton County Circuit Court)

30. *Griffin v. City of Madison Heights*, Case No. 20-18196-CZ (Oakland County Circuit Court)

31. *Heos v. City of East Lansing*, Case No. 20-199-CZ (Ingham County Circuit Court)

32. *United House of Prayer v. City of Detroit*, Case No. 20-014218-CZ (Wayne County Circuit Court)

33. *Nofar v. City of Novi*, Case No. 2020-183155-CZ (Oakland County Circuit Court)