STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

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

v.

CITY OF EAST LANSING,

Defendant.

OPINION & ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

Case No. 20-199-CZ

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, county of Ingham,
this 31 day of March 2022.

PRESENT: HON. WANDA M. STOKES

This matter comes before the Court on Plaintiff James Heos individually, and as representative of a class of similarly-situated persons and entities, Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Defendant's responsive motion requesting judgment pursuant to MCR 2.116(C)(10) and (I)(2). Plaintiff seeks summary disposition as to Counts I through III of their Complaint arguing that there is no genuine issue as to any material fact requiring judgment for Plaintiff on those counts as a matter of law.

The Court having reviewed the briefs, having heard oral argument, having been apprised of the facts and otherwise being fully informed regarding the issues, now **GRANTS** Plaintiff's motion, and Denies Defendant's request for judgment under MCR 2.116(I)(2). The Court notes that Defendant has also filed a separate motion for Summary Disposition and the Court has issued a separate opinion and order addressing those claims.

FACTS

An overview of the geographic and utility service area provides relevant information for the present motions before this Court. Defendant City of East Lansing ("The City") is served power by two separate utility companies: the Lansing Board of Water and Light ("LBWL") and Consumers Energy Company ("Consumers"). LBWL's service area covers a majority of the city and according to Defendant, up to 89 percent of the City's total right of ways, and an estimated 76 total continuous miles of right of ways. Comparatively, Defendant estimates that Consumers covers approximately 11 percent of the City's right of ways and around 10 total continuous miles of right of ways.

Defendant estimates that LBWL covers around 29,000 residents, and 600 non-residential properties. In comparison, Defendant estimates that that Consumers covers 3,050 residents and 143 non-residential properties. Defendant further states it spends an average of $1.4 million to $1.9 million annually in maintaining the LBWL service area, and it spends $100,000 to $300,000 on expenditures in the Consumers service area.

This case centers on a Franchise Agreement between the Defendant City and the LBWL that provides for a five percent fee (Franchise Fee) to be collected by the LBWL and remitted back to the City. Defendant City alleges the franchise fee is lawful and was designed to pay for the use of the City's rights of way and to cover the significant costs the City incurs annually so that the BWL can provide electricity to the Class members. While the BLBWL initially objected to the franchise under the Foote Act, after some discussions, they withdrew their objections and agreed to a franchise. The agreement provides for a franchise fee to be paid to the City in exchange for LBWL to receive an increase in exclusive service area within the City, and according the City, to

cover the cost for use of the associated right of ways. Consumers rejected the City's request for a franchise and no fee exists between the two entities to this date.

On June 6, 2017, Defendant enacted Ordinance No. 1411 ("Franchise Ordinance") approving the Franchise Agreement and setting forth its material terms. The relevant section of the Franchise Ordinance states:

> SECTION 1: GRANT TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.
>
> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. Such fee will appear on the corresponding energy bills.

On April 13, Plaintiff, individually and as a representative of a class of similarly situated City residents, filed a six count class action complaint relating to the Franchise Agreement. Count I alleges that the Franchise Agreement violated the Headlee Amendment to the Michigan Constitution; Count II claims a cause of action for assumpsit for the Defendant's alleged violation of MCL 141.91; Count III asserts "unjust enrichment" for the Defendant's alleged violation of MCL 141.91; Count IV alleges the Defendant violated the equal protection clause of the Michigan

constitution; Count V asserts a claim of "unjust enrichment" for the Defendant's alleged violation of the Foote Act; and Count VI makes a claim of assumpsit for the Defendant's alleged violation of the Foote Act.

This Court certified the class by order dated August 5, 2020.

STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). The Michigan Supreme Court has stated that:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion.
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.

Smith v Globe Life Ins Co, 460 Mich 446, 454-55; 597 NW2d 28 (1999)(citations omitted). "Further, a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition." *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641, 645 (2005)(citations omitted).

Ultimately, "[a] genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds might differ." *Myers v City of Portage*, 304 Mich App 637, 641; 848 NW2d 200 (2014) (quotation marks and citation omitted).

A "tax" or a "user fee" is a question of law for the Court to Decide. *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998).

MCR 2.116(I) states in relevant part:
"(1) …
(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

ANALYSIS

I. The Franchise Fee is Imposed on the Citizens

The Franchise Agreement provides that LBWL is responsible for collecting and then remitting the Franchise Fee back to Defendant. Plaintiff argues that this process puts the responsibility of paying the Franchise Fee on the citizens as opposed to LBWL, supporting their argument that the Franchise Fee is a tax. This Court agrees.

The U.S. Supreme Court held: "where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incident of the tax falls upon the purchaser." *US v Mississippi Tax Comm'n*, 421 US 599, 608 (1975). Federal Courts have found that franchise fees and other utility charges are taxes when imposed on utility customers instead of the utility itself. *See United States v Leavenworth*, 443 F. Supp. 274, 280-82 (D. Kan. 1977) (finding that a franchise fee was not a tax because the fee was not required to pass onto the customer); *see also United States v Maryland*, 471 F Supp 1030, 1038 (D. Md. 1979) (finding a utility fee was not a pass through tax on a tax exempt entity because it was directly imposed on the electric companies).

The unambiguous language in the Franchise Agreement provides that LBWL "shall, upon acceptance of the City, collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the Grantee

within the City." This provides that the purchaser, the citizens are responsible for paying the franchise fee. The next question for this Court is whether this payment is a user fee or a tax.

II. The *Bolt* Factors Entitle Plaintiff to Summary Disposition

There is no bright-line test for distinguishing between a valid user fee and an unlawful tax. *Bolt v. City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). Instead, the Michigan Supreme Court has provided three factors for the Court to consider in determining whether a charge is a user fee or tax: (1) Does the fee serve a regulatory purpose or revenue-raising purpose; (2) the proportionality of the charge compared with the necessary cost of the service and; (3) the voluntariness of the charge. *Id.* at 161-162.

These factors are not to be considered in isolation but instead in their totality, and therefore a weakness in one area does not necessarily mandate a finding that the charge is not a fee. *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). The Court considers each factor separately.

a. The Franchise Fees Have a Revenue-Raising Purpose

In *Jackson County v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), the Michigan Court of Appeals found that the charges involved were taxes as opposed to fees. The *Jackson* Court held that the charges served the purpose of relieving other City funds of the obligation to finance expenditures related to the City's storm drainage system. Specifically, the Court of Appeals noted:

> [T]he documents provided [to] this Court reveal that the management charge serves a dual purpose. The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations. The charge also serves a general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue generation. This latter method of

> revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the revenue previously used to fund the activities once provided by the city's Engineering and Public Work Departments and now bundled together and assigned to the storm water utility. Because the ordinance and the management charge serve competing purposes, the question becomes which purpose outweighs the other. We conclude that the minimal regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance.

Id. at 105-106 (internal citations omitted);

Here, like in *Jackson*, the Franchise Fee is allocated into the general fund. The City admits that the fees are general fund revenues and may be used for whatever general fund purpose deemed appropriate by the City. Notwithstanding this fact, the City argues that the Franchise Fees still go towards the rent for use of the right-of-ways used by BWL. However, when asked to balance the regulatory-purpose with the revenue-raising purpose, the allocation of the fee into the general fund clearly provides that it serves a revenue-raising purpose.

b. The Charges Raise Revenue for An Activity that Benefits the General Public

The Michigan Supreme Court has found that a governmental fee that has a revenue-raising purpose is a tax when those revenues confer benefits on citizens not subject to the fee. *Bray v Department of State*, 418 Mich 149; 341 NW2d 92 (1983). In reaching that result, the Court ruled:

> Revenue from taxes, therefore must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed. The MVACA was obviously designed to raise revenue. As we have previously explained, the revenue raised by the MVACA did not inure to the benefit of the group assessed.

Id. at 162.

Here, the fee does not provide a particular benefit to those customers with the fee imposed on them. Since the fee is part of the general fund, it would benefit any financial expense of the city. Therefore, *Bray* supports the notion that the fee has a revenue-raising purpose.

This is the situation faced in *County of Jackson v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013) where the city's stormwater charges had the effect of relieving city obligations that had previously been supported by tax dollars. Likewise, Defendant City in this case is using the fees collected by LBWL to support activities, whether it's the pension or other financial obligations that benefit the general public at large. By essentially replacing the property taxes with the Franchise Fees, the City alleviates the General Fund's financial responsibility for the costs associated with the maintenance of its right of ways. This shifting of financial obligation creates a revenue-raising purpose which outweighs a regulatory purpose.

c. The Franchise Fees Also Fail the Proportionality Test of *Bolt*.

Michigan Courts have consistently held that a fee fails the proportionality test of *Bolt* if those that pay the fee do not receive a "particularized benefit" from the fee when compared with those who do not pay the fee. *Graham v Township of Kochville*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, *Bolt* held that a fee is just that, a fee, when the payment is made for the voluntary receipt of a measured service, where the revenue of the fees are based upon the service provided. *Bolt*, 459 Mich 268 n. 16. Here, not only is there no particularized benefit provided to those who pay the fee, the City admits that the 5% fee was decided because other townships had settled on that amount. Defendant argues that the LBWL customers do receive a particularized benefit because the franchise fees enable LBWL to have access to the right of ways, but fail to mention how those in the Consumers service area, who do not have the franchise fees, do not receive such a benefit.

d. Payment of the Franchise Fees were Compulsory

The *Bolt* Court held that a fee is "effectively compulsory" when "the property owner has no choice whether to use the service and is unable to control the extent to which the service is used." *Bolt* 459 Mich at 167-168. The *Jackson* Court held that the storm water charges at issue were not voluntary because the property owners had no means to escape the financial demands of the ordinance. *Jackson* 302 Mich App at 111-112.

Here, the Franchise fee is not at all tied to the amount of electricity used by the fee payers, and the fee payers choices are between either paying the franchise fee and not having electricity. The cold temperature in Michigan winters forecloses the option of living without electricity; and thus submitting to the franchise fee is effectively compulsory. *Bolt* 459 Mich *supra* 167-168.

III. Assumpsit Element of Count II

Defendant argues that Plaintiff's assumpsit claims set forth in Counts II and VI must be dismissed because assumpsit is no longer a cause of action in Michigan. This Court agrees that the form of action was abolished; this Court disagrees that Defendant is entitled to summary disposition on the matter. In *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543 564; 837 NW2d 244 (2013) the Court noted: "[w]ith the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." When there has been an allegation of an illegal or excessive collection of fees, a Plaintiff may maintain an "action of assumpsit [to] recover back the amount of the illegal exaction." *Bond v Pub Sch Of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970).

Plaintiff's complaint sufficiently alleges that Defendant imposed Franchise Fees in violation of statutory law, thus Plaintiff has properly asserted assumpsit claims and is entitled to summary disposition as to Count II.

IV. Unjust Enrichment Element of Count III

Defendant argues that unjust enrichment is a tort claim and therefore government immunity protection is triggered. The Michigan Supreme Court addressed this issue in *Wright v Genesee Co* 504 Mich 410; 934 NW2d 805 (2019). In *Wright*, the Supreme Court held that unjust enrichment claims against municipalities are not barred by governmental immunity because they are not tort or contract claims but instead seek the return of monies that are unfairly retained by the government. The *Wright* Court held: "a claim for unjust enrichment is neither a tort nor a contract but rather an independent cause of action. And the remedy for unjust enrichment is restitution—not compensatory damages, the remedy for tort. For both reasons [government immunity] does not bar an unjust enrichment claim." *Id.* at 414.

The Court of Appeals also addressed this issue following remand from the Michigan Supreme Court, in *Logan v Charter Twp of W Bloomfield*, unpublished opinion[1] issued February, 18, 2020 (Docket No. 333452). While unpublished, the *Logan* court decision is instructive in that it held that because the Plaintiff sought the return of monies paid to the municipality that should not have been charged in the first instance, requesting the return of the funds was not a tort or a contract action, but an action to divest the municipality of benefits that were obtained unjustly. *Id.* at *4. The *Logan* Court further clarified that the Plaintiff did not seek redress directly under the statute in question, but instead claimed that the township was unjustly enriched by the funds

[1] The Court recognizes that MCR 7.215(C)(1) provides that an unpublished opinion is not precedentially binding under the rule of stare decisis; however, the Court finds the cited opinion instructional on the issues asserted in the instant case.

collected in violation of the statute. *Id.* at *3. Therefore, the *Logan* Court held, the claim was not barred by governmental immunity. *Id.* at *4.

Here, similarly, Plaintiff does not seek to recover directly under MCL 141.91 or the Foote Act, but instead alleges that Defendant was unjustly enriched by the funds collected in violation of the statute. Therefore, Plaintiff is entitled to summary disposition as to Count III.

CONCLUSION

Plaintiff seeks summary disposition as to liability as a matter of law on Counts I, II and III. This Court finds that the Franchise Fee collected by the LBWL constitutes a tax as opposed to a permissible fee in violation of statute.

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is **GRANTED** as to liability under Counts I through III of the Complaint, and Defendants request for summary disposition pursuant to MCR 2.116(I)(2) is denied.

In accordance with MCR 2.602(A)(3), the Court finds that this Order does not dispose of the last pending claim, and does not close this case.

MAR 3 1 2022

Date

Wanda M. Stokes

Hon. Wanda M. Stokes
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER to each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, or by electronic email communication pursuant to MCR 2.107(C)(4) on March 31, 2022.

Christina Beahan
Judicial Assistant to Hon. Wanda M. Stokes