FOR IMMEDIATE RELEASE

April 4, 2022

KICKHAM HANLEY AND THE ABOOD LAW FIRM OBTAIN CLASS ACTION VICTORY FOR EAST LANSING CITIZENS WHO RECEIVE ELECTRIC SERVICE FROM THE LANSING BOARD OF WATER AND LIGHT

Ingham County Circuit Court Rules That "Franchise Fees" Imposed By The City of East Lansing (the "City") and Collected By The Lansing Board of Water and Light Constitute Unlawful Taxes.

In two March 31, 2022 Opinions, the Ingham County Circuit Court held that certain "Franchise Fees" imposed by the City on residents of East Lansing who receive electric service from the Lansing Board of Water & Light were unlawful taxes that had been imposed by the City in violation of the Michigan Constitution and a Michigan statute. The City began imposing the unlawful taxes in July 2017, and the taxes currently generate approximately $1.4 million per year in revenue for the City. In the Opinions, the Court ruled that the taxes being imposed on the citizens of the City receiving electric service from the Lansing Board of Water & Light were illegal because they generated revenue for general public purposes, were not proportional to the City's costs, and were compulsory.

Heos' attorney Andrew Abood of the Abood Law Firm stated: "It is never easy to fight 'City Hall.' We are proud of Jim Heos for having the courage to wage this battle on behalf of all of his neighbors and other residents in the City. We are very pleased by the Court's ruling, which we believe properly applied the established law which prohibits these kinds of 'disguised' taxes. We now plan to seek an order requiring the City to escrow the taxes it collects until the case is finally concluded. We also look forward to obtaining refunds of these illegal taxes on behalf of the citizens of East Lansing who were forced to pay them since June 2017."

Plaintiff Jim Heos – the East Lansing resident who assumed the critically-important role of "class representative" in the suit --- had this to say: "The Court's analysis reflected in the Opinions was spot on. I'm pleased with the Court's ruling. I hope the City will come to its senses, stop collecting the Franchise Fee, and refund the money it has already collected."

Heos' attorney Greg Hanley of the Kickham Hanley law firm added:

"It never should have come to this. We believe that the City should have known the Franchise Fees were illegal at the time the Council voted to approve the Fees back in 2017, but it went ahead and imposed them anyway. The Lansing Board of Water & Light had surely sounded the alarm about the 'Franchise Fees' at that time because the Board of Water & Light expressed concern that the Fees were illegal and therefore refused to be anything but a 'collection agency' for the City. And, of course, the City should have known the Franchise Fees were illegal when this case was filed in April 2020, because on February 3, 2020 – two months before we filed this case -- Judge John Maurer of the Eaton County Circuit Court ruled that the identical 'Franchise Fees' imposed by Delta Township were

illegal. Yet the City continued to impose and collect its own illegal 'Franchise Fees' for another two years."

Kickham Hanley and the Abood Law Firm believe that the Court's ruling will require the City to refund at least $6.6 million in "Franchise Fees" collected since July 1, 2017. To the extent the City does not immediately cease collecting the "Franchise Fees" as a result of the Circuit Court's Opinions, the amount the City will ultimately be required to refund will continue to grow by at least $1.4 million per year.

Hanley further stated:

"We believe that the Court's Opinions send a strong signal to municipalities which seek to evade constitutional and statutory limitations on their taxing powers through creative financial gimmicks. It is particularly troubling here that the City's illegal 'Franchise Fees' made an essential service – electricity – significantly more expensive for its citizens during a time that the City's residents were already facing unique financial challenges presented by the COVID-19 pandemic. We are hopeful that, instead of protracting the case through appeals or otherwise, the City will finally do the right thing and stop imposing and collecting these unlawful taxes and agree to return the money it has received from the 'Franchise Fees' to the citizens who paid them."

For further information, please contact Greg Hanley at 248-544-7430 or ghanley@kickhamhanley.com.

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

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 DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

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 **Defendant** City of East Lansing's Motion for Summary Disposition. The Court having reviewed the briefs, heard oral argument, and otherwise being fully informed regarding the issues, now **DENIES** Defendant City of East Lansing's Motion for Summary Disposition as to as to Plaintiff's Counts I through III, V, and VI, and **GRANTS** Defendant City of East Lansing's Motion for Summary Disposition as to Plaintiff's Count IV for the reasons set forth below.

FACTS

An overview of the geographic and utility service area provides relevant information for the present motions before this Court. The City of East Lansing ("Defendant") is served 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 East Lansing and, according to Defendant up to 89 percent of the East Lansing'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 East Lansing's right of ways and around 10 total continuous miles of right of ways.

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

This case centers on the franchise agreement between East Lansing and the LBWL. According to Defendant the five percent fee at issue was designed to recoup Defendant's costs of maintaining the right of ways from the LBWL and Consumers through franchise arrangements. Consumers outright rejected Defendant's request for a franchise and no fee exists between the parties to this date. LBWL and Defendant eventually reached an agreement to create a franchise and provide a franchise fee ("the franchise fee") to the City in exchange for LBWL to receive an increase in exclusive service area within East Lansing.

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.

Plaintiff alleges that the franchise fee in this case can be likened to franchise fees in an "identical case against Delta Township" where the Eaton County Judge found that the franchise fee collected by the township using the LBWL as the collection agent was a tax. Plaintiff alleges that the franchise fee here goes into the city's general fund in order to cover for the city's pension fund obligations. Defendant argues that the franchise fees are instead a lease for LBWL to utilize the right of ways in order to provide electricity service to residents.

On April 13, Plaintiff, individually and as a representative of a class of similarly situated City residents, filed a six count class action complaint ("Class 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. Count VI makes a claim of assumpsit for the Defendant's alleged violation of the Foote Act.

Defendant brings its motion for summary disposition under MCR 2.116(C)(5), (7), (8) and (10).

STANDARD OF REVIEW

MCR 2.116(C)(5) permits dismissal when the party asserting the claim lacks the legal capacity to sue. Defenses under MCR 2.116(C)(5) must be raised not later than a party's first responsive pleading. MCR 2.116(D)(2). Such defenses include lack of standing and that a partnership is barred from bring suit because of the failure of the partnership to file a certificate of co-partnership. *Sprenger v Bickle*, 302 Mich App 400 (2013); *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409 (1991). When ruling on a motion under MCR 2.116(C)(5), the trial court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Szyszlo v Akowitz*, 296 Mich App 40, 46 (2012).

MCR 2.116(C)(7) states that a motion for summary disposition should be granted when the claim is barred by, *inter alia*, a statute of limitations, or other disposition of the claim before commencement of an action under the statute of limitations. When reviewing a motion under this sub rule, the Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the plaintiff. *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554 (1996). A motion under this subrule should be granted only if no factual development could provide a basis for recovery. *Rheaume v Vandenburg*, 232 Mich App 417, 420 (1998).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint to determine whether the opposing party's pleadings allege a prima facie case. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417 (2003); *Stehlik v Johnson*, 206 Mich App 83, 85 (1994). All well pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Haywood v Fowler*, 190 Mich App 253, 256; 475 NW2d 458, 460 (1991). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120 (1999).

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(2005)(citations omitted).

ANALYSIS

I. The Limitations Period for Plaintiff's Headlee Claim Does Not Depend Upon the Date of Adoption, but Upon the Time the Fees were Assessed.

Defendant first argues that Plaintiff's Headlee Amendment Claim is barred because Plaintiff brought their claim more than one year after the imposition of the tax. The Michigan Supreme Court, however, clarified that when a Plaintiff seeks a refund of the imposed and collected Franchise fees, "a cause of action for a tax refund accrues at the time the tax is due[.]" *Taxpayers Allied for Constitutional Taxation TACT v Wayne County*, 450 Mich 119, 124 (1995). *TACT* further clarifies that the only type of Headlee claim that would accrue at the time of resolution would be one brought on behalf of the public, as opposed to a claim that seeks a refund of the tax imposed. *Id.* at 124.

Here, Plaintiff brought this case on behalf of himself and other payers who have been subject to or paid the franchise fees. Therefore, Plaintiff has not filed "the only type of Headlee claim that would accrue at the time the resolution is passed[.]"

II. Plaintiff's recovery under the equitable claims in Counts II and III extend beyond the One-Year Statute of Limitation Governing the Headlee Amendment claims.

Defendant also argues that the one-year statute of limitations that governs Headlee Amendment claims applies to Plaintiff's additional equitable claims for unjust enrichment and assumpsit based upon a violation of MCL 141.91. Defendant cites the Michigan Supreme Court's order remanding *Gottesman v City of Harper Woods*, _ Mich. _; 964 N.W.2d 365 (2021) as support for this position. This Court disagrees.

In the *Gottesman* remand Order, the Supreme Court clearly recognizes that a plaintiff can assert claims under both the Headlee Amendment and equitable claims under MCL 141.91. On remand the Court of Appeals is not being instructed to determine the question of whether plaintiff can simultaneously assert such claims. The Court opined that the Court of Appeals had erroneously

concluded that Plaintiff's equitable claims were necessarily governed by a six-year statute of limitations without considering whether those claims should be subject to the one-year statute governing Headlee claims. This holding does not alter the analysis in this case at this time.

While unpublished, the underlying Court of Appeals decision in *Gottesman* confirms that where a plaintiff brings equitable claims in addition to a Headlee amendment claim, not all claims are subject to the one-year statute of limitations that govern Headlee claims. *Gottesman v City of Harper Woods*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2019 (Docket No. 344568)[1]. Like in this case, Plaintiff in *Gottesman* sought unjust enrichment and assumpsit claims. The Court reasoned that because Plaintiff would be entitled to recover more damages under the equitable claims, Plaintiff's remedy at law would not be an adequate remedy that equity would confer. *Id.*

MCR 2.111(A)(2) provides that a party may allege alternative or even inconsistent claims based on the same facts, whether the party bases those claims upon legal or equitable grounds or both. *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich App 463, 471 (2003). Plaintiff's Counts II and III allege claims in assumpsit and unjust enrichment, and the six- year statute of limitations provided for in MCL 600.5813 applies.

III. The Franchise Fee is a Tax

I. 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

[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. The Court further notes that the Supreme Court remanded this case back to the Court of Appeals for further consideration of issues not germane to this case at this time.

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 contention 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 are 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 or 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.

Based upon the foregoing, the franchise fees assessed amount to a tax, and summary dismissal for Defendant is not appropriate.

IV. Plaintiff's Assumpsit Claims in Counts II and VI are Properly Pled for Obtaining A Refund of Charges paid by Plaintiff and the Class

Defendant claims 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. *Fisher Sand & Gravel Co v Neal A. Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013) 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).

Defendant brings their motion under MCR 2.116(C)(8). Under MCR 2.116(C)(8) all well-pled factual allegations must be taken as true. *Haywood v Fowler*, 190 Mich App 253, 256; 475 NW2d 458(1991). Here, Plaintiff's Complaint alleges that Defendant imposed Franchise Fees in violation of statutory law, thus Plaintiff has properly asserted assumpsit claims.

V. Plaintiff and the Class May Recover on Theories of Unjust Enrichment as Pled in Counts III and V

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 addressed this issue, following remand from the Michigan Supreme Court, in *Logan v Charter Twp of W Bloomfield*, unpublished opinion of the Court of Appeals, issued February, 18, 2020 (Docket No. 333452), 2020 WL 814408[2]. While unpublished, the *Logan* court 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 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, Defendant is not entitled to summary disposition as to Plaintiff's Counts III and V.

[2] 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.

VI. Plaintiff Sufficiently Pleads a Violation of the Foote Act

The LBWL provided electricity since 1892. The Foote Act, 1905 PA 264, 1914 CL 4841, allowed the LBWL the right to construct and maintain electrical service infrastructure without the City's permission, thus without paying the City for the use of its streets and other property. The Act provides in relevant part:

> Any person, firm or corporation authorized by the laws of this State to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along, or across any public streets, alleys and highways and over, under or across any of the waters of the State, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same; Provided, That the same shall not injuriously interfere with other public uses of such streets, alleys or highways, or with the navigation of said waters, and that the designation and location of all lines of poles and wires shall be subject to the regulation, direction, and approval of the common council of cities, the village council of villages, and the township board of townships, as the case may be: Provided, That this act shall not apply to the county of Wayne: Provided further, That nothing herein shall deprive cities, villages or townships of the power and control over their streets and highways, which they have by the general laws of this State.

Const 1908, art 8, § 28 abrogated the Foote Act, providing:

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities or such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

Defendant argues that the Foote Act's abrogation, along with the fact that Plaintiff is not a utility company, bars Plaintiff's claims under the Foote Act. This Court again disagrees. In *City of*

Lansing v Michigan Power Co, 183 Mich 400; 150 NW 250 (1914), the Michigan Supreme Court held that despite the abrogation of the Act, the granting of a state franchise under that act created a vested property right "which cannot be impaired or destroyed by the Legislature, Constitution or court."

Here, LBWL provided electrical service starting in 1892. In 1905, the legislature passed the Foote Act which provided the LBWL the right to sell electrical service without seeking permission or paying a franchise fee. LBWL sold electrical service between 1905 and 1908, when the Foote Act was repealed. In 1914, the Michigan Supreme Court in *City of Lansing v Michigan Power Co*, held that a utility operating under the Foote Act in 1905 and 1908 had permanently gained the benefit of the act which remained, without paying franchise fees, continued regardless of the 1908 constitutional amendment. Therefore, Plaintiff is not entitled to summary disposition regarding Defendant's Foote Act Claim.

VII. Plaintiff's Equal Protection Claim in Count IV Fails

Plaintiff's Count IV alleges that under Const. 1963, art. 1, § 2, they are entitled to recoup the franchise fees paid. Defendant argues that Plaintiff cannot recover money damages under the equal protection clause and therefore his Count IV must be dismissed under MCR 2.116(C)(8). This Court agrees.

Const. 1963, art. 1, § 2 states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The Michigan Supreme Court has held that a plaintiff cannot recover money damages under this section. *Lewis v State*, 464 Mich 781; 629 NW2d 868 (2001). The *Lewis* Court held that the section gives legislature the power of implementing Const. 1963, art. 1, § 2. *Id.* at 787. The

Supreme Court went on to rule that if it allowed for money damages under this section, the court would abrogate the power expressly given to the Legislature. *Id.*

Here, Count IV of Plaintiff's complaint states that "Plaintiff seeks a refund of all amounts to which it and the Class are entitled." Plaintiff provided no argument in their brief against Defendant's argument regarding recovery of money damages for an equal protection claim. Given that Plaintiff seeks money damages for a Const. 1963, art. 1, § 2 claim, Plaintiff has failed to state a claim upon which relief can be granted regarding Plaintiff's equal protection claim. Therefore, Defendant is entitled to summary dismissal of Count IV pursuant to MCR 2.116(C)(8).

CONCLUSION

Defendant's motion for summary disposition fails as to Plaintiff's Counts I through III, V, and VI of Plaintiff's Complaint. The Franchise Fee amounts to an improper tax, and Plaintiffs have properly pled equitable claims as noted above. The Defendant City is entitled to summary dismissal of Plaintiff's Equal Protection claim in Count IV, as Plaintiff failed to state a claim upon which relief can be granted. MCR 2.116(C)(8).

THEREFORE, IT IS ORDERED that Defendant's Motion for Summary Disposition is **DENIED** as to Plaintiff's Counts I through III, V, and VI.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is **GRANTED** as to Plaintiff's Count IV which is dismissed.

In accordance with MCR 2.602(A)(3), 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