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

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

Plaintiff,

v.

THE GREAT LAKES WATER AUTHORITY,
an incorporated municipal authority,

and

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

Defendants.

Case No. 18-011569-CZ
Hon. Charles S. Hegarty

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SUMMARY OF THE CASE

Dated March 2, 2022

Plaintiff General Mill Supply Co. (hereinafter, "Plaintiff"), by its attorneys, Kickham Hanley PLLC, individually and on behalf of a class of similarly situated class members, presents the following Summary of the Case to set forth in detail the facts and law which support its claims against

Defendants Great Lakes Water Authority ("GLWA") and the City of Detroit (the "City," collectively with GLWA, "Defendants").

I. INTRODUCTION

This is a certified class action challenging an Industrial Waste Control Charge ("IWC Charge") GLWA and the City collectively impose on approximately 47,000 owners of certain types of non-residential property located in various municipalities in Southeast Michigan.

Defendants impose the IWC Charge solely to recover the costs of GLWA's Industrial Waste Control Division (the "IWC Division"), which is primarily tasked with monitoring the discharge of industrial waste by a small set of Significant Industrial Users ("SIUs"). There are about 250 SIUs under GLWA's jurisdiction.[1]

The IWC Charge has nothing to do with the actual cost of treating industrial waste. Instead, the purpose of the IWC Charge is "to offset the cost incurred in administering regulatory activities under the Sewer Use Ordinance/Industrial Waste Control Ordinance as required in the National Pollutant Discharge Elimination System (NPDES) Permit Program and the Clean Water Act." The IWC Charge purportedly finances, among other things, the costs associated with inspections, issuance of notices of violation or noncompliance, and other enforcement activities related to industrial waste generated by SIUs. The IWC Charge also finances other regulatory activities of the IWC Division, such as monitoring and licensing septage haulers and regulating a small number of sewer users who discharge sanitary sewage containing heavier volumes of "ordinary" pollutants.

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[1] SIUs are users that are either subject to categorical pretreatment standards per 40 CFR 403 or contribute an average of 25,000 gallons per day or process wastewater which usually requires pretreatment before discharge to the collection system operated by a Publicly Operated Treatment Works ("POTW"). An SIU is specifically defined in City of Detroit Ordinance 08-05, Chapter 56, Article III, Division 3, Section 56-3-58.1. All SIUs operate under permits issued by the City and/or GLWA as the "Control Authority", court orders or consent decrees.

The IWC Division's regulatory activities, including monitoring the discharge of industrial waste by SIUs, provide a public benefit because they help prevent pollution, including pollution of waterways. However, Defendants do not impose the cost of the IWC Division on the public at large. Defendants instead impose the IWC Charge on approximately 47,000 owners of certain types of non-residential property based solely upon the size of the water meter[2] serving their properties. Plaintiff and the 47,000 class members incur the IWC Charges even though Defendants concede that Plaintiff and the Class are the type of users who discharge only sanitary sewage and stormwater into the sewer system. In doing so, the Defendants inexplicably exempt from the Charges other types of similarly-situated non-residential properties – including schools and government facilities -- and **all** residential properties.

Plaintiff's First Amended Complaint alleges three distinct theories of recovery: (1) the IWC Charges constitute taxes which have been imposed in violation of the Headlee Amendment to the Michigan Constitution and MCL 141.91;[3] (2) even if the IWC Charges are not taxes, they still are unreasonable in violation of common-law ratemaking principles because, among other things, Defendants have imposed IWC Charges which generate revenues far in excess of the costs associated

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[2] In this context, "meter" does not refer to the actual device that measures the amount of water that enters a dwelling or facility from a water main, but instead refers to the diameter (i.e. size) of the water line that services the dwelling or facility. The idea is that facilities with larger water lines ("meters") discharge more sanitary sewage. However, there is no connection between the IWC Charge collected for a certain size water meter and any actual volume that flows through the meter. A user could have a ½ inch meter with absolutely no metered flow through it during a given billing period and the user will still be charged a static IWC Charge each month.

[3] The Prohibited Taxes by Cities and Villages Act, MCL 141.91, provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964." The City did not impose the IWC Charge on or before January 1, 1964 and, although the IWC Charge is a tax, it is not an ad valorem property tax. Because the IWC Charge is a tax that was not being imposed on January 1, 1964, it is unlawful under MCL 141.91.

with the IWC Division and have not imposed the Charges on other similarly-situated sewer users; and (3), the IWC Charges violate equal protection guarantees because Defendants have arbitrarily exempted hundreds of thousands of similarly-situated sewer users from paying IWC Charges, which results in significantly higher Charges to Plaintiff and the Class.

First, the IWC Charges here are not "user fees" but rather constitute taxes imposed by Defendants in violation of Section 31 of the Headlee Amendment to the Michigan Constitution, which provides:

> 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. [Const 1963, art 9, § 31.]

In *Bolt,* the Supreme Court identified "three primary criteria to be considered when distinguishing between a fee and a tax" (459 Mich. at p. 161):

A. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";

B. "[U]ser fees must be proportionate to the necessary costs of the service"; and

C. Payment of the fee is voluntary. [459 Mich. at pp. 161-62]

The IWC Charges have a revenue-raising purpose which significantly outweighs any regulatory purpose of the Charges. The Charges here lack a significant element of regulation because, among other things, Plaintiff and the Class are not even subject to the regulatory programs administered by the IWC Division.

Further the Charges are not proportionate to the necessary costs of the service because (a) the activities of the IWC Division confer a general public benefit and therefore the Charges are disproportionate to any specific benefits received by the payors of the Charges; (b) Plaintiff and the Class do not receive any direct benefit in exchange for their payment of the IWC Charges because they are not even subject to the regulatory programs administered by the IWC Division; and (c) even if the activities of the IWC Division confer particularized benefits upon sewer users, those benefits

extend to all sewer users, not just the sewer users Defendants have arbitrarily chosen to pay the costs of the IWC Division.

Finally, the Charges are not voluntary because, at the very least they are "effectively compulsory" in that "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.

Second, even if Defendants could lawfully impose some IWC Charge, the IWC Charges still have been unreasonable (and thus unlawful) because the total IWC Charges collected greatly exceed the actual costs of the IWC Division, and because Defendants have not charged all sewer users. As a result, the overall IWC Charges are inflated and Plaintiff and the Class bear a grossly disproportionate share of those inflated Charges.

Third, by imposing the IWC Charges only on the 47,000 nonresidential property owners they have arbitrarily chosen, Defendants have violated the equal protection guarantees afforded to those property owners by the Michigan Constitution. Indeed, Defendants' actions in imposing the IWC Charges on a limited subset of sewer users are not "based on natural distinguishing characteristics" and the "privilege" of not paying the IWC Charges is "extended to an arbitrary or unreasonable class while denied to others of like kind." *Alexander v Detroit*, 392 Mich 30; 219 NW2d 41 (1974).

On April 7, 2020, after a lengthy and hotly-contested certification fight, the Court entered an order certifying a Class as follows:

> (1) All persons and entities who/which are not Significant Industrial Users ("SIUs") and who/which have paid or incurred Industrial Waste Control Charges ("IWC Charges") to the Great Lakes Water Authority since January 1, 2016 and/or paid or incurred the IWC Charges to the City of Detroit (the "City") since July 17, 2013[4] and
>
> (2) Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

[4] The City of Detroit filed for federal bankruptcy protection in July 2013, which is why the Class Period begins after the bankruptcy filing.

On a class-wide basis, the refund to the Class that will be required if the Charges are invalidated, in whole or in part, is massive. For example, if the Court finds that the IWC Charges are unlawful taxes under Headlee, GLWA/DWSD will collectively be required to refund all IWC Charges imposed since at least September 2017. *See, e.g.*, *Bolt v. City of Lansing,* 238 Mich. App. 37, 49; 604 N.W.2d 745 (1999) ("*Bolt II*") ("any tax collected on or after December 28, 1998, that is adjudicated to be a wrongful tax under Headlee will have to be refunded, provided, of course, that persons seeking relief have acted within the statutory period of limitation.") (emphasis added).[5] A finding that the IWC Charges are unlawful taxes under MCL 141.91 will likely extend the refund period to July 2013.

Based upon the Revenue Requirements (see Doc. No. 463957) (Exhibit AA hereto), if Plaintiff recovers on its tax-based claims, the Headlee-only refund required (covering the time period from September 10, 2017 through December 31, 2021) will exceed **$41,000,000** and the refund required for Defendants' collective violation of MCL 141.91 and Headlee (covering the time period from July 18, 2013 through December 31, 2021) will exceed **$112,000,000**. And because Defendants continue to impose the IWC Charges, these amounts are rising every day. Given the ongoing amount of IWC Charge revenues garnered by the Defendants, three years from now (the likely time to resolve this

[5] Plaintiff's Headlee Amendment claim is subject to a one-year statute of limitations. *See Taxpayers Allied for Constitutional Taxation [TACT] v. Wayne County*, 450 Mich. 119, 124 (1995). Because this case was filed on September 10, 2018, Plaintiff and the Class can recover IWC Charges imposed and collected since September 10, 2017 under Headlee. Plaintiff's separate and distinct claims for assumpsit and unjust enrichment based upon DWSD's violation of MCL 141.91 are subject to a six-year statute of limitations, as are the assumpsit and unjust enrichment claims based upon the common-law imposing the reasonableness requirement. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 (2010) (unjust enrichment claim); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for sales tax refund subject to six-year statute of limitations). The equal protection claim is governed by a three-year statute of limitations. *See Orco Invs. v. City of Romulus*, 2012 Mich. App. LEXIS 1254 (2012) ("Michigan law does not specify a statute of limitations for equal protection or due process claims brought under its Constitution. Therefore, the statute of limitations is three years. *See* MCL 600.5805(10).")

case if the parties do not reach a settlement) their aggregate exposure will increase to at least **$136 million**.

If Plaintiff does not prove that the IWC Charges are unlawful taxes, but Plaintiff is successful only on its alternative claims for unreasonable IWC Charges, the total refund for the period of July 1, 2013 through June 30, 2019 will exceed **$81 million**. A preliminary calculation of amount of the Defendants' collective Overcharge during that period is set forth in Section IV below. The overcharge claims for the period following June 30, 2019 – which are still being evaluated -- will only increase this already-massive exposure.

II. STATEMENT OF RELEVANT FACTS

A. The Relationship Between GLWA and the City With Respect To Water and Sewer Services.

Defendant GLWA is an incorporated municipal water authority formed pursuant to MCL 124.282 with its primary offices in Detroit, Michigan. Defendant the City of Detroit is a Michigan home-rule city and is located in Wayne County, Michigan.

GLWA is the regional utility providing water and sewer services in southeast Michigan. GLWA was incorporated by the Counties of Macomb, Oakland and Wayne and the City of Detroit on November 26, 2014 pursuant to Act 233, Public Acts of Michigan, 1955, as amended ("Act 233"). Pursuant to leases that became effective on January 1, 2016, GLWA assumed possession and control of the regional assets of both the water supply and sewage disposal systems owned by the City, which were previously operated by the Detroit Water and Sewerage Department ("DWSD"). The City, acting through DWSD, continues to manage and operate its own local retail water and sewer system infrastructure. The leases assigned all revenues of both systems to GLWA for an initial term of 40 years and substituted GLWA for the City as the obligor on all outstanding debt obligations of the City related to the systems. *See* Exhibit A hereto (Summary Description of the GLWA Series 2020 Sewer Bonds described in the Official Statement).

GLWA's sewer system is one of the largest in the United States, both in terms of treatment capacity and population served. The sewer system currently serves an area of 944 square miles located in three Michigan counties and an estimated population of nearly 2.8 million or approximately 28% of Michigan's population. Suburban customers comprise approximately 76% of the population served by GLWA, and sewer customers in the City of Detroit comprise the remainder served by GLWA. *Id.*

GLWA is authorized to establish rates, fees and charges for its water supply and sewage disposal services. Under the Water and Sewer Services Agreement, the City is appointed as agent of GLWA for setting retail rates and for billing, collecting and enforcing the collection of charges from "retail" customer in the City of Detroit. *Id.* Notably, GLWA has no authority to impose taxes. *See* MCL 124.293 ("The Authority shall not have direct taxing power").

B. The Activities Of The IWC Division, And The Public Benefits Conferred By Those Activities.

GLWA maintains, and previously the City maintained, within their sewer operations a group known as the Industrial Waste Control Division. Prior to January 1, 2016, the City was responsible for the IWC Division. Effective January 1, 2016, the IWC Division was transferred to GLWA.

GLWA describes the activities of the IWC Division as follows:

> The Great Lakes Water Authority's Industrial Waste Control group implements and enforces an Industrial Pretreatment Program (IPP) to regulate the discharge of commercial and industrial waste and wastewater. The IPP includes the following elements:
>
> **Pretreatment Program** – regulates the discharge of toxic pollutants to the sewer collection system and performs inspection, monitoring, enforcement control and administration of industrial and commercial wastewater discharges. All Users must comply with general requirements and Significant Industrial Users must comply with permit-based requirements.
>
> **Surcharge (High Strength) Program** – is a cost recovery program for commercial and industrial waste discharging conventional pollutants above Domestic Levels and payment of additional treatment costs ($/lb) associated with these Users.

> **Special Discharge and General Permit Program** – authorizes the discharge of special wastes and wastewaters including groundwater, construction water, spent products, and other short-term projects through a permit program.
>
> **Hauled in Waste Program** – authorizes the discharge from waste haulers of septic tank and septage, and other domestic wastewater through a permit and ticket/token payment program. [Exhibit B hereto].

Defendants concede that the activities of the IWC Division confer benefits upon the general public and not just those persons and entities who pay the IWC Charges. For example, in its Rules relating to the IPP (Exhibit C hereto), GLWA states:

> The GLWA promulgates these rules and regulations for **the protection of the environment, the public health and safety** by abating and preventing pollution through the regulation and control of the quantity and quality of sewage, industrial wastes, and other wastes admitted to or discharged into the sewerage systems, and sewage treatment facilities under the jurisdiction of the GLWA and enabling the GLWA to comply with all applicable state and federal laws required by the Federal Water Pollution Control Act, being 33 U.S.C. 1251, et. Seq.; the General Pretreatment Regulations for Existing and New Sources of Pollution (40 CFR 403); and the National Categorical Pretreatment Standards at 40 CFR 405 – 471.

In its answer to Plaintiff's Third Request for Admission No. 1 (Exhibit D hereto), Defendants admitted that the "**the general public** within the jurisdictions providing Industrial Waste Control ('IWC') services **benefit from those services**, similar to the benefit they may derive from other public utility services." [emphasis added].

In his most recent deposition, Stephen Kuplicki, the head of the IWC Division, confirmed the public benefit of the IWC Division's actions:

> Q: Well the users of the sewer system are a subset of the public, right?
> A: Right.
> Q: All right, and the protection of the environment. Does it benefit more than just the sewer users?
> A: I mean, there may be benefits to people who are not part of the system. I mean, the state, generally.
> Q: All right. Well, a major goal of the regulations is to keep bad stuff out of the river, right?
> A: Correct.
> Q: All right, and if bad stuff gets in the river, that's a harm that goes beyond just a harm to sewer users, correct?

A: Right. I mean, it impacts, in our case it impacts state waters, federal waters, international waters. [Kuplick Dep. II at pp. 14-15 (Exhibit E hereto).]

Moreover, Defendants admit that the activities of the IWC Division at the very least confer benefits on all users of the regional sewer system, and not just the non-residential users who incur the IWC Charges. *See* Defendants' Answer to Third Request for Admission No. 9 (admitting that "all sewer users who receive sewage disposal services from DWSD or GLWA benefit from those services, similar to the benefit they may derive from other public utility services").

Mr. Kuplicki acknowledged this fact in his recent deposition, in which the following exchange occurred:

Q: Okay. So, part of the purpose of the rules and regulations [of the IWC Division] is protection of the environment and the public health and safety?
A: Yes.
Q: All right. Is protecting the environment a benefit to the public, generally?
A: **It's benefit to all system users**. [Kuplicki Dep. II at p. 14 (Exhibit E hereto) (emphasis added).]

C. The IWC Division Is Funded Solely By IWC Charges

Defendants admit that the IWC Division is funded **solely** through the IWC Charges. *See* Defendants' Answers to Third Request for Admission, RTA No. 22 (Exhibit D hereto). This is the case even though other activities of the IWC Division generate revenues for GLWA and DWSD. *See Id.*, RTA 14, 17, and 20 (admitting that Surcharge, Hauled-in-Waste and Special Discharge and General Permit Program generate revenues). None of those revenues are credited toward the revenue requirements of the IWC Division. *Id.*, RTA 15, 18, and 21 (admitting that revenues from those programs "are not credited toward the Revenue Requirement").

Prior to January 1, 2016, the City imposed and collected the IWC Charges for the entire suburban and City of Detroit service area. Effective January 1, 2016, GLWA established the rates for the IWC Charges for the entire service area. As discussed more particularly below, following GLWA's takeover of the IWC Division, the IWC Charges in suburban areas were collected by suburban

municipalities acting as collection agents for GLWA and forwarded to GLWA, and IWC Charges in the City of Detroit were collected by the City, also as a collection agent for GLWA, and forwarded to GLWA. Therefore, since January 1, 2016, GLWA has ultimately received all IWC Charge revenues.

D. The IWC Charges Are Imposed On Certain End-Users Of The GLWA and DWSD Sewer Systems, and It Is Those End-Users Who Bear The Legal Incidence Of The Charges.

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

a) "The IWC Charge **is assessed to any water meter** that is greater than or equal to 5/8" diameter under the following circumstances:

   i. **The user** is a commercial or industrial user whose operations are defined by the 1987 SIC Code (or its corresponding designation of the North American Industrial Classification system) being Divisions A, B, C, D, E, F, G, H, I and/or J;

   ii. The water meter in question is not strictly used for Fire Protection;

   iii. The facility is not a residential or multi-family dwelling."

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

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

c) In a March 25, 2015 "Industrial Waste Control and Pollutant Surcharge Program Review" (GLWA000042-GLWA000059) (Exhibit F hereto) Mark Savitskie and Cheryl Jordan of DWSD:

   Define "End-User" as "the business that **ultimately pays** the IWC charges and/or pollutant surcharge." *See* GLWA000044, (emphasis added).

   State "Over 47,000 non-residential commercial and industrial **end-users pay IWC charges monthly**, either through a direct billing from DWSD (for Detroit end-user locations) or a billing from their community customer (for suburban end-user locations) with the proceeds forwarded to DWSD." *See* GLWA000045, (emphasis added).

State "Program costs **are passed to the customer** based on their meter size (5/8 inches or greater)" *Id,* (emphasis added).

Identify that the purpose of IWC charges is to "[r]ecover the cost of the program by establishing charges based on meter size (IPP) and concentration of waste (PS) **for all non-residential customers** (subject to some exclusions)" *See* GLWA000046, (emphasis added).

Note that, with respect to the IWC charge, "many are billed a small amount each." *See* GLWA000051.

d) The IWC Charge "is **assessed against any water meter size greater than 5/8" to all commercial and industrial users of the DWSD system**, whose operations are defined by the 1987 SIC Code Division A, B, C D, E, F, G, H, I and J" *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added) (Exhibit H hereto).

e) "**Any user not specifically exempted by the court's 1981 order or as stated above, is to be assessed the Industrial Waste Control charge**." *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added) (Exhibit H hereto).

f) The DWSD "recovers the cost of the Industrial Waste Control Division budget through the **assessment of a meter charge** placed on all water meters of 5/8" or greater than 5/8" in all communities serviced by DWSD's Wastewater System." *See* DWSD Information Statement regarding the IWC Charge (GLWA000133-GLWA000135, emphasis added) (Exhibit H hereto).

g) "**IWC costs are not allocated to individual communities** or separately between Detroit and Suburban Wholesale. Total revenue requirements allocated to IWC are simply divided by the total IWC billing units to determine a set of charges that varies by meter size but that is uniform throughout the customer base." *See* "IWC Observations" (GLWA000384, emphasis added) (Exhibit I hereto).

In her deposition, DWSD's former in-house counsel, Cheryl Jordan, confirmed the "pass through" role of the so-called Member Communities in imposing and collecting the IWC Charges from non-residential sewer users in their respective communities:

Q: And I guess the fourth bullet point down, this what we were just talking about, over 47,000 nonresidential, commercial and industrial end users pay IWC Charges monthly either through direct billing from DWSD (for Detroit end user locations) or a billing from their community customer (for Suburban end user locations) with the proceeds forwarded to DWSD. You see that?
A: Yes.
Q: And that was an accurate recitation of how it worked, correct;
A: I believe so, yes. …

Q: **So would it be fair to characterize the member communities who are passing this on as basically collection agents for DWSD**?
A: **Yes**. [Jordan Dep. at p. 12 (Exhibit J hereto) (emphasis added).]

GLWA has continued that exact same process since taking control of the IWC Division on January 1, 2016. GLWA's Rules, which govern the activities of the IWC Division, set forth the procedure GLWA's suburban wholesale customers (i.e., the "Member Communities") are required to follow in their role as collection agents for the IWC Charges. Those Rules (Exhibit C hereto) provide in pertinent part as follows:

> Article I Industrial Waste Control Charges Section V-101.
>
> The Control Authority is required to implement and enforce an Industrial Pretreatment Program and perform other related duties as required by the NPDES Permit MI 0022802 and the Clean Water Act. To accomplish these duties and requirements, the Control Authority must have a revenue source which insures adequate funding. The Control Authority hereby adopts the following method of funding these regulatory activities:
>
> a) An IWC water meter charge shall be established by the Board to recover the costs incurred in administering, implementing and enforcing the regulatory activities and obligations under the NPDES Permit MI 0022802 and the Clean Water Act, and any rules adopted by the Board.
>
> b) The IWC water meter charge shall be based on the size of the water meter on a proportional basis and assessed on any non-residential water meter with the following exceptions: 1) The IWC water meter charge shall not be assessed on any meter dedicated for Fire Protection purposes only. 2) The IWC water meter charge shall not be assessed on any meter dedicated for Irrigation purposes only. 3) The IWC water meter charge shall not be assessed on any meter from a multi-family residential dwelling; public and private elementary and secondary school which are part of a government school district; colleges, universities, professional schools, junior colleges and technical institutes; and local, state and federal government facilities.
>
> c) Member Communities shall periodically report the quantity, number and size of non-residential meters, and any exempt meters (as described in paragraph 2).
>
> d) The Control Authority shall prepare a bill to each Member Community using the information provided in paragraph 3 and forward the bill for payment either through the Wholesale Sewer Contract Customer (if applicable) and/or Member Community, indicating the terms and conditions of payment.
>
> e) **Each Member Community is responsible for assessing these fees on applicable Users and collection thereof in accordance with the delegation and**

service agreements; and for reporting changes in the number of meters reported in paragraph 3.

f) The Control Authority reserves the right to collect any and all outstanding amounts in accordance with applicable law. [Exhibit C hereto at p. 78 (emphasis added).]

Consistent with the GLWA Rules, the "Member Communities" fully understand that they are not legally responsible to pay the IWC Charges but instead function solely as collection agents for the IWC Charges. For example, the City of Birmingham characterizes its role as follows:

> The Industrial Waste Control charge is an additional fixed fee **charged to commercial properties** by the GLWA for additional sewage treatment costs associated with commercial properties. The fixed fee is based on the size of the water meter. **These fees are collected by the City of Birmingham and remitted to the GLWA**. … [Exhibit K hereto (emphasis added).]

See also Exhibit L hereto (St. Clair Shores Council meeting minutes stating that the IWC fees "are a 100% pass thru charge as all monies are remitted directly to GLWA").

E. The Defendants Impose The IWC Charges On Tens of Thousands Of Users Who Are Not Even Subject To the Regulatory Programs Administered By The IWC Division

There are approximately 47,000 non-residential properties which incur IWC Charges. *See* Exhibit F hereto. But only a small fraction of those users (SIUs primarily) are even subject to the regulatory programs administered by the IWC Division which are financed through the IWC Charges.

In an industry presentation, GLWA recently characterized "today's users" as follows:

Federal Categorical Users subject to the Industrial Pretreatment Program – 155
Local Users subject to the Industrial Pretreatment Program – 119
Surcharge Program – 142
Septage Waste Haulers – 50
Groundwater/Special Discharge 16
Minor Users – 14,622 [*See* Exhibit M hereto.]

Significantly, however, only approximately **600 users** are subject to the regulatory programs administered by the IWC Division because, as described below, so-called "Minor Users" are **not** subject to those regulatory programs.

1. GLWA Concedes That "Minor Users" Are Not Subject To The Regulatory Programs Administered by GLWA.

GLWA's own documents confirm the extremely limited number of users that are actually "regulated" by the IWC Division. In a 2017 memo, GLWA characterized a Minor User as "any Industrial User who does not meet the definition of a Significant Industrial User, or qualify for a Wastewater Discharge Permit under the Industrial Pretreatment Program." Exhibit N hereto at p. 1. That critical memo makes clear that any commercial or industrial facility that generates only sanitary sewage or stormwater (and not other types of pollutants) is classified as a Minor User. *Id.* Most importantly, the memo admits that Minor Users are "**not subject to a local regulatory program**." *Id.* at p. 2 (emphasis added).

Mr. Kuplicki, the head of the IWC Division, confirmed these facts in his recent deposition:

> Q: Okay. **So if you are a plain old minor user, you're not subject to a local regulatory program, you're just subject to the general discharge prohibitions under the GLWA Rules, correct**?
> A: Well, you're subject to the general discharge prohibitions and the specific prohibitions apply, too. Those are the specific pollutant limitations.
> Q: Right, but when you talk about local regulatory programs, what programs are you talking about?
> A: **We were talking the formal Industrial Pretreatment Program, the formal Surcharge Program, the Special Discharge Program, the Hauled-in Waste Program.**
> Q: Right. All of which are administered by the Industrial Waste Control Division?
> A: Correct [Kuplicki Dep. II (Exhibit E hereto) at p. 23.] [6]

See also Id. at p. 19 (confirming that "any user that's not an SIU is considered a minor user") and p. 22 (confirming that "if you're just putting sanitary or stormwater in the sewer, you're going to be classified as a minor user").

[6] This damning testimony is contrary to Mr. Kuplicki's previously-submitted affidavit, in which he averred that "[t]o maintain compliance with its NPDES permit and the CWA, GLWA is required to implement these [Pretreatment Program] activities with respect to the entire class of non-residential (non-domestic) users, and not just significant industrial users." *See* Exhibit O hereto at p. 3.

2. The EPA Does Not Even Consider "Minor Users," As Characterized By GLWA, To Be "Industrial Users" Subject To The Pretreatment Program Requirements.

There is a very good reason GLWA concluded that "Minor Users" are "not subject to" the "formal Industrial Pretreatment Program:" The EPA expressly excludes sewer users who contribute only sanitary sewage or stormwater to a publicly owned treatment works ("POTW") from the scope of its Industrial Pretreatment regulations, because those regulations only apply to "Industrial Users" as defined by the EPA and "Minor Users" designated by Defendants do not fall within the definition of "Industrial Users." As discussed below, this is made clear by the EPA regulations and the Clean Water Act itself.

First, as Defendants admit, the Pretreatment Regulations only potentially apply to "Industrial Users." *See* 40 CFR Part 403 et seq; Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Class Certification (Exhibit P hereto) at p. 6 (stating that "the federal IPP regulations … apply to Industrial Users only"). In particular, the Regulations define "Industrial User" or "User" as "a source of Indirect Discharge" and further define "Indirect Discharge" as "the introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the [Clean Water] Act." 40 CFR Part 403.3(i) and (j). *See* Exhibit Q hereto. Thus, to be an Industrial User, a source of wastewater must be a "nondomestic source regulated under section 307(b), (c) or (d)" of the Clean Water Act.

Second, because they discharge only sanitary sewage and stormwater, "Minor Users" are not within the definition of "Industrial Users" because they are not "nondomestic sources." This is because sanitary sewage, even sanitary sewage discharged by non-residential users, is characterized by the EPA as "domestic" sewage. *See, e.g.*, EPA Guidance Manual for POTW Pretreatment Program Development (Exhibit R hereto) at pp. 2-5 to 2-9 (stating that the list of Industrial Users compiled by a POTW "should include only those firms that discharge nondomestic industrial wastewater to the

POTW"); *Id.* at Table 2.2 (stating that industries that have "domestic discharge[s] only" can be "eliminated").

Third, because they discharge only sanitary sewage and stormwater, "Minor Users" are not "regulated under section 307(b), (c) or (d) of the Clean Water Act." That section and subsections apply to sources of "pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works." *See* 33 U.S.C. Sec 1317(b) (Exhibit S hereto). Sanitary sewage and stormwater obviously are "susceptible to treatment" by a treatment plant and those substances do not "interfere with the operation" of the treatment plant.

GLWA's own Rules recognize this fact and therefore expressly exclude from its own definition of "Industrial User" the following types of "users": "an industry, commercial establishment, or other entity that discharges wastewater to a publicly-owned treatment works **other than, or in addition to, sanitary sewage**; and is a source of indirect discharge." *See* Exhibit C hereto at p. 11 (emphasis added). Therefore, all 47,000 Class Members, which GLWA has determined only discharge sanitary sewage and stormwater, are excluded from GLWA's own definition of "Industrial Users."[7]

3. ***Regardless Of Whether Minor Users Are "Industrial Users," Plaintiff and the Class Are Not The Type Of "Industrial Users" That Are Subject To The Pretreatment Program Requirements***.

Even if Minor Users (as defined by GLWA) could properly be characterized as "Industrial Users" under the EPA regulations, those Minor Users still are not subject to the Industrial

[7] The EPA clearly does not view all non-residential properties as "Industrial Users." When the EPA Pretreatment Regulations were implemented in 1978, the EPA determined that 568 treatment plants in the United States would be subject to the Pretreatment regulations and requirements. *See* Exhibit T hereto at p. 27744. At that time, the EPA estimated that there would be approximately 40,000 "Industrial Users" in the **entire United States** that provided waste to those 568 treatment facilities. That is, each treatment plant would service about 70 "Industrial Users." Here, Defendants have effectively designated 47,000 "Industrial Users" for a **single treatment plant**, more than the EPA estimated for 568 plants!

Pretreatment Program because they are not discharging the types of wastes that would bring them within the regulatory framework. GLWA states that it is "charged with identifying all Industrial Users who **may be subject** to the Industrial Pretreatment Program." *See* Exhibit N hereto (emphasis added). Clearly, then, all Industrial Users are not automatically subject to the Pretreatment Program but, instead, are only subject to the Program if their discharges threaten the public treatment works or the environment. Again, that is why GLWA determined that "Minor Users" are not subject to any of the regulatory programs administered by GLWA even though, in GLWA's eyes, "Minor Users" are one type of "Industrial User."

4. Defendants Concede That There Are Tens Of Thousands Of Sewer Users Who Pay The IWC Charges Who/Which Are Not Characterized As "Minor Users" Or "Industrial Users."

Not only are "Minor Users" not subject to the regulatory programs administered and carried out by the IWC Division, but there are tens of thousands of other non-residential "users" who pay the Charges and are not even characterized as "Minor Users." In his first deposition, Mr. Kuplicki confirmed that, in addition to "Industrial Users" (which are synonymous with "Minor Users"), there are other "nondomestic wastewater sources" – *i.e.*, commercial properties -- that pay IWC Charges:

> Q: So there are nondomestic wastewater sources that don't necessarily qualify as industrial users, correct?
> A: Yes.
> Q: And further down in paragraph eleven [of Mr. Kuplicki's Affidavit], the first sentence says: The IWC chart was established by DWSD and continued by GLWA to recover sufficient revenues to operate the IWC division and is paid by municipalities from industrial and other nondomestic waste water users residing based in a specific municipality who use GLWA's services. Do you see that?
> A: Yes, I do.
> Q: So the charge, the IWC charge is paid by both industrial and certain nondomestic wastewater users as you stated in your affidavit, correct?
> A: That's my understanding, correct. [Kuplicki Dep. I (Exhibit U hereto) at pp. 17-18.]

See also Id. at p. 36 (confirming that "nonresidential users, which would include both commercial and industrial, are assessed this charge").

Significantly, Defendants do not claim that there are any particularized benefits provided to "nondomestic water sources" (i.e., commercial properties) in exchange for their payment of the IWC Charges or that those users are directly subject to the regulatory activities of the IWC division. Instead, Defendants assert that GLWA must establish "a legal framework to monitor and enforce its pretreatment standards with respect to any 'Industrial User.'" *See* Kuplicki Affidavit (Exhibit O hereto).

In his first deposition, Mr. Kuplicki testified that there were 18,453 "minor industrial users" and that "these minor industrial users correspond to the industrial users" that Mr. Kuplicki described in his affidavit. Exhibit U hereto at pp. 34-35. *See also* Exhibit V hereto at p. 18 (DWSD presentation describing a "Program Overview" and identifying 288 SIUs and 18,453 "Minor Users"). Thus, there are less than 19,000 "users" that Defendants claim are benefitted by their IWC regulatory activities.

Significantly, however, there are at least 47,000 properties or "users" who are subject to the IWC Charges. *See* Exhibit F hereto at p. 4 ("Over 47,000 non-residential commercial and industrial end-users pay IWC charges monthly, either through a direct billing from DWSD (for Detroit end-user locations) or a billing from their community customer (for suburban end-user locations) with the proceeds forwarded to DWSD"). *See also Id.* at p. 10 (identifying 47,434 customers who/which incur IWC Charges). Thus, there are over **28,000 properties or "users"** (i.e., the "Commercial Properties") who are subject to the IWC Charges but are not subject to the regulatory and enforcement activities of the IWC division.

Notably, the Class here includes all "Minor Users" and "non-domestic wastewater sources."

F. Not Only Do Defendants Impose the IWC Charges On Users Who Are Not Regulated By The IWC Division, But Defendants Also Inexplicably Exempt Thousands Of Other, Similarly Situated Sewer Users From The Obligation To Pay IWC Charges.

And it gets worse. In order to fund the IWC Division, Defendants have created a nonsensical ratemaking scheme, which requires persons and entities who are not even subject to the regulation of

the IWC Division to finance virtually the entire budget of that Division, while at the same time exempting other similarly-situated sewer users from payment of the Charges.

First and foremost, all residential sewer users are completely exempt from the IWC Charges. *See* GLWA000133 (Exhibit H hereto). This includes all multi-family properties. *Id.* As a result, there are hundreds of thousands of sewer users in the GLWA service area that are exempt from the Charges. Plaintiff is currently investigating the total number of such exempt residential sewer users in the GLWA service area in discovery, but there are at least 211,000 residential sewer users in the City of Detroit alone that are exempt from the IWC Charges. *See* Exhibit W hereto.[8]

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[8] Defendants have claimed that they are legally required to impose the IWC Charges only on non-residential properties. *See* Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Class Certification at p. 7 ("the US EPA requires that [the IWC Division] be funded by non-residential users"). But this is completely untrue. Defendants have never cited any federal law or EPA regulation that dictates how a sewer system must fund its Industrial Pretreatment Program. That is why the federal court, in remanding this case to this Court, specifically noted:

> There is no question that federal law imposes obligations on Defendants. However, Plaintiff's claims challenge how Defendants choose to fund those federally-imposed obligations, not whether those obligations are being met. Defendants have cited no provision under the CWA, or any federal law, that prescribes the manner in which Defendants must fund their pretreatment program. [May 6, 2019 Order in Case No. 18-13255 (E.D. Mich.) at p. 4 (Exhibit CC hereto).]

The Industrial Pretreatment Regulations are completely silent on the means and methods of financing a Pretreatment Program. *See* Exhibit Q hereto. And even if the Defendants could show that Pretreatment Programs are required to be funded by "Industrial Users," for the reasons discussed above, Plaintiff and the Class are not even within the definition of "Industrial Users."

Even worse, not only does the EPA **not** require Defendants to impose the IWC Charges in the way Defendants have chosen to do so, but the Defendants have ignored the method of funding the IWC Division that the EPA **has** dictated. In its "Guidance Manual for POTW Pretreatment Program Development," the EPA gave some discretion to POTWs concerning charges to recover the costs of Pretreatment Programs, but the EPA imposed the following rational limitation:

> In all cases, the function of the cost allocation scheme is to allocate costs to appropriate categories of users of the POTW system based on specific criteria. Criteria for cost allocation include such things as number and type of sampling and analysis of events performed, and amount and type of pollutant discharged. **In this way users**

In addition, even though Defendants claim that all non-residential properties are subject to the regulation of the IWC Division, Defendants have inexplicably exempted tens of thousands of nonresidential properties from the IWC Charges. Indeed, the following types of nonresidential properties do not incur IWC Charges:

> Public and private elementary and secondary schools which are part of a governmental school district; colleges, universities, professional schools, junior colleges and technical institutes; and local, state and federal government facilities. [Exhibit C hereto at p. 78.]

The head of the IWC Division, Stephen Kuplicki testified that it was a "policy decision" to create the arbitrary exemptions. Kuplicki Dep. II (Exhibit E hereto) at pp. 39-40. It appears DWSD created these arbitrary exemptions, even though they were not authorized by the original 1981 federal court order which initially established the IWC Charges. *See* Exhibit H hereto (GLWA000133). Kuplicki confirmed that, absent the exemption, the exempted entities would be required to pay IWC Charges. Kuplicki Dep. II at p. 40.

The magnitude of the exemption is substantial. Investigation continues, but common sense indicates that, in Detroit and in the 77 suburban communities serviced by GLWA, there are tens of

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> **will be charged based on their relative impact on pretreatment program costs**. [Exhibit R hereto at p. 7-22 (emphasis added).]

Here, in derogation of the EPA guidance, "users" are not charged "based on their relative impact on pretreatment costs" but rather on the size of the water meter servicing their facility. And residential users and certain "favored" non-residential users are not charged at all.

Nor can Defendants rely upon the 1981 federal court order, which obviously is no longer operative given that DWSD is no longer under federal court oversight and, in any event, the order does not apply to GLWA, which has been responsible for imposing the IWC Charges since January 1, 2016. Of course, if the 1981 federal court order were still extant, Defendants clearly have violated it by, among other things, (1) arbitrarily excluding certain types of non-residential properties from payment of the IWC Charges and (2) imposing Charges that generate revenues far in excess of the actual costs of the IWC Division. *See* Order at p. 3 (authorizing IWC Charges on "industrial and commercial users" and requiring DWSD to "adjust the fees upward or downward so as to collect only the amount necessary to recover the cost of the Industrial Waste Control Section budget").

thousands of public and private elementary and secondary schools, colleges, universities, professional schools, junior colleges and technical institutes, and local, state and federal government facilities that would incur IWC Charges absent the exemption. Indeed, DWSD characterizes at least 56,000 water and sewer accounts in the City of Detroit as "Government" accounts. *See* Exhibit W hereto. As a result, the other payers of the IWC Charges must incur and pay higher rates in order to subsidize the favored, exempted, class.

G. The Gross Inflation Of IWC Charges Confirmed By DWSD's Own Investigation.

Defendants acknowledge that they were legally obligated only to recover the actual costs of the IWC Division through the IWC Charges. *See* Exhibit F hereto at p. GLWA000046 (acknowledging Defendants may "[c]ollect only the amount necessary to cover the cost of the IWC program"). Former DWSD in-house counsel Cheryl Jordan confirmed in her deposition that it was her understanding that "the IWC charges were limited to those that would allow DWSD to only recover the cost of the IWC program" and that DWSD was not "supposed to make a profit" from the IWC Charges. Jordan Dep. (Exhibit J hereto) at p.14. Even the 1981 federal court order that Defendants rely upon imposes this limitation. *See* Order (Exhibit X hereto) at p. 3 (requiring DWSD to "adjust the fee upward or downward to collect only the amount necessary to recover the cost of the Industrial Waste Control Section budget").

The rates for the IWC Charge have historically been determined by Defendants' outside consultant, Bart Foster. In his deposition, Foster confirmed various basic-ratemaking principles that apply to the calculation of the IWC Charges. For example, Foster testified or agreed with the following statements:

1. The determination of the IWC Charges begins with the establishment of the "Revenue Requirement," which is the "budgeted operating and other expenditures, including capital recovery that must be generated from rates charges and fees from customers." Foster Dep. (Exhibit Y hereto) at p. 9;

2. In determining the Revenue Requirement it is "appropriate to use the most accurate estimate of the amount of each of the cost components." *Id.* at pp. 9-10;

3. "And if the amount of a particular cost is known or fairly estimable, you should use that amount in determining the revenue requirement." *Id.* at p. 10;

4. "And it would be, from a rate-making standpoint, it would be inappropriate to use a cost amount that's materially higher or lower than the expected or known amount." *Id.*

5. "[i]n deriving Revenue Requirements, you endeavor not to materially overstate those requirements." *Id.* at p. 97;

6. "If the revenue requirement is materially overstated, it could result in rates that are in excess of the cost of service." *Id.* at p. 98.

Defendants indisputably have violated these basic rate-making principles by including in the Revenue Requirements elements of cost that are grossly in excess of Defendants' actual costs, as detailed below.

1. The Phantom Charges For The "Analytical Lab" And Other "Wastewater Operations" Costs.

For FY 2013-14, the City determined that the Revenue Requirement for the IWC Charges was $22.4 million. In March 2015, however, the City undertook a more detailed analysis of the actual Revenue Requirements associated with the Industrial Waste Control Division. At that time, the City "obtained FY 2014 Revenue Requirement data" for the IWC Charge, and performed a "[r]econstructed cost buildup from 'bottom up' based on actual for FY 2014." In other words, the City used "reconstructed data from FY 2014 to recalibrate FY 2016 rates." *See* Exhibit F hereto at p. 11.

As part of the new analysis, the City determined that the $22.4 million Revenue Requirement was completely fraudulent because it included $9.5 million in wastewater operations expenses when the actual wastewater operations expenses were $2.29 million. The analysis further determined that the $22.4 million Revenue Requirement included $4.46 million in indirect administrative overhead when the actual indirect administrative overhead was $2.65 million. As a result of the City's more

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

The "reconstructed" analysis described above was conducted by a third-party consultant for DWSD, Mark Savitskie. In his deposition (Exhibit Z hereto), Mr. Savitskie gave the following damning testimony:

> Q: Just so we are clear on the record, the rate calculation for fiscal year 2014, you concluded that it resulted in $22,450,700 of charges pursuant to that rate calculation, correct?
> A: Yes.
> Q: And then when you did your reconstructed calculation, you determined that it was $13,053,349, correct?
> A: Correct.
> Q: And that 13 million number is based upon actual information from 2014 as opposed to what was in the rate calculation?
> A: Correct. …
> Q: **So what you concluded at the end of the day is that the fiscal year 2014 IWC revenue requirement should have been 13 million dollars as opposed to 22 million dollars?**
> **A: Right**.
> Q: And so in your calculation here – you would agree with me that the one major driver of this difference is that in the rate calculation, almost 9.5 million dollars was allocated to wastewater operations including the lab, and in your reconstructed wastewater lab operations, it was $2,300,000, basically?
> A: Yes.
> Q: And when you reconstructed the wastewater lab ops to come up with – you determined that the budget for, the entire lab operations was a little over three million dollars, correct?
> A: Where are you – okay, the 3,016,000?
> Q: Yes
> A: Yes.
> Q: And that was based upon actual data that you obtained for fiscal year 2014?
> A: Yes. [Savitskie Dep. (Exhibit Z hereto) at pp. 13-15 (emphasis added)].

Savitskie went on to confirm this massive overcharge at the conclusion of his deposition:

> Q: Was that your understanding of the goal of these charges was to collect only the amount necessary to recover the cost of the IWC program?
> A: Yes.
> Q: **And isn't it true that your analysis that's reflected on page 11 confirms that at least for fiscal year 2014, DWSD recovered more than the cost of the IWC program?**

A: The data on page 11 does suggest that, yes.]
Q: By about nine million dollars, correct?
A: I'm not looking at that page now.
Q: If we can just go back to it just to confirm this question.
A: **If you say by about nine million, you're comparing 22.4 to 13 million, yes**. [Savitskie Dep. at pp. 20-21 (emphasis added).][9]

A primary reason the IWC Revenue Requirement the City used in FY 2013-14 and 2014-15 was so grossly inflated was because DWSD used a completely fictional number for the so-called "Analytical Lab" budget. The Analytical Lab is a group at DWSD (now GLWA) tasked with analyzing waste materials which provides support to the IWC Division and also to other sewer functions. *See generally* Kuplicki Dep. II (Exhibit E hereto) at pp. 28-34.

In his deposition, Bart Foster confirmed that, in determining the IWC Charges for FY 2013-14 and FY 2014-15, DWSD budgeted **$8,000,000** for the Analytical Lab when the entire Analytical Lab budget for those years was only approximately **$3,000,000**:

Q: Right, but my question is, we know from Mr. Savitskie's document, which we'll get to, but its represented in your document here that the Analytical Lab Budget for the Fiscal Year 2016 was $3,058,800, correct?
A: Correct.
Q: That would be the entire Analytical Lab Budget?
A: Based upon his review, yes. [Foster Dep. (Exhibit Y hereto) at p. 24. *See also* Exhibit AA hereto at p. 463957.]

Despite the fact that the entire Analytical Lab budget during those years was about **$3,000,000**, Foster acknowledged that the FY 2014 IWC Charge revenue requirement included **$8 million** as the budget for the Analytical Lab:

Q: All right but that's a different question. Let's see if we can agree that for Fiscal Year 2014, in looking back at how the Revenue Requirement was generated in that

[9] While Savitskie's analysis was limited to FY 2014, Bart Foster testified that Savitskie's overcharge calculation would apply to FY 2015 as well. This is because there was no new "cost of service" study prepared for that year and therefore the FY 2014 budget and revenue requirement numbers were simply carried-through and applied to FY 2015. *See* Foster Dep. (Exhibit Y hereto) at pp. 32-33. As a result, the overcharge Defendants admit just for FY 2014 and FY 2015 exceeds **$18 million**.

year, what you assumed was that $8,000,000 of the Revenue Requirement was attributable to the Analytical Lab Budget, correct?

A: Attributable to the Analytical Lab activities in the budget that were allocable to the Industrial Waste Control program, yes.

Q: All right, so, but at least $8,000,0000 of Analytical Lab Budget was attributable to the IWC Division, correct?

A: Yes, that the assumption that went into the 2014 Cost of Service Study. [Foster Dep. (Exhibit Y hereto) at pp. 25-26].[10]

2. Other Deficiencies In Defendants' IWC Charge Methodology That Further Confirm The Gross Overcharges.

Defendants also grossly inflated the IWC Charge revenue requirement by utilizing an inflated amount for so-called "direct" IWC expenses, which primarily consist of salary and benefit expenses of the employees of the IWC Division. For example, the "direct" IWC expenses were overstated in at least the following amounts in the following fiscal years:

Fiscal Year	**Direct IWC Costs in Rev. Requirement**	**Actual Direct IWC Costs**[11]
FY 2014	$6,301,600	$3,759,584
FY 2015	$6,613,400	$2,365,109
FY 2016	$4,699,600	$2,365,109
FY 2017	$5,871,800	$4,887,800
FY 2018	$5,640,400	$5,162,600
FY 2019	$2,956,800	$2,792,000

The resulting overcharge is further amplified when one considers that certain indirect costs were allocated based upon the direct IWC costs. Bart Foster testified that the amount of the indirect cost allocation is a direct function of the amount of the direct IWC costs. *See* Foster Dep. (Exhibit Y

[10] Foster testified that it was a "reasonable assumption" that the $8 million number for the Analytical Lab was carried through and incorporated into the IWC Charge revenue requirement for FY 2015 as well. Foster Dep. at p. 33.

[11] The "Direct IWC Costs in Revenue Requirements" is derived from Doc No. 463957 in Exhibit AA hereto. The "Actual Direct IWC Costs" are derived from Defendants' sworn interrogatory answers. Exhibit BB hereto.

hereto) at p. 36 (confirming that "the higher the direct costs under the IWC Revenue Requirement, the higher these Allocated Admin/Centralized Services overhead costs are going to be"). *See also* Exhibit AA at doc 463957 ("These amounts allocated to Cost Pools based on 'direct' allocations, so lower "directs" leads to lower allocation). Therefore, in order to further adjust the revenue requirement, one must determine what the indirect cost allocation would have been if the lower (correct) direct IWC costs were utilized. We perform that calculation for certain years in the Class Period in Section IV.B below.

3. Defendants Have Gradually Reduced The IWC Charges, But They Still Are Far Too High.

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

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

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

Effective July 1, 2018, GLWA finally implemented an additional 31% reduction in the amount of the IWC Charges. Mr. Foster characterized this reduction as "material." However, this reduction

came too late for thousands of non-residential property owners who were grossly overcharged for years, and still does not reflect the actual direct and indirect costs associated with the IWC Division.

By utilizing the actual Analytical Lab and direct IWC costs instead of the inflated costs used in generating the Revenue Requirements, and allocating the administrative and central services overhead based upon the actual direct IWC costs, Plaintiff will establish a minimum Gross Overcharge to Plaintiff and the Class for the Class Period in excess of **$26.9 million** through just the end of FY 2019 based just upon the inflated Revenue Requirement. The overcharge Plaintiff will ultimately prove under this theory is actually much higher, because, assuming Defendants are legally authorized to impose IWC Charges, the Revenue Requirements for the Charges have to be allocated among **all** sewer users, not just the nonresidential users upon whom the IWC Charges have historically been imposed. In other words, not only should the Revenue Requirements have been dramatically lower during the Class Period, but those lower Revenue Requirements should have been allocated among a much larger number of "meters" (i.e., both residential and nonresidential sewer users). This calculation greatly lowers the Revenue Requirements that should have been allocated to Plaintiff and the Class and greatly amplifies the overcharge, increasing it to **$81.75** million through June 30, 2019.

A more complete analysis which more specifically quantifies the Overcharges during the Class Period is set forth in Section IV.B below.

III. THE IWC CHARGES CONSTITUTE UNLAWFUL TAXES THAT HAVE BEEN IMPOSED IN VIOLATION OF THE HEADLEE AMENDMENT AND MCL 141.91

A. THE IWC CHARGES ARE IMPOSED ON END USERS OF THE GLWA/DWSD SEWER SYSTEM.

As a precursor to the analysis of whether the IWC Charges constitute taxes, the Court must determine who has the legal obligation to pay the IWC Charges. For the reasons discussed below, the Court will easily conclude that the end-users of Defendants' sewage disposal services are the legal payers of the IWC Charges.

In the DWSD service area, clearly the end-users of the DWSD system are the "payers" of the IWC Charges because they are directly billed by DWSD. In other words, the end-users bear the "legal incidence" of the Charges.

As to the GLWA service areas outside of the City of Detroit, the end-users also are the "payers" of the IWC Charges, notwithstanding the role of the Member Communities in collecting the Charges from those end-users. Because the Member Communities are required to collect the IWC Charges from the end-users and remit the IWC Charges to GLWA, the legal incidence of the IWC Charges falls on the end-users who incur the Charges. *See, e.g., U.S. v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975) ("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 incidence of the tax falls upon the purchaser").

The U.S. Supreme Court has long recognized this basic principle of taxation. For example, the Court has held that a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser" because the text of the statute indisputably provides that the tax "must be passed on to the purchaser." *First Agric. Nat'l Bank of Berkshire Cty v. State Tax Comm'n*, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968) (citations omitted).

B. THE TAX VS. USER FEE DISTINCTION MADE UNDER THE HEADLEE AMENDMENT

Once the Court concludes that the legal incidence of the IWC Charge falls upon the end-users, the Court will further find that the IWC Charges are unlawful taxes that have been imposed in violation of the Headlee Amendment and MCL 141.91.

"Section 31 [of the Headlee Amendment] prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's

electorate." *Durant v Michigan,* 456 Mich 175, 183; 566 NW2d 272 (1997).[12] Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt,* 459 Mich at 158. However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id.* at 159. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.*at 161.

C. THE "*BOLT* FACTORS" ENUNCIATED BY THE SUPREME COURT.

In *Bolt*, the Court found that certain stormwater management charges imposed by the City of Lansing were unlawful taxes imposed in violation of Headlee.[13] In *Bolt,* the Court identified "three primary criteria to be considered when distinguishing between a fee and a tax" (459 Mich. at p. 161):

1. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";
2. "[U]ser fees must be proportionate to the necessary costs of the service"; and
3. Payment of the fee is voluntary. [459 Mich. at pp. 161-62]

Additionally, the courts have noted that "the inquiry into the first two factors is closely intertwined." *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412, 415, 671 N.W.2d 572 (2003). This is a matter of simple logic; if the fees charged are in not proportional to the actual costs of the services provided, then they are properly regarded as a "means of producing revenue" and

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[12] GLWA is subject to the Headlee Amendment limitations on taxes imposed by "Local Governments" because it is an "authority created by other units of local government." *See* Mich. Const. Art IX, Section 33 ("'Local Government' means any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government").

[13] In *Bolt*, the city of Lansing sought to limit the polluting of local rivers that resulted when heavy storm water precipitation caused the city's combined storm water and sanitary sewer systems to overflow. *Id.* at 154-155. The city decided to separate the remaining combined storm and sanitary sewer system, at a cost of $176 million. *Id.* at 155. As a means to fund the costs of the sewer system separation, the Lansing City Council adopted Ordinance 925, which provided that the costs would be financed through an annual storm water service charge which was imposed on each parcel of real property located in the city.

therefore support the conclusion that the dominant purpose of the charge is revenue-raising rather than regulatory. 258 Mich. App. At 415-416.

It is now well-established that sewer-related charges, like the IWC Charges here, clearly are subject to the Headlee Amendment tax limitations. Indeed, as the Court of Appeals recently reaffirmed, "[w]ater and sewer charges are not always user fees and … such charges must be measured against the 'relevant criteria for determining whether a charge is a fee or a tax.'" *Shaw v. City of Dearborn*, __ Mich. App. __, __ N.W.2d __ (2019) at p. 13 (citing *Bolt*, 459 Mich at 162-163, n. 12). Moreover, "[t]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v. Kochville Twp.*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999).

With regard to the first two criteria, the *Bolt* Court concluded that the Lansing charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service. Rather, the Court concluded that the service charge served a revenue-raising purpose. *Id.* at 163-167. According to the Court, "the 'fee' [was] not structured to simply defray the costs of a 'regulatory' activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens." *Id.* at 164 (quoting *Bolt v City of Lansing,* 221 Mich. App. 79, 91 (1997) (Markman, J., dissenting).[14] For this same reason, the Court concluded that the "revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax." *Id.* at 164.

The Court further concluded that the storm water service charge neither served a regulatory

[14] Judge (later Justice) Markman's dissent in the 1997 *Bolt* Court of Appeals' decision is noted repeatedly in this Summary because the Supreme Court ultimately adopted it in substantial part in the majority opinion in *Bolt*.

purpose nor was proportionate to the necessary costs of the service on the basis of the following two "related failings" of the ordinance. The first failing the Court found was that the fee imposed did not correspond to the benefits conferred because a majority of the property owners in the city who were required to pay the charge were already served by a separated storm and sanitary sewer system that many of them had already paid for through special assessments. *See* discussion in *Bolt*, 459 Mich. at 165-167. The Court noted that "a true 'fee' . . . is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed." *Id.* (citations omitted). The Court then concluded that "the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id.*

The "second failing" was the ordinance's lack of a significant element of regulation because: (a) the ordinance only regulated the amount of rainfall shed from a parcel of property as surface runoff, and did not consider the presence of pollutants on each parcel that contaminate such runoff contribute to the need for treatment before discharge into navigable water; (b) it failed to distinguish between those responsible for greater and lesser levels of runoff and excluded street rights of way from the properties covered by the ordinance; and (c) the stormwater was not treated before it was discharged into the waterway. *Bolt,* 459 Mich at 165-167.

Next, the Court found that the charge lacked any element of voluntariness, which the Court found to be further evidence that the charge was a tax and not a user fee. The Court opined:

> The charge in the present case is effectively compulsory. 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 (footnote omitted).][15]

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[15] In reaching its decision, the *Bolt* court specifically rejected the assertion that charges for storm or sanitary sewers are "always user fees." 459 Mich. At 162. Instead, the Court held that sewerage can properly be viewed "as a utility service for which usage-based charges are permissible, and not as a disguised tax," **only** where "**the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology,**

C. THE COURT OF APPEALS CONFIRMS THE *BOLT* PRINCIPLES IN INVALIDATING THE CITY OF JACKSON'S STORMWATER CHARGES.

The principles of *Bolt* were more recently applied by the Michigan Court of Appeals to strike down another municipality's attempt to impose stormwater-related charges without complying with the voter approval requirements of Headlee. In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013), the Court held that a city ordinance establishing a storm water utility and imposing a stormwater charge on all property owners within the City established an unconstitutional tax.

In *County of Jackson*, the City of Jackson maintains and operates separate storm water and wastewater management systems. Historically, the city funded the operation and maintenance of its storm water management system with money from the city's general and street funds. In 2011, however, the Jackson City Council created a "storm water utility" and imposed a storm water management charge on all property owners within the city to generate revenue to pay for the costs associated with operating and maintaining the City's separate storm drain system. Plaintiffs alleged that the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge, ran afoul of § 31 of the Headlee Amendment.

Applying the *Bolt* factors, the Court held that the charges there were motivated by a revenue-raising purpose, were not proportional to use, and were not voluntarily paid by the city's landowners. Accordingly, the Court invalidated the Jackson charges. 302 Mich. App. at 112.

As discussed below, the IWC Charges at issue here are legally indistinguishable from the stormwater charges that were struck down in *Bolt* and *County of Jackson.*

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including some capital investment component." *Id* at p. 164-64 (emphasis added).

D. THE IWC CHARGES ARE MOTIVATED BY A REVENUE-RAISING PURPOSE THAT SUBSTANTIALLY OUTWEIGHS ANY REGULATORY PURPOSE

The first *Bolt* factor focuses on the primary purpose of the contested charge. In addressing this factor, the issue is not whether the activity financed is a "regulatory" activity. Rather, the focus is whether the means of imposing the charge furthers the regulatory purpose and whether that regulatory purpose outweighs a counter-vailing revenue-raising purpose. *See, e.g., County of Jackson*, 302 Mich. App. at 105-106 ("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"). In order to justify a finding that the regulatory purpose of a disputed charge outweighs the revenue-raising purpose, there must be a "significant element of regulation." *Id.*

Here, as applied to Plaintiff and the Class, the IWC Charges clearly lack a "significant element of regulation." This is true because the Charges regulate **nothing** with respect to the group of IWC Charge payers that comprise the Class. Indeed, Defendants must concede that Minor Users (and "nondomestic waste water users") are "not subject to a local regulatory program." Exhibit N hereto at p. 2. *See* discussion, *supra,* at Section II.E.

Moreover, because the IWC Charges are not proportional to any benefits conferred on Plaintiff and the Class by their payments of the Charges (which is discussed extensively below), the Court will surely conclude that the primary purpose of the Charges clearly is to raise revenue. *See, e.g.*, *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412, 415, 671 N.W.2d 572 (2003) (holding that the first two *Bolt* factors are "closely intertwined").

Thus, as in *Jackson*, the first *Bolt* factor is clearly satisfied.

E. THE CHARGES ARE NOT PROPORTIONAL TO ANY ACTUAL BENEFITS CONFERRED UPON THE MEMBERS OF THE CLASS.

1. The Charges Are Not Proportional Because The Charges Do Not Confer Any Particularized Benefit On The Persons Paying The Charges.

The Michigan courts have repeatedly recognized that a charge is not "proportionate" unless

the payors of the fee receive a "particularized benefit" and those benefits do not extend to persons who do not pay the fee. *See Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits **only** upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.") (emphasis added) (citing *Bolt,* 459 Mich. at 164-165). Said another way, a true fee is "**paid only by those who use the service in question**." *A&E Parking v. Detroit Metropolitan Wayne County Airport Authority*, 271 Mich. App. 641, 644, 723 N.W.2d 223 (2006) (emphasis added). Moreover, the *Bolt* Court quoted the Headlee Blue Ribbon Commission's definition of "user fee" as follows: "**A "fee for service' or 'user fee' is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are [sic] used only for the service provided.**" *Bolt*, 459 Mich. at 168 n.16 (emphasis added).

As described above, Defendants concede that the activities of the IWC Division confer benefits upon the general public and not just those persons and entities who pay the IWC Charges. For example, in its Rules relating to the IPP (Exhibit C hereto), GLWA states that rules and regulations which apply to the activities of the IWC Division are for "**the protection of the environment, the public health and safety** by abating and preventing pollution through the regulation and control of the quantity and quality of sewage, industrial wastes, and other wastes admitted to or discharged into the sewerage systems, and sewage treatment facilities under the jurisdiction of the GLWA and enabling the GLWA to comply with all applicable state and federal laws required by the Federal Water Pollution Control Act, being 33 U.S.C. 1251, et. Seq.; the General Pretreatment Regulations for Existing and New Sources of Pollution (40 CFR 403); and the National Categorical Pretreatment Standards at 40 CFR 405 – 471."

The Michigan courts have held that governmental charges lack the required proportionality when those charges finance a governmental activity that provides a benefit to the general public. For

example, in *Bolt*, the Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two "related failings" of the ordinance:

> First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. **A true "fee," however, is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed**. *Bray [v Dep't of State,* 418 Mich. 149, 162; 341 N.W.2d 92 (1983); *Nat'l Cable Television Ass'n v United States & Federal Communications Comm*, 415 U.S. 336, 340-342; 94 S Ct 1146; 39 L Ed 2d 370 (1974)]. …
>
> **In this case, the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public**.
>
> This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. **Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the City, not only property owners**. [459 Mich. at 166 (emphasis added)]

Similarly, in In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013), the Court held that a city ordinance establishing a storm water utility and imposing a stormwater management charge on all property owners within the City established an unconstitutional tax. In reaching this conclusion, the Court relied heavily on the fact that the charges at issue there did not correspond to any particularized benefit conferred upon the payers of the charges:

> Likewise, the lack of a correspondence between the charge imposed and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee. A true fee confers a benefit upon the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. *Id. at 165*. …
>
> **We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's**

> **ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*, benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax**. *Bolt, 459 Mich at 166*. [302 Mich. App. at pp. 108-109 (emphasis added)].

More recently, in *People v. Cameron*, 319 Mich. App. 215, 900 N.W.2d 658 (2017), the Court held that certain court costs imposed by a state statute upon criminal defendants constituted taxes. In reaching that result, the *Cameron* court reiterated that charges which finance activities that benefit the general public fail to satisfy the proportionality factor:

> **Defendant further argues that the costs are "not proportionate to the 'service,' because the courts confer benefit[s] to the public (justice, fairness, order) not the particular person on whom the costs are imposed." This argument has merit**. …
>
> We find the reasoning in [*State v Medeiros*, 89 Hawaii 361, 370; 973 P2d 736 (1999)] persuasive and conclude that, **although the court costs at issue comport with the requirements of MCL 769.1k(1)(b)(iii) and Konopka, they nevertheless are not proportionate to the service provided because any service rendered by the trial court's role in the prosecution of defendant benefits primarily the public, not defendant**. [319 Mich. App. at 226-27 (emphasis added).]

This case is not distinguishable from *Bolt* or *Jackson* because the IWC Charges here provide a public benefit and the persons and entities who are subjected to the IWC Charges simply are not "users" of the "services" of the Industrial Waste Control Division. "Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who must pay the fee." *County of Jackson*.

2. Given the Defendants' Method Of Imposing The Charges, The Actual "Use" Of The Services of the IWC Division By Each Billed "User" Is Not Accounted For With The Requisite Level of Precision Necessary

To Support A Conclusion That The Charge Is Proportionate To The Costs Of The Services Provided.

In order to be proportionate, the IWC Charges must bear a "close proportional relationship" to the benefits conferred upon Plaintiff and the Class by the activities of the IWC Division. *See County of Jackson*, 302 Mich. App. at 109-110. Even if the activities of the IWC Division could properly be viewed as bestowing a particularized benefit on the landowners who are subject to the IWC Charges, those charges still are not proportionate to the necessary costs of the alleged "service" for at least four reasons.

a). The IWC Charges Are Not Proportional Because Plaintiff And The Class Are Not Subject To The Regulatory Programs Administered By the IWC Division.

This deficiency in the IWC Charges is fully discussed in Section II.E, *supra*.

b). The IWC Charges Also Are Not Proportional Because The Three Classes Of Users Who Are Subject To The Charges Receive Disproportionate "Benefits" In Exchange For Their Payments

Defendants concede that they have created three categories of "users" – SIUs, "Minor Users" and "nondomestic waste water users" -- and that these three categories of "users" receive varying "benefits" from the activities of the IWC Division. Yet all three types pay the same IWC Charge rates. This is further confirmation of the disproportionality of the Charges.

c). Defendants' Arbitrary Exemption Of Tens of Thousands Of Properties From The IWC Charges Further Renders The IWC Charges Disproportionate.

As described above, Defendants have exempted all residential properties and various types of nonresidential properties from the obligation to pay the IWC Charges. This arbitrary and capricious exemption scheme artificially inflates the amounts that must be paid by Plaintiff and the Class in order to subsidize the exempt sewer users.

First, Defendants cannot justify the residential exemption by arguing that Plaintiff and the Class impose greater burdens on the IWC Division than the residential sewer users. Defendants admit

that Plaintiff and the Class are not subject to the Pretreatment Program because they only discharge sanitary sewage into the system, which is the very same type of sewage discharged by residential users.

Nor can Defendants justify the exemption for residential properties on the grounds that, even though the Class members are not subject to the specific regulatory programs administered by the IWC Division, they are still subject to the IWC Division's enforcement of the general discharge restrictions set forth in the Detroit ordinance. This is because **all** sewer users, including residential users, are subject to the general discharge restrictions set forth in the Detroit ordinance. *See* Ordinance (Exhibit DD hereto) at p. 2 ("this division shall apply to every user contributing or causing to be contributed, or discharging, pollutants or wastewater into the wastewater collection and treatment system of the City of Detroit POTW").

Further, even if Defendants could establish that the IWC Division's activities conferred particularized benefits upon the **nonresidential properties** that incur the IWC Charges, those Charges still are disproportionate because the Defendants inexplicably exempt hundreds of other similarly-situated **nonresidential** properties from paying the IWC Charges.

This type of evidence of nonproportionality is of particular interest to at least one Justice of the Michigan Supreme Court. At a recent Supreme Court oral argument in the *Binns v. City of Detroit* case, a Headlee Amendment case challenging the City of Detroit stormwater drainage charges, Justice Brian Zahra addressed the proportionality of a "user charge" system that allocated stormwater treatment charges based solely upon the area of "impervious" surfaces present on each property. In doing so, Justice Zahra emphasized that pervious surfaces contribute runoff to a stormwater system and openly questioned whether the City of Detroit's method of charging there which, like the City's method here, only measured the area of impervious surfaces, could result in proportionate charges:

> JUSTICE ZAHRA: The test is proportionality, and I'm very concerned about a fee that's only put on people who are deemed to have impervious acreage, when I know from common sense that water runoff goes off of lawns, soil surfaces that are sometimes compacted and goes into the sewer system. [Exhibit EE hereto at p. 19].

When the Supreme Court later vacated the Court of Appeals' ruling that the City of Detroit's Drainage Charges were proper user fees in *Binns*, Justice Zahra expressed additional concern about the proportionality of the charges there, because Detroit was not charging all landowners whose properties "contributed" stormwater runoff into Detroit's combined sewer system. In fact, one of the largest landowners in Detroit, the Detroit Land Bank Authority ("DLBA") was inexplicably exempted from the payment of the charges. Upon being informed of that fact, Justice Zahra stated:

> Given the foregoing, it is at best unclear to me who the City's drainage charge is best classified as a user fee rather than a tax where: (1) "user fees must be proportionate to the necessary costs of the service," *Bolt,* 459 Mich at 161-162; (2) a subunit of the City is exempted from paying the drainage charge that other impervious-acreage landowners must pay, see Kickham Hanley amicus brief at 3; and (3) that results in the imposition of "higher Drainage Charge rates" on other, non-DLBA landowners, see *id.* – all of which applies to plaintiffs in these cases. [*See* Exhibit FF hereto at p. 2.]

Justice Zahra's remarks at oral argument and in his concurrence in the *Binns* remand order indicate that regardless of what happens in the Circuit Court, the Michigan appellate courts are likely to agree with Plaintiff that the IWC Charges are not proportionate.

d). <u>The Charges Also Lack Proportionality Because They Generate Revenues Far In Excess of the Costs Of The IWC Division</u>

Finally, the Charges also lack proportionality because the total amount of the charges are far in excess of the City's actual costs of the IWC Division. In *Jackson*, the Court found that the fact that the charges generated revenues which exceeded related expenditures further supported the conclusion that the charges there failed to satisfy the proportionality requirement:

> **This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses**. Although maintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities, see 73B CJS, Public Utilities, § 64; 64 Am Jur 2d, Public Utilities, Sec. 107, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases in not such a fee. **For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for**

> **with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided**. [302 Mich. App. at 111 (emphasis added).]

Here, as discussed extensively in Section II.G. *supra*, Defendants have imposed IWC Charges that have generated revenues far in excess of the actual costs of the IWC Division. This further demonstrates that the Charges have not been proportionate.

F. PAYMENT OF THE CHARGES IS NOT VOLUNTARY

Finally, the Charges are not voluntary because, at the very least they are "effectively compulsory" in that "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 (footnote omitted).

In *Jackson*, the Court found that the Charges there were not voluntary. There, the Court ruled:

> Finally, our conclusion that the city's management charge is a tax is bolstered by the fact that Ordinance 2011.02, like Lansing Ordinance 925, is effectively compulsory. Although Ordinance 2011.02 allows property owners to receive credits against the management charge for actions taken to reduce runoff from their respective properties, it does not guarantee all property owners will receive a 100 percent credit. Indeed, if the ordinance realistically allowed for all property owners to receive a 100 percent credit, the credit system would undermine the central purpose of the ordinance, which is to generate dedicated funding to maintain and operate the current storm water management system. The city would be left with a storm water sewer system to operate and maintain and no dedicated revenue source to fund street sweeping, catch-basin cleaning, and leaf pickup, among other activities necessary to the city's stewardship of the system. More importantly, however, this system of credits effectively mandates that property owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. **In other words, property owners have no means by which to escape the financial demands of the ordinance. Additionally, the ordinance authorizes the administrator of the storm water utility to discontinue water service to any property owner delinquent in the payment of the fee, as well as to engage in various civil remedies, including the imposition of a lien and the filing of a civil action, to collect payment of past-due charges. All of these circumstances demonstrate an absence of volition. This lack of volition lends further support for our conclusion that the management charge is a tax**. *Bolt*, 459 Mich. At 168. [302 Mich. App. at 111-112 (emphasis added).]

Most recently, the Court of Appeals in a published decision held that flat-rate sewer charges are compulsory for purposes of the *Bolt* framework. In *Youmans v. Bloomfield Township*, __ Mich. App. __, __ N.W.2d __ (2021), the Court observed:

> On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the Bolt inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the variable portion of the disputed rates by refusing to use any water. But the fixed portions of those rates constitute flat rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. *See id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third Bolt factor weighs in favor of plaintiff's position.

Similarly, here the City's property owners "have no means by which to escape the financial demands" of the IWC Charges. If they do not pay, their properties are ultimately subject to forfeiture. Under MCL 141.121(3), "[c]harges for services furnished to a premises may be a lien on the premises . . . and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes." Under the statute, unpaid municipal utility charges give rise to a lien automatically, by operation of law. *See NL Ventures VI Farmington, LLC v. City of Livonia*, No. 323144, 2015 Mich. App. LEXIS 2506 *18 (Dec. 22, 2015) (quoting *Brown Bark I, LP v Traverse City Light & Power Dep't*, 736 F Supp 2d 1099 (WD Mich, 2010), aff'd 499 F Appx 467 (CA 6, 2012)) ("A municipal authority or government utility is not required 'to file a specific lien . . . before the unpaid charges will cause the formation of a lien . . .'").

There is no element of volition here. At a minimum the IWC Charges are "effectively compulsory" within the meaning of *Bolt*.[16]

IV. EVEN IF THE IWC CHARGES ARE NOT TAXES, THEY STILL ARE UNLAWFUL BECAUSE WHEN VIEWED AS A WHOLE, THE CHARGES HAVE BEEN EXCESSIVE AND THEREFORE UNREASONABLE.

A. The Standard For Determining Whether Municipal Utility Rates Have Been Unreasonable

Even if the IWC Charges are not taxes, they must still be "reasonable." *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003). *See also City of Plymouth v. City of Detroit*, 423 Mich. 106, 133, 377 N.W.2d 689 (1985) (noting that courts will interfere with municipal utility rates where the party challenging the rate demonstrates that the rate determination was "arbitrary, capricious or unreasonable.").

In *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015), the Court of Appeals recently reiterated the role of the courts in evaluating the reasonableness of municipal utility rates. There, the Court affirmed the following principles:

1. "[M]unicipal utility rates are presumptively reasonable." 311 Mich. App. at 594;
2. The "presumption of reasonableness may be overcome by a proper showing of evidence." *Id*; and
3. Plaintiff meets its burden of proof by showing that "any given rate **or** ratemaking practice is unreasonable." *Id.*

This standard was more fully refined in the recently decided published case of *Youmans v. Bloomfield Township*. In *Youmans*, the Court considered claims which alleged, among other things, that Bloomfield Township's water and sewer rates were unreasonable because they included improper cost

[16] Finally, the IWC Charges have additional characteristics which "buttress" the conclusion that they are taxes. The *Bolt* Court observed the presence of "additional factors" which further supported its finding that the Lansing stormwater charges were taxes, including the fact "that the storm water service charge may be secured by placing a lien on property." Similarly, here, payment of the IWC Charges can be secured by placing a lien on Plaintiff's property and any unpaid amounts get transferred to the tax rolls. This further supports a finding that these Charges are "taxes."

components. Although this Court reversed the Circuit Court's entry of judgment in favor of Plaintiff, it did so in a way that confirms the validity of Plaintiff's claims here.

In *Youmans*, the Court rejected Plaintiff's argument that municipal water and sewer rates can be unreasonable merely by demonstrating that the rate-making methodology was improper irrespective of whether the rates generated excessive amounts of cash. The Court accepted the Township's argument that the use of an improper rate-making methodology was not alone sufficient to demonstrate that the resulting rates were unreasonable, and that a plaintiff must show that the rates "viewed as a whole" generated revenues that were "excessive:"

> In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable") (emphasis added), plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff does present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually overcharged for the related water and sewer services. **In stark contrast, the Township argues that, under *Trahey*, even if a specific expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a whole. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township**.
>
> In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever

> amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." *See Wright*, 504 Mich at 417-418, 422-423. **Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper**. *See id.* at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position.") [*Youmans* Op. at pp. 29-30 (emphasis added).

The *Youmans* plaintiff's claims failed because, in the Court of Appeals' view, she failed to show that the water and sewer rates, "viewed as a whole," were "excessive." Here, in contrast, Plaintiff has adduced significant, if not dispositive, evidence that the IWC Charges, viewed as a whole, **were** "excessive," indeed fraudulent, and thus unreasonable.

B. The Magnitude Of The Overcharge

Under Plaintiff's "Gross Overcharge" theory, the IWC Charges generate revenues far in excess of the actual direct and indirect costs associated with the IWC division and the Defendants have not imposed IWC Charges on all properties that benefit from the activities of the IWC division – *i.e.*, residential properties and non-residential property types that have been arbitrarily exempted from the IWC Charges. The IWC Charges thus are unlawful because they are arbitrary, capricious and/or unreasonable. In other words, (1) the IWC Charge Revenue Requirement has been grossly inflated and (2) the IWC Charges to Plaintiff and the Class have been further inflated because the inflated Revenue Requirement has not been allocated to all sewer users.

In order to determine the refund required for the Gross Overcharges, we need to (1) calculate the appropriate IWC Charge Revenue Requirement for each fiscal year and (2) then allocate that Revenue Requirement over all sewer users, not just Plaintiff and the class of non-residential sewer users.

Through their expert, Plaintiff will present a cost-of-service analysis which will calculate the Revenue Requirements the Defendants should have used during the Class Period. We believe that virtually all of the cost allocations Defendants have utilized to determine the IWC Revenue Requirements have been grossly inflated. For purposes of this case summary, however, Plaintiff's preliminary overcharge analysis is based solely upon three distinct costs which Defendants must admit were grossly inflated during the Class Period:

(a) The so-called "Analytical Lab" costs;
(b) The "direct" IWC costs; and
(c) The allocation of administrative and central services overhead.

By utilizing the actual Analytical Lab and direct IWC costs instead of the inflated costs used in generating the Revenue Requirement, and allocating the administrative and central services overhead based upon the actual direct IWC costs, Plaintiff will establish a minimum overcharge to Plaintiff and the Class for the Class Period in excess of **$26.9 million** through just the end of FY 2019 based just upon the inflated Revenue Requirement. The overcharge Plaintiff will ultimately prove under this theory is actually much higher because, assuming Defendants are legally authorized to impose IWC Charges, the Revenue Requirements for the Charges have to be allocated among **all** sewer users, not just the nonresidential users upon whom the IWC Charges have historically been imposed. In other words, not only should the Revenue Requirements have been dramatically lower during the Class Period, but those lower Revenue Requirements should have been allocated among a much larger number of "meters" (i.e., both residential and nonresidential sewer users). This calculation greatly lowers the Revenue Requirements that should have been allocated to Plaintiff and the Class and greatly amplifies the overcharge.

Plaintiff is pursuing discovery concerning the total number of unique sewer users served by Defendants and the total "equivalent meters" associated with those users. At this point, however, Plaintiff will assume that the total number of equivalent meters in the sewer areas serviced by

Defendants that have members of the class who incur IWC Charges is 1 million. The total number of equivalent meters associated with the properties that currently incur IWC Charges is approximately 200,000. Thus, Plaintiff and the Class should only be allocated approximately 20% of the IWC Charge Revenue Requirement (1,000,000/200,000).[17] When these adjustments are made, the total overcharge for the period of July 1, 2013 through June 30, 2019 exceeds **$81.75 million**.[18]

A calculation of this overcharge is set forth below.

FISCAL YEAR 2013-14 – Minimum overcharge – **$19,857,086**

I. **Total IWC Revenue Requirement** – $22,450,700 (doc 463957)

II. Direct IWC Costs

A. Direct IWC Costs in Revenue Requirement -- $6,201,600 (doc 463957)
B. Actual Direct IWC Costs per Interrogatory Responses – $3,759,584
C. Overcharge of Direct IWC Costs – **$2,442,016**

III. Analytical Lab

A. Amount included in Revenue Requirement -- $8,000,000 (doc 463957)
B. Actual Analytical Lab total budget -- $3,058,800 (Exhibit 11)
C. Max percentage of Analytical Lab budget that could be allocated to IWC – 76% (Exhibit 11)[19]
D. Maximum amount that could have been allocated to IWC – $2,324,700
E. Minimum overcharge of Analytical Lab costs -- **$5,675,300**

IV. **Indirect Cost Allocation ("Admin/Centralized Svcs OH")**

A. Indirect Costs included in Revenue Requirement -- $3,500,800
B. Maximum indirect Costs that could have been included in Revenue Requirement – $2,135,488 ($3,500,800 x .61)

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[17] Obviously, this specific calculation could go up or down depending upon whether the actual number of equivalent meters associated with all relevant sewer users is higher or lower.

[18] Plaintiff does not yet have all of the information necessary to calculate the overcharges for FY 2020 and FY 2021.

[19] This percentage is surely itself inflated. In later years, Defendants used a maximum percentage of 60% and a minimum of 40%.

C. Overcharge of Indirect Costs -- **$1,365,312**

Maximum Total Revenue Requirement – $12,968,072

Maximum Revenue Requirement For Plaintiff and Class – $2,593,614 (20% x $12,968,072)

Overcharge to Plaintiff and Class -- $19,857,086 ($22,450,700 minus $2,593,614)

FISCAL YEAR 2014-15 – Minimum overcharge – **$20,340,021**

I. Total IWC Revenue Requirement – $22,384,000 (doc 463957)

II. Direct IWC Costs

A. Direct IWC Costs in Revenue Requirement -- $6,613,400 (per interrogatory answers)
B. Actual Direct IWC Costs per Interrogatory Responses – $2,365,109
C. Overcharge of Direct IWC Costs – **$4,248,291**

III. Analytical Lab

A. Amount included in Revenue Requirement -- $8,000,000 (doc 463957)
B. Actual Analytical Lab total budget -- $3,058,800 (Exhibit 11)
C. Maximum percentage of Analytical Lab budget that could be allocated to IWC – 76%
D. Maximum amount that could have been allocated to IWC – $2,324,700
E. Minimum overcharge of Analytical Lab costs -- **$5,675,300**

IV. Indirect Cost Allocation ("Admin/Centralized Svcs OH")

A. Indirect Costs included in Revenue Requirement -- $3,500,800
B. Maximum indirect Costs that could have been included in Revenue Requirement – $1,260,288 ($3,500,800 x .36)
C. Minimum overcharge of Indirect Costs -- **$2,240,512**

Maximum Total Revenue Requirement – $10,219,897

Maximum Revenue Requirement For Plaintiff and Class – $2,043,979 (20% x $10,219,897)

Overcharge to Plaintiff and Class -- $20,340,021 ($22,384,000 minus $2,043,979)

FISCAL YEAR 2015-16 – Minimum overcharge – **$11,783,179**

I. Total IWC Revenue Requirement – $13,950,100 (doc 463957)

II. Direct IWC Costs

A. Direct IWC Costs in Revenue Requirement -- $4,699,600 (doc 463957)
B. Actual Direct IWC Costs per Interrogatory Responses – $2,365,109[20]
C. Overcharge of Direct IWC Costs – **$2,334,391**

III. Indirect Cost Allocation ("Admin/Centralized Svcs OH")

A. Indirect Costs included in Revenue Requirement -- $1,562,200
B. Indirect Costs that should have been included in Revenue Requirement – $781,100 $1,562,200 x .5)
C. Overcharge of Indirect Costs -- **$781,100**

Maximum Total Revenue Requirement – $10,834,609

Maximum Revenue Requirement For Plaintiff and Class – $2,166,921 (20% x $10,834,609)

Overcharge to Plaintiff and Class -- $11,783,179 ($13,950,100 minus $2,166,921)

FISCAL YEAR 2016-17 – Minimum overcharge – **$11,657,675**

I. Total IWC Revenue Requirement – $14,259,700 (doc 463957)

II. Direct IWC Costs

A. Direct IWC Costs in Revenue Requirement -- $5,871,800 (doc GLWA000654)
B. Actual Direct IWC Costs per Interrogatory Responses – $4,887,800
C. Overcharge of Direct IWC Costs – **$984,000**

III. Indirect Cost Allocation ("Admin/Centralized Svcs OH")

A. Indirect Costs included in Revenue Requirement -- $1,562,200 (doc 463957)
B. Indirect Costs that should have been included in Revenue Requirement – $1,296,626 ($1,562,200 x .83)
C. Overcharge of Indirect Costs -- **$265,574**

Maximum Total Revenue Requirement – $13,010,126

Maximum Revenue Requirement For Plaintiff and Class – $2,602,025 (20% x $13,010,126)

Overcharge to Plaintiff and Class -- $11,657,675 ($14,259,700 minus $2,602,025)

FISCAL YEAR 2017-18 – Minimum overcharge – **$11,780,194**

[20] Defendants claim not to know the actual "direct" IWC costs for FY 2016. Therefore, this number is estimated, but is believed to be reasonably accurate, given the other data provided.

I. Total IWC Revenue Requirement – $14,560,600 (doc 463957)

II. Direct IWC Costs

A. Direct IWC Costs in Revenue Requirement -- $5,640,400 (doc 463957)
B. Actual Direct IWC Costs per Interrogatory Responses – $5,162,600
C. Overcharge of Direct IWC Costs – **$477,800**

III. Indirect Cost Allocation

A. Indirect Costs included in Revenue Requirement -- $2,259,600 (doc 463957)
B. Indirect Costs that should have been included in Revenue Requirement –$2,078,832 ($2,259,600 x .92)
C. Overcharge of Indirect Costs – **$180,768**

Maximum Total Revenue Requirement – $13,902,032

Maximum Revenue Requirement For Plaintiff and Class – $2,780,406 (20% x $13,902,032)

Overcharge to Plaintiff and Class -- $11,780,194 ($14,560,600 minus $2,780,406)

FISCAL YEAR 2018-19 – Minimum overcharge – **$6,367,794**

I. Total IWC Revenue Requirement – $9,148,200 (doc 463957)

II. Direct IWC Costs

Direct IWC Costs in Revenue Requirement -- $2,956,800 (doc 463957)
Actual Direct IWC Costs per Interrogatory Responses – $2,792,000
Overcharge of Direct IWC Costs – **$164,800**

III. Indirect Cost Allocation

Indirect Costs included in Revenue Requirement -- $1,514,000 (doc 463957)
Indirect Costs that should have been included in Revenue Requirement –$1,423,160 ($1,514,000 x .94)
Overcharge of Indirect Costs – **$90,840**

Maximum Total Revenue Requirement – $8,892,560

Maximum Revenue Requirement For Plaintiff and Class – $1,778,512 (20% x $8,892,560)

Overcharge to Plaintiff and Class -- $6,367,794 ($9,148,200 minus $2,780,406)[21]

[21] Plaintiff will also prove that Defendants' arbitrary imposition of the IWC Charges on a limited group of non-residential sewer users violates equal protection guarantees. This is because there is no rational basis for Defendants' exemption of all residential users and certain specific types of non-residential users.

In Alexander v Detroit, 392 Mich 30; 219 NW2d 41 (1974), a Detroit ordinance provided that multiple dwellings of more than four units were classified as commercial waste and charged higher rates. The court held that inclusion of multiple dwellings with more than four units in the fee-paying "commercial waste" category, while multiple dwellings with four or less units and condominiums and cooperative were excluded, was a constitutionally improper classification violative of the Mich. Const. art. 1, Sec 1 (1963) and the U.S. Const. art. XIV, § 1. The court reasoned that the city did not incur any greater expense in collecting refuse from multiple dwellings with four or more units than from condominiums or cooperatives.

In reaching this decision, the Court enunciated a two-part test for determining whether governmental actions have run afoul of equal protection guarantees:

> **(1) Are the enactment's classifications based on natural distinguishing characteristics and do they bear a reasonable relationship to the object of the legislation?**
>
> **(2) Are all persons of the same class included and affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind?** [*Id.* at 35-36. Citations omitted.]

Here, it is manifest that Defendants' actions in imposing the IWC Charges on a limited subset of sewer users are not "based on natural distinguishing characteristics" and the "privilege" of not paying the IWC Charges is "extended to an arbitrary and unreasonable class while denied to others of like kind."