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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as,
representative of a class of
similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN,
a municipal corporation,

Defendant.

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DEFENDANT CITY OF NOVI'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO COUNTS I AND II OF HIS COMPLAINT PURSUANT TO MCR 2.116(C)(10)

Defendant, CITY OF NOVI, opposes Plaintiff's Motion for Partial Summary Disposition as to Counts I and II of His Complaint Pursuant to MCR 2.116(C)(10). The Court should deny the motion for the reasons stated below, and instead grant the City partial summary disposition of Plaintiff's Counts I and II under MCR 2.116(I)(2).

BRIEF IN SUPPORT

This motion is a diversion from Plaintiff's larger case. His Complaint alleges that the City's water and sewer rates are too high, allowing it to accumulate cash/investments reserves in its Water & Sewer Fund (W&S Fund) in excess of what he thinks is necessary to operate and

maintain the City's water and sewer system, thereby making the rates unreasonable and/or rendering them an unauthorized "tax." He brought his Complaint in equity, under assumpsit/unjust enrichment theories, although he also cites both MCL 141.91, relating to the imposition of taxes by local government, and *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998), relating to the Headlee Amendment.

But with this Motion for Partial Summary Disposition, Plaintiff is making a different claim. He cherry picks a single capital improvement project within the system—the HRSDS Sanitary Sewer Retention Facility (Retention Facility) currently under construction—and asks the Court to find that the City should not have paid for it with money from its W&S Fund. The City was required to pay for the Retention Facility because the City sometimes (during wet weather events) sends more sewage to Wayne County's sanitary sewer system for treatment than it is allowed to send by contract. Wayne County told the City that it had to fix this problem, as did Oakland County (who is the entity that actually contracted with Wayne County for Novi's sewage discharge capacity in that system). Thus, the Retention Facility is being built primarily to handle sanitary sewage generated by *current users* of the City's *existing* sanitary sewer system.

Plaintiff complains that the Retention Facility was designed to not only correct these current exceedances, but also to include *additional* storage capacity for future users of the City's sanitary sewer system; he also objects that the City paid cash from its reserves (a $10 million initial payment) to Oakland County for the work and the right to use the Facility. Plaintiff says this all violates MCL 141.91 and *Bolt,* because "the Facility was designed and built to accommodate significant future expansion of the City's sewer system and, as a result, the City's current water and sewer customers not only financed up-front a major infrastructure improvement that will serve the City for 30-50 years, but they also paid for an improvement that will benefit future users of the system who have not been required to pay for that benefit." (Plaintiff's Brief, p. 3.)

In other words, Plaintiff's *Complaint* says "Novi, you have too much money laying around not being used . . .," Plaintiff's *motion* says ". . . and you're not allowed to spend it on urgent

sanitary sewer system improvements, either." The Court should deny the Motion for several reasons.

1. Plaintiff's Motion never talks about "unjust enrichment"—which is the underlying legal theory for Counts I and II of his Complaint, and never addresses the unreasonableness of the City's rates. Without an initial showing by Plaintiff that the rates are in fact unreasonable when considered "as a whole," Plaintiff has no right or ability to attack a *portion* of those rates (for the Retention Facility) as improper. *Youmans v Bloomfield Township*, 336 Mich App 161; 969 NW2d 570 (2021).

2. Plaintiff's motion also fails to account for the fact that the City's reserves include "connection charges" that the City has also collected from new users to the W&S system. In fact, since 2015, the City has collected more than the initial $10 million payment to Oakland County. Plaintiff's Complaint does not challenge those connection charges—and it cannot, because **Plaintiff never paid any connection charges to the City, and thus he has no standing to challenge their collection or use and is not a representative plaintiff for any class of people who did (which, by the way, would be a smaller and different class than the one certified by this Court).**

3. Even if the Plaintiff gets past these issues and the Court gets to the fee vs tax test, the City's expenditure of W&S reserve funds for the Retention Facility is permissible. The City does not concede that the *Bolt* test applies in a non-Headlee case, but even if it does, *Bolt* allows usage fees to have a "limited capital improvement component." Any "surplus" in the City's reserves from usage fees over and above the expenses of providing service that is available for "capital investment" as allowed by *Bolt* is, as a **component** of the overall usage fee revenues, "limited."

Plaintiff's theory seems to be that the City cannot collect rates or spend any money for capital improvements related to its water and sewer system to make even the most basic improvements that benefit both current and future users. Unfortunately, our state has too many examples of what happens when a municipality fails to properly plan and pay for the needs of its utility systems. Novi wants to stay off the list of communities with unsafe drinking water or homes with basements full of sewage. Fortunately, not a single *published* appellate decision has bought into Plaintiff's uniquely dystopian vision, which is a foreseeable recipe for disaster that this Court should not want to be the first to embrace.

STATEMENT OF FACTS

A. The City's cash/investment reserves.

Plaintiff begins his motion by reciting of information really only relevant to his main Complaint about the City "hoarding" money because it is not holding the bare minimum of W&S Fund reserves acceptable to him personally. It is true that in a single snapshot of time on June

30, 2019, the W&S Fund had a cash/investments balance of $69 million. But the idea that this number from the City's Annual Financial Report (CAFR) means that the W&S Fund had that much uncommitted money just sitting there is wildly misleading. That number, standing alone, does not tell someone what projects are (or will be) underway that will be paid for out of the W&S Fund.

As of right now, the amount of cash/ investments in the W&S Fund is down considerably to about $42.8 million, because those reserves have been used to pay for projects the City is working on. (Affidavit of Finance Director Carl Johnson, Exhibit 1.) More projects are in the works for the next two fiscal years that total some $18 million at least. (Affidavit of City Engineer Ben Croy, Exhibit 2.) If those all occur as expected, Plaintiff's mythical $69 million will likely be under $30 million by the end of the 2023 Fiscal Year. The City certainly never planned to have the reserves that it had in 2019 (or that it has now) in perpetuity.

B. The requirement that the City pay for the Retention Facility.

The City is part of the Huron Rouge Sewage Disposal System (HRSDS). The area of Novi that the Retention Facility serves sends its sanitary sewage to Wayne County under a contract that was entered into between Wayne County and Oakland County (acting on the City of Novi's behalf) back in 1962 involving the Rouge Valley Sewage Disposal System (RVSDS). (Affidavit of Brian Coburn, Exhibit 3, Attachment 1.) Following an amendment to that contract in 1988, the City's authorized sanitary sewage capacity was set at 20.48 cfs. (Exhibit 3, Attachment 2.) As Novi grew, it began on occasion sending too much sanitary sewage flow to Wayne County. In 2016, the City and Oakland County received formal notice from Wayne County that these exceedances were a violation of the contract, and that such violations put Wayne County in jeopardy of violating its obligations under its Final Administrative Order with the State of Michigan, a regulatory compliance plan imposed by the State on Wayne County. (Exhibit 4.) The City (and Oakland County) responded acknowledging the exceedances and the City's obligation to address "ongoing capacity issues" and to provide a "short-term capacity solution." (Exhibit 5.)

Ultimately, the City and Oakland County determined to pursue construction of a storage facility at its Rotary Park to address the capacity issues. Oakland County hired the engineering firm Hubbell, Roth & Clark (HRC), which produced a report that Oakland County forwarded to the City on January 23, 2018. (Exhibit 6.) The HRC report confirmed that in order to address the *current* exceedances based on the City's *current* customer base, a storage facility of a minimum 0.33 MG (million gallons) capacity would be required. The report also found that to address the *future* capacity needs of the system at the time of buildout based upon the then-existing projected land use conditions for the City (under the 2010 Master Plan for Future Land Use) would require a retention facility of 0.48 MG.

However, the report also noted that the City's (then) recently-updated Master Plan (the 2016 Plan) had included some areas of additional population and/or commercial density that HRC noted "could cause the needs for storage to exceed 0.50 MG." (Exhibit 3, p 2.) The HRC report therefore reviewed the costs of both a 0.5 MG storage facility and a twice-as-large 1.0 MG facility. Interestingly, doubling the size for future capacity only increased the size of the project by around 20.4%, from $8.69 million for a 0.5 MG facility to $10.46 million for a 1.0 MG facility. (Coburn, Exhibit 3), presumably because much of the same work would need to be done regardless of the increase—e.g., engineering design, surveyor, site preparation, mobilization, inspections, etc.

The Novi City Council authorized the project on June 3, 2019 and signed the Agreement with Oakland County shortly thereafter. (Exhibit 7.) The project is underway, but is not yet in service. The City did receive an invoice from Oakland County for the project prior to commencement of construction. (Exhibit 8.) The invoice was for $10 million, paid by the City out of the W&S Fund. When completed, the Facility will belong to and be operated by Oakland County. (See Exhibit 7.)

C. The "rates and charges" in the City's W&S Fund

Plaintiff uses the terms "rates," "rates and charges," "fees," and "ratepayers" at various times and seemingly interchangeably. What Plaintiff means by those references is not always clear, but what is clear is that two kinds of fees or charges make up the vast majority of the money in the

W&S Fund revenues (and thus its reserves). There are "usage fees" that the City charges all customers of the water and sewer system for their ongoing use of the system. By ordinance, these fees are calculated through the use of water meters, which measure the amount of water used by customers, which is then used to set the charge for sewer usage. (Exhibit 9, Water & Sewer Ordinance excerpt.) The City also collects a "connection charge" from new users who are connecting to the City's water and sewer system for the first time (e.g., for a new commercial development.) *Id.* at Sections 34-21.1 (water) and 34-145 (sewer). The connection charge to the City's water system is currently $1,850, and the connection charge for sewer system is $2,720. (2021 Council resolution, Exhibit 10.) The distinction is important because Plaintiff never paid any connection charges. (Nofar deposition, p 7, Exhibit 12.)

ARGUMENT

THE CITY APPROPRIATELY USED LAWFULLY COLLECTED W&S FUNDS TO PAY FOR THE RETENTION FACILITY, AND ITS USE OF THOSE FUNDS FOR THE FACILITY DID NOT TURN THEM INTO TAXES.

Regardless of what happens with this motion, which is just about the Retention Facility, Plaintiff will continue to argue in the rest of the case that the City has accumulated too much money in its W&S Fund without spending it, which is what his Complaint says. Discovery in the case is not done. The City's expert will be providing his report to the City on April 15, and the City fully expects that report to say that the City's rates are low and reasonable and that the City's cash reserves are within appropriate ranges. At which point the parties will likely move toward respective MCR 2.116(C)(10) motions and on from there.

Which is why it is ironic that this motion has been filed now. Because *this motion* isn't specifically about the City's reserves being too large; it is instead about the reserves being unavailable for this general system improvement that is necessary to permit current systems users to continue to discharge sewage in compliance with in-place contracts—in other words, for the system just to keep functioning—and also to account for known additional needs caused by

fluctuation and more severe weather, as well as the addition of new users who buy into the system through connection charges.

Plaintiff wants this Court to let him pretend that there is an actual "charge" for the Retention Facility "embedded" in the W&S Fund rates or reserves that he can rhetorically isolate and call a disguised "tax." There is no such "Retention Facility Charge," just the rates and charges in the City's ordinances, which are reasonable. So the City's first position is that the Court should not even address the merits of Plaintiff's *Bolt*-based motion, because Plaintiff has ignored his obligation to first prove the "unreasonableness" of the City's rates and because Plaintiff never even addresses the "unjust enrichment" theory that is his actual cause of action in Counts I and II.

A. Plaintiff ignores his obligation under binding case law to first address the reasonableness of the City's rates "as a whole," and also does not argue—let alone establish—his unjust enrichment theories for Counts I and II.

Count I of Plaintiff's Complaint is entitled "Unjust Enrichment—Unreasonable Water and Sewer Rates." Count II of Plaintiff's Complaint is entitled "Unjust Enrichment—Violation of MCL 141.91." Plaintiff did not bring these two claims under the Headlee Amendment, which would have given him a clear path to having this Court evaluate the City's fees under the three-part *Bolt* test—but that would correspondingly have limited him to a one-year statute of limitations. Having instead chosen unjust enrichment as the general basis for both his "unreasonableness" and MCL 141.91 claims—obviously to get access to a more lucrative six-year statute of limitations—he is obligated to make his case under the common law relevant to that legal theory. But even before getting into any "tax vs. fee" claims, he must *first* establish, under well-documented and published case law, that the City's water and sewer rates are in fact unreasonable, and he has not even attempted to do so in his motion.

Whether something is a tax under *Bolt* for purposes of Headlee, or MCL 141.91, is an entirely separate question from whether a municipality's water and sewer rates are "reasonable." In Michigan, there is a common law presumption of reasonableness. "Michigan courts…have recognized the longstanding principle of presumptive reasonableness of municipal utility rates."

City of Novi v City of Detroit, 433 Mich 414, 428; 446 NW2d 118 (1989). The reason for this is plain: "[c]ourts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *City of Novi*, 433 Mich App 414. The Supreme Court insists that the judiciary refrain from strictly scrutinizing rate-making because, among other things, "[t]he rate-making authority of a municipal utility is expressly reserved to the legislative body giving the power to set rates under the municipal charter." *City of Novi*, 433 Mich at 430 (citing MCL 141.103(d); 141.121).

Because municipal utility rates are presumptively reasonable, **"[t]he burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable**." *Trahey v City of Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015)(emphasis added), *citing City of Novi*, 433 Mich at 432-33. "**Absent 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**." *Trahey*, 311 Mich App at 595 (emphasis added). In order to demonstrate "clear evidence of illegal or improper expenses," the plaintiff must identify "what amount, if any, of the water and sewer rate account[s] for **expenses *unrelated* to water and sewer**." *Id.* (emphasis added)

Plaintiff does not even tell the Court what any of the City's "rates" actually are. He makes no analysis of any specific fees or charges and no argument at all that they are objectively unreasonable. He makes no allegations about the City's plans for use of the reserves that have been established through the imposition of rates and charges. In other words, nowhere in his motion or Brief does Plaintiff actually address the question of unreasonableness.

Similarly, for purposes of his motion on Count II, Plaintiff treats MCL 141.91 as some sort of "stand in" for a *Bolt* claim, bootstrapping his way to the same three-part legal test that *Bolt* uses for Headlee claims by alleging—without any citation to an appellate cases to that effect—that *Bolt* really just codified the same existing test that would apply under common law to an

MCL 141.91 claim. But again, he never actually ties this claim to either the reasonableness of the City's rates or his equitable legal theories.

Instead, Plaintiff picks one project—a necessary and reasonable project for the benefit of the water and sewer system as whole—and argues that the use of "rates" to pay for its construction was inappropriate. Plucking a single expenditure for a single project out of all of the expenses of a water and sewer system and examining it through the lens of an equitable unjust enrichment claim is completely unacceptable. The Court of Appeals specifically closed down that avenue just recently in *Youmans, supra,* at 601 (Exhibit 17, pp 22-23), in no uncertain terms:

> **[T]he 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. (Emphasis added.)

The Court of Appeals just recently put an exclamation point on *Youmans* in *Brunet v City of Rochester Hills*, COA Case No. 354110, unpublished, dated December 2, 2021, clearly confirming that before a plaintiff can start attacking particular fees and charges, he must *first* show that the fees as a whole are unreasonable:

> [A] party contesting the validity of municipal charges (i.e., rates) must *first* produce evidence that the charges are unreasonable, and *then* the municipality must justify its action in setting those charges. As applied here, defendant does not have to justify its actions in setting the water charges at issue—its alleged lack of a preexisting specific plan for use of the reserve—unless plaintiff first shows that the charges are unreasonable.

Id. at 12, fn 12. (Exhibit 11.)

Plaintiff here doesn't even bother to try to prove the "unreasonableness" of the City's water and sewer usage rates. He simply ignores the actual equitable claims that he made in Counts I and II of his Complaint.[1] This Court cannot do so. *Youmans* is a binding, published case, and its holding that unreasonableness "as a whole" must be proved *before* attacking any particular charge, like that for the Retention Facility, is clearly dispositive here. **The Court's analysis of this motion must as a result end right here,** and the Court should deny Plaintiff's motion.

B. From 2015 to the present the City has collected more in connection charges (as opposed to usage fees) than the $10 million it paid to Oakland County for the Retention Facility. Plaintiff has never paid any connection charges to the City, so he has no standing to challenge either their collection or their use as a source of the payment to the County and also is not a representative plaintiff for those who did.

As noted above, not all of the City's W&S Fund revenues or reserve funds actually come from the usage fees on which Plaintiff has clearly based his Complaint. There is certainly no reference to connection charges in Plaintiff's Complaint, and the City therefore believes that they have *not* been challenged in Plaintiff's Complaint and are *not* at issue in this case. That is likely because Plaintiff never actually paid any connection charges. At least, the City has not been able to find any evidence that he did. (Johnson, Exhibit 1.) Moreover, there is no reason to believe that Plaintiff would have paid such a fee or charge, because he actually does not believe that he made such a payment. (Nofar deposition, p 7, Exhibit 12.)

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[1] Since Plaintiff doesn't bother to tell the Court what the actual elements of his cause of action for unjust enrichment even are, the City will do so. Claims for unjust enrichment require: "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the *retention* of the benefit by the defendant . . . In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been **unjustly or inequitably enriched** at the plaintiff's expense." *Morris Pumps v Centerline Piping, Inc,* 273 Mich App 187, 195; 729 NW2d 898 (2006) (internal citations omitted)(emphasis added)."

Attached to Finance Director Carl Johnson's affidavit, Exhibit 1, is a chart prepared by the City that compares the usage fee revenues to connection fee revenues. It shows that the connection fees collected since 2015 actually exceed the "net fees" from usage fees after payment of expenses:

	Balance as of 6/30/2015	Balance as of 6/30/2016	Balance as of 6/30/2017	Balance as of 6/30/2018	Balance as of 6/30/2019	Balance as of 6/30/2020	Balance as of 6/30/2021	
W&S fees	21,460,677	24,616,266	24,063,446	23,987,428	23,916,364	24,238,332	26,385,146	
Total expendi-tures	20,587,316	23,268,053	21,527,676	22,091,656	21,153,748	23,355,810	24,462,740	
Net fees	873,361	1,348,213	2,535,771	1,895,772	2,762,616	882,522	1,922,406	12,220,661
Connection fees	1,928,296	1,952,318	1,809,068	2,171,429	3,015,026	1,745,872	1,239,990	13,861,998

Plaintiff thus has no standing to object to more than half of the charges that have gone into the City's reserves from 2015 to the present because he didn't pay toward them. That's some $13.8 million available to pay Oakland County's $10 million invoice that Plaintiff has no ability to argue about and that the City believes is a perfectly appropriate source of funds for that payment to the County. The connection charges and usage fees are not separated in the W&S Fund. They make up one "bucket" of cash/investments. And, as Plaintiff is so eager to note, while that bucket at one point held some $69 million, only $26 million was collected during the class period, and nearly $14 million of that came from connection charges. Currently there is only about $42 million in the collective bucket.[2]

And even if Plaintiff wanted to challenge the use of connection charges for this sort of capital investment, that argument would fail because connection charges are intended to be used exactly for this kind of improvement to a system. New users are funding—among other things—capacity expansion relating to them. See *Graham v Kochville Twp*, 236 Mich App 141, 149-150; 599 NW2d 793 (1999), where the Court recognized that "the purpose of the charge is mainly regulatory—without the extension of the water line and the connection to such line, the citizens of the

[2] While Plaintiff makes a show (Plaintiff's Brief pp 8-9) of "quoting" various City officials saying that the money for the Retention Facility came from "rates," it is clear from the context of those conversations and writings that the point being made was not that the money was from usage fees in particular but from the reserves in the W&S Fund as opposed to issuing debt. In case it needs to be clearer, see the affidavits of Jeff Herczeg (Exhibit 13), Pete Auger (Exhibit 14), Carl Johnson (Exhibit 1), and Ben Croy (Exhibit 2).

community served by the new line would have no access to municipal water" and that the amount of the fee was proportional to the cost of the water extension improvement.

Plaintiff is thus not an appropriate party representative with regard to a claim that these significant connection fee revenues and reserves are not available for the Retention Facility, because he is not a party in interest who "owns the claim asserted" and which would confer standing as to the claim, *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 356; 833 NW2d 284 (2013). Furthermore, because Plaintiff himself cannot maintain an action claiming any impropriety as to the use of the connection charges as an individual, and therefore does not "own the claim asserted" and is not a party in interest, he is not qualified to represent any purported class of persons who could. MCR 3.501. See also, *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999), and *Lansing Sch Ed Assn v Bd of Ed*, 487 Mich 349, 355; 792 NE2d 686 (2010). In fact, because any issue as to the connection charges is not pleaded in the Complaint, and this Court was only asked to certify the class as to alleged unlawful usage fees, it is completely inappropriate for the Plaintiff to challenge the connection charges or their usage in any way within this litigation. Because Plaintiff has no standing and isn't representative of the class of people who paid connection charges, Defendant City is actually the party entitled to summary disposition of these two counts of Plaintiff's complaint as the Retention Facility under MCR 2.116(I)(2).

C. While the City does not concede that *Bolt* applies to Plaintiff's equitable unjust enrichment claims, the City's water and sewer rates and reserves pass the fee vs tax test.

Plaintiff argues that the City's rates and charges violate *Bolt* because (1) the Retention Facility has a lifespan of "decades," and therefore cannot be paid for from user fees; and (2) the Facility will serve *future* users and therefore should not be paid for by current users in their fees. Both claims fail for several reasons.

First, *Bolt* doesn't apply to either of Plaintiff's equitable claims. Plaintiff wants the benefits of a *Bolt* claim with none of the guardrails that go with it (like the 1-year statute of

limitations). But he pled the *equitable* theory of unjust enrichment with regard to *both* Count I ("reasonableness") and Count II (MCL 141.91), and he's stuck with that. The *Bolt* test applies to Headlee cases as a *legal* test, based generally—but not entirely—on pre-*Bolt* cases. By contrast, Plaintiff has only *equitable* claims, which require the Court to **do equity**, not simply apply *Bolt*. The admonitions of *Trahey* and *Youmans*, and the presumption of reasonableness that has gone entirely unrebutted here apply with full force here, and both give ample basis to uphold the City's rates and reserve use in this case.

Second, the pre-*Bolt* cases that do apply to Plaintiff's tax vs fee claim under MCL 141.91 establish that the City's rates and reserves are not taxes because they are regulatory and proportional. Assuming that some sort of fee vs. tax analysis applies to Plaintiff's MCL 141.91 claim, what test would apply, if not *Bolt*? In a remand of the *Bolt* decision, the Court of Appeals provided a summary of the law in Michigan fee challenge cases that do not involve Headlee claims, which answers this question:

> Under this test, where the amount charged proportionately correlated to the payer's use of the service or to the benefit the payer received from the service, and where the funds collected were appropriated for the sole purpose of paying for that service, the charge was deemed a fee, and laws governing the assessment of taxes did not apply. For example, in *Ripperger v. Grand Rapids,* 338 Mich. 682, 62 N.W.2d 585 (1954), the city's utility charge for water and sewage service was deemed a user fee, because the charge proportionately related to residents' use of these services. Accordingly, the city did not have to comply with tax assessment procedures when residents did not pay the charge; the city could simply cut off water and sewage services until the fee was paid. In contrast, in *Merrelli [v St. Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959)]*, supra,* the Court held that the city's building license fees were really an improper tax because they were disproportionate to their related administrative costs.[3]

Bolt v City of Lansing (on Remand), 238 Mich App 37, 45-48, 604 NW2d 745 (1999) (Emphasis added). Referring to the Supreme Court's prior decisions in *Ripperge* and *Merrelli*, the dissent in *Bolt* summarized the law in non-Headlee cases leading up to the *Bolt* decision as follows: "The principles that emerge from this precedent identify two factors that are the focus for determining

[3] Based on Justice Markman's dissent in *Bolt* (*On Remand*) and the fact that there is no statement in *Bolt* that it overruled *Merrelli* and *Rippenger,* those two prior cases remain the law in non-Headlee Amendment cases.

whether an exaction imposes a fee: the proportionality and reasonableness of the fee to the benefit conferred and the purpose of the regulation, specifically whether its purpose is to charge the user and not simply raise revenue." *Bolt*, 459 Mich at 176 (Boyle, J., dissenting). Note that there is no specific "voluntariness" aspect to the pre-*Bolt* test cited above.

What's the benefit of the Retention Facility here? Well, the *current* users paying usage fees get to keep sending their sanitary sewer flowing to Wayne County without the City being in violation of its contract obligations. That's pretty significant; for one thing those existing users are not paying any fines or other charges resulting from such violations. And *new or future users* paying both a connection charge and usage fees get to connect to the system *and* discharge their sewage somewhere—which Wayne County was formally objecting to in 2016.[4]

The City's water and sewer rates here thus serve the plainly regulatory purpose of providing potable water and sanitary sewage disposal service to the City's residents. The use of the rates from City W&S Fund reserves for the Facility as a necessary system improvement, mandated by Wayne County and Oakland County, satisfy the regulatory requirement in the most literal sense. As *Youmans* said, "**Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose."** *Id.* at 606 (Exhibit 17, p 28.)

The City's water and sewer rates are also proportionate to the necessary costs of providing the services, including construction of the Facility. The City used its W&S Fund reserves to cash-fund a necessary system improvement for both existing/current and future users. That use was proportionate because they were specifically used for a capital project that will benefit the current system users whose sanitary sewer flow contributed to the need for the Facility in the first place *and* for the future or new system users who will make use of any additional capacity in the system

[4] Plaintiff makes a truly bad faith argument at pages 3 and 8 of his Brief to the effect that the Act 342 contract between the City and Oakland County for construction and use of the Facility was only for the benefit of the City (or general public) as opposed to the "users" of the water and sewer system. That language is standard in the County's Act 342 contracts, and read in the context of the preceding and following provisions of the document it really just means that the City is the one contracting with the County, and is the one responsible for paying the County and that there are no individuals that have the right to directly connect to or use Facility. (See Act 342, Exhibit 18.)

by virtue of its size. This Retention Facility project is a veritable poster child for a good *Bolt* project because everyone benefits.

On this standard the City also notes the timeliness of two recent but unpublished Court of Appeals cases, which, while not precedential, are certainly on point on the issue of the use of rates and reserves for capital improvements. *Bohn v City of Taylor*, COA Docket No. 339306, decided January 29, 2019 (Exhibit 15), completely dismissed the argument that using rates from current customers to pay for capital investments was an "intergenerational" unfairness:

> As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:
>
> > The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for . . . renewals and replacements.
>
> The users of the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis.

And in *Deerhurst v Westland,* COA Case No. 339143, unpublished decided January 29, 2019 (Exhibit 16, p 3), the Court of Appeals reached a similar conclusion that "[t]hose users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the city ensures that the users will pay a fee proportionate to the necessary costs of service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated."

Novi's presumed-to-be reasonable rates—a presumption never rebutted or even addressed by Plaintiff—are not disguised taxes under the common law noted above, particularly given the unrebutted reasons for the project as described above, including in the affidavit of the City Engineer (Exhibit 2).

Third and finally, even if the Court applies Bolt, the City's rates and reserves still pass the fee vs tax test. Even under *Bolt's* somewhat differently-worded standard, there is no bright line test for distinguishing between a fee and a tax. *Bolt* also says that the fee must serve a regulatory purpose rather than a primarily revenue-generating purpose. A fee may be used to raise money as long as it is in support of an underlying regulatory purpose. *Id.* at 161. *Bolt* also says that the fee must be proportionate to the necessary cost of the service rendered or the benefit conferred. *Id.* at 161-162. The fee is proportionate if it reflects the actual cost of use and reflects "some capital component." *Id.* at 164-165. "Mathematical precision is not necessary" when calculating a proportionate fee. *Jackson County v City of Jackson*, 302 Mich App 90, 110; 836 NW2d 903 (2013). *Bolt* adds that the fee must be voluntary in nature, meaning the payer of the fee must be able to refuse or limit its use of the service or benefit. *Bolt*, 459 Mich 162. The three criteria are not to be considered in isolation, however, but in their totality. *Id.* at 167.

Importantly, "under the Headlee Amendment, it is not [the] Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. [The Court's] role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax." *Shaw v Dearborn*, 329Mich App 640; 944 NW2d 153 (2019).

- ***Bolt does not say that a utility cannot use reserves from rates—particularly usage fees—to pay for capital improvements.***

Plaintiff basically argues to the Court that the City cannot use *any* rates/reserves for capital improvements. *Bolt* literally says the opposite:

> A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. [Citations omitted] Where the charge for either storm or sanitary sewer reflects the actual costs of use, metered with relative precision in accordance with available technology, ***including some capital investment component***, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. (Emphasis added.)

So, what we are talking about here is the application of the "some capital investment" language of *Bolt*. Plaintiff tells this Court that the Court of Appeals has "repeatedly recognized that it is

unlawful for municipal utilities to impose charges which force current customers to create reserves to finance future capital improvements." (Plaintiff's Brief, p. 15.) And yet, there is no such published case. In fact, there are plenty of Court of Appeals cases that say exactly the opposite.

In *Youmans*, which Plaintiff shockingly never quotes, the Court made clear that capital improvements paid from reserves built up by usage fees can in fact be appropriate under a *Bolt* analysis:

> Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year ***capital improvement program*** was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. **Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose.** On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue ***and capital*** and operational reserves through the disputed rates—including revenue to find its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and ***necessary capital improvements***—primarily serves valid regulatory purposes.[5] (Emphasis added.)

Id. at 606 (Exhibit 17, p 28).

It is important to understand exactly what the *Bolt* Court had in front of it. The fee Lansing had imposed on an annual basis was to implement a stormwater separation program for the 25% of the city that did not already have its storm sewers separated from its sanitary sewers. This separation program was to cost $176 million over a 30-year period of implementation. The charge was therefore *primarily* intended as a capital charge: "A major portion of this cost (approximately

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[5] Plaintiff drops a long footnote, fn 15 on pages 18-19 of his Brief, to the effect that the City's capital reserves also violate proportionality requirement because they benefit the public at large. *Youmans, supra*, at 606-607 (Exhibit 17, p 23), also slams that claim:

> Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale.

sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the cost of a regulatory activity." *Bolt,* at 163. The charge was also imposed on 100% of the system's customers—including the 75% who didn't need separating storm and sanitary anymore.

Contrast that to the City of Novi's usage fees for its water and sewer system. As is clear from the chart attached to Exhibit 1 (Affidavit of Carl Johnson), the vast majority of the City's usage fees go to pay for services—that is, to pay for the cost of the water being used by the customer and for the treatment of sewage. The usage fee rates are also used for payroll, supplies, and "operating costs," which include some maintenance and repair. At the end of each fiscal year, the chart shows "net fees" that might otherwise be called a surplus. In some years, the dollar amount is relatively low (less than $1 million in FY 2015 and FY 2020, more in the other years). Those net fees are what's available for capital investment.

But in any given year, the "net fees" number is only somewhere between the range of 4% and 12% of the revenues for the entire W&S Fund. While Plaintiff has made no effort to determine exactly how much of those "net fees" might be used for presumably unobjectionable purposes as maintenance, repair, or rehabilitation of existing infrastructure, even if the Court were to ascribe the *entire* amount of the "net fees" *Bolt's* "capital investment component," in Novi's case that would be somewhere between 4%-12% in any given year. (See chart at Exhibit 1 and p 12 above.) That is a true fraction of the 63% of the charge at issue in *Bolt*. Four to ten percent of usage rates, the City believes, is clearly that literal "some capital investment component" that *Bolt* says is okay.

- ***The fact that an infrastructure improvement will last more than a few years—or even "decades"—does not preclude the use of rates/reserves to pay for it.***

The constant refrain in this case that a municipality cannot invest in capital infrastructure that is going to last longer than the "30 years" described in *Bolt* is pure fiction. *Bolt* referred to a 30-year period of time because the city was funding a *specific* capital improvement (the $176 million CSO program) with a *specific charge* related to that *specific improvement*, and it was doing

so for a *specific period* of 30 years. The *Bolt* Court was simply pointing out that as a capital improvement, the physical infrastructure created from that $176 million capital program would likely last longer than 30 years. Of course it will. The City of Novi hopes that every single water line, sewer line, or in this case, storage pipe, lasts at least 30 years.[6]

But unlike *Bolt*, the City here did not actually impose a "Retention Facility Charge." There is no such thing. Under *Trahey*, "absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has *no authority*" to interfere with them or find them unreasonable. *Id.* at 595. That's why Plaintiff uses this odd rhetorical device of saying that there is a "charge" specifically for the Retention Facility "embedded" in the City's usage fees. The Court of Appeals has called Plaintiff's counsel out for this fiction in other cases. In *Shaw,* they called it "a CSO-Capital Charge or CSO-O&M Charge." The *Shaw* Court noted that "[t]hese are merely terms created by plaintiff for the purpose of this litigation. Plaintiff claims that these purported charges are embedded in the city's water and sewer rates, but cites no pertinent authority suggesting that it is appropriate for the purpose of a Headlee Amendment claim to analyze a purported charge that is not separately or distinctly assessed by the governmental agency."[7]

While *Shaw* went on to go through the *Bolt* analysis, missing from that analysis (and the similar analysis in the published *Youmans* case) is any reference to this "30-year useful life" red herring. Again, *Bolt* was addressing a particular and distinct charge intended to carry out a particular and distinct program for a specific period of time of 30 years, and it was evaluating that separate charge. What Novi has here is a water and sewer usage charge based almost entirely on metered consumption but that also covers operations, maintenance, repairs, and the

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[6] As it turns out though, the useful life of some significant electrical/mechanical components of the Retention Facility—at least 50% of it—has a useful life of closer to 20 years. See Exhibit 6, Appendix C. And contrary to Plaintiff's baseless allegations, paying for the improvement up front did not violate the City's Debt Financing Policy (Exhibit 19), which sets *minimum* limits for debt financing, not a maximum as Plaintiff misunderstands.

[7] The Court in *Westland* did the same thing, noting plaintiffs' strategy of disputing individual cost components of water and sewer rates "without respect to whether the actual water and sewer rates are reasonable," and finding that it was "at odds with" Supreme Court precedent establishing "the limited role of the judiciary in reviewing municipal utility rates." *Westland, supra,* at *4, citing *Novi,* 433 Mich at 425-26, 428, 430.

like, with in any given year some leftover amount that can be used for "capital investment" as specifically and directly authorized by *Bolt*.

The only other aspect of *Bolt* that bears some (brief) mention is the "voluntariness" element. As stated in *Youmans*, the 3-part *Bolt* test is a "balancing" act (even more so here given Plaintiff's equitable claims). *Youmans, supra*, at 608-609. As in *Youmans*, the other two parts of the test—regulatory purpose and proportionality—clearly weigh in the City's favor. And to the extent that what is at issue here is usage fees, those are, as *Shaw, supra*, p 669, noted, ultimately controlled by the property owner.

The City has implemented long-term financial plans that ensure that it has sufficient cash on hand to fund significant future water and sewer system repair and reinvestment projects while also keeping rates stable and low for its customers, avoiding rate spikes, and minimizing reliance on debt. It was permissible for the City to use any and all of the monies in its W&S reserves to pay for the Retention Facility, regardless of whether they come from usage fees or connection charges, and such use did not violate *Bolt* or MCL 141.91.

Wherefore, Plaintiff's motion should be denied, and instead relief in the form of a dismissal should be granted to Defendant pursuant to MCR 2.116(I)(2) as to Counts I and II and the Retention Facility.

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the Court's e-filing system which will send notification of such filing to all counsel of record.

/s/ Julie A. Hinkle