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,

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

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

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DEFENDANT CITY OF NOVI'S CORRECTED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10) AND BRIEF IN SUPPORT

Respectfully submitted,

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MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10)

Defendant, CITY OF NOVI, by and through its attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C., hereby moves, under MCR 2.116(C)(8) and (10), for summary disposition of Plaintiff's Complaint and incorporates the following brief in support of this motion.

BRIEF IN SUPPORT

FACTS ABOUT THE CITY'S WATER & SEWER SYSTEM

Novi is about 33 square miles in area. Its water and sewer systems are massive, with more than 361 miles of water mains and 289 miles of sanitary sewers, along with a 1.5 million gallon above-ground water storage tank and a 1 million gallon underground sanitary sewage retention basin.[1] (Ex. 1, Affidavit of Jeff Herczeg, ¶ 20.) The systems' infrastructure dates to the 1950s. (Ex. 13, System Age Map.) So, while Plaintiff characterizes the entire utility system as "still in its early phases," that's not accurate. A significant portion of the system is at or nearing the end of its useful life. The City estimates the cost to replace all of these assets at over $900 million. To point out just one aspect of the replacement cost, the City has embarked on a program in areas of older subdivisions to replace water mains that are made of asbestos cement—*a project that by itself will likely cost the City over $40 million over the next decade.* (Ex. 1, Herczeg, 20.)

The City is responsible for maintaining both systems. It gets drinking water from the Great Lakes Water Authority (GLWA). (Ex. 1, Herczeg, ¶ 10.) Its sanitary sewer system is "split." About two-thirds of the City discharges sanitary sewage south to Wayne County, as part of the Rouge Valley Sewage Disposal System (RVSDS). This contractual arrangement involves an agreement between Wayne County, as the sewage system provider, and a number of suburban communities, including Oakland County on behalf of the City of Novi, which is granted a specified capacity within the Wayne County system. (Ex. 1, Herczeg, ¶ 6-8.) The remaining roughly one-third of the City is serviced directly through the Oakland County Water Resource Commissioner (WRC). Again, the City pays for the right to discharge into Oakland County's system. (Ex. 1, Herczeg, ¶ 9.)

Novi charges its customers fees to cover the cost of all of this. It charges usage (or consumption) fees—what Plaintiff calls "rates" in the Complaint—based upon metered use of water. It also, separately, charges connection fees to property owners who join these systems. This

[1] Notably, unlike the *Bolt v Lansing,* 459 Mich 152; 587 NW2d 264 (1998), case that Plaintiff heavily relies on, this case has nothing to do with fees charged for a *storm* sewer or *stormwater* system. Novi does not charge usage fees for its stormwater system.

combination of usage fees and connection charges is very typical of communities in the state. (Ex. 2, Affidavit of Carl Johnson ¶ 12.)

The City has a Department of Public Works (DPW), which does the day-to-day work necessary to operate, maintain, and repair the water and sewer systems. It includes the City Engineer and other departmental staff overseen by a Director of Public Works (Jeff Herczeg). (Ex. 1, Herczeg, ¶ 5, 11.) The City also employs outside consultants who assist the City with planning and executing those activities, as well as improvements to the system as it expands. (Ex. 3, Affidavit of Tim Juidici, ¶ 9.)

The City's 6-year Capital Improvement Plan (CIP) includes line items related to certain planned and expected water and sewer capital improvements. (Ex. 14.) However, the CIP is not a complete and exhaustive list of all of the projects the City expects to work on in a given year. (Ex. 1, Herczeg, ¶ 13.) The City also prepares various other planning documents for its systems. For example, the City prepared a Water Master Plan in 2014, which it updated in 2021. (Ex. 1, Herczeg, ¶ 14; Ex 15; Ex 16.) In 2014, it also completed a sewer capacity assessment, and there have been other system plans, reports, and evaluations undertaken at various times to ascertain and plan for system needs. (Ex. 1, Herczeg, ¶ 15.) These needs assessment and planning efforts are further detailed in Mr. Herczeg's and Mr. Juidici's Affidavits (Exs. 1 & 3), which also detail the kind of ongoing maintenance activities, paid for from W&S system funds, that the City undertakes outside its CIP and master-planned capital outlay efforts.

FACTS ABOUT WATER & SEWER RATE-SETTING, FUNDING, AND DEBT

The City sets its water and sewer usage fees (i.e., rates) on an annual basis to make sure it collects enough revenue to cover the costs of providing water and sewer service to the public. This includes not only the cost to pay GLWA, Wayne County, and Oakland County for their services, but an annual amount that the City anticipates will cover maintenance, repair, rehabilitation, and replacement expenses. (Ex. 2, Johnson, ¶ 7-11.)

Every year the City's Finance Department gathers information from the DPW staff regarding the City's anticipated costs, and also from GLWA and Oakland County as to their anticipated rates and charges. The Finance Director (Carl Johnson) and City Manager (Pete Auger) jointly make a recommendation to the City Council, which reviews and makes the decision on setting the water and sewer rates for the year. (*Id.*) In addition to the information gleaned from others, the evaluation is guided by various state and local laws that *require* the City to charge rates sufficient

to cover the costs of providing the water and sewer services, including the Revenue Bond Act, MCL 141.101, *et seq.;* the City Charter, § 13.3 (Ex. 4); and the City's Water (§ 34-19) (Ex. 5) and Sewer (§§ 34-115, 34-612) (Ex. 6) Ordinances.

The above recommendations from the City Administration are generally laid out in an annual memo from the Finance Director describing the Administration's efforts to keep the rates as low as possible. (Ex. 2, Johnson, ¶ 9.) Over the years, that effort has been quite successful. The City's water and sewer rates are in fact low compared to others, as confirmed by the City's nationally-known utility rate expert, Eric Rothstein, who, based on surveys of other systems conducted by the American Water Works Association and the Michigan Metropolitan Treasurers Association, has concluded that the City's rates, "even at their highest levels [], are not out of alignment with peer retail water and wastewater systems in Michigan or nationally" and "are unambiguously reasonable based on state and national comparisons." (Ex. 7, Rothstein Expert Report, p 4.)

Also as part of his rate-setting evaluation, the Finance Director generally includes a discussion of the W&S Fund's cash reserves. He looks at several categories of potential expenditures that might be needed beyond just the expected or planned outlays, and assigns a value to those to determine whether the reserves remain sufficient. (Ex. 2, Johnson, ¶ 25.) A couple of additional points are relevant to the overall rate-setting process:

- The City prefers to pay cash for the maintenance, repair, rehabilitation and capital improvements to replace infrastructure or to make system improvements to ensure the system is able to accommodate new users. The City prefers not to incur debt to finance any of these improvements. In fact, it has not issued bonds for water and sewer improvements since 1998, and it paid off those bonds early. For the entire period of this class action, from 2015 to present, the City has not had any active bonds for any system improvements. (Ex. 2, Johnson, ¶ 30.)
- Because parts of Novi are still developing, it regularly collects connection charges from new users who have joined the system. For the period of this class action, 2015 to the present, the City has actually collected over $12 million in connection charges. Those charges are not at issue in this case, as Plaintiff (and a large portion of the class established by Plaintiff) did not pay a connection charge and has not challenged the City's connection charge. (Ex. 2, Johnson, ¶ 16.)

While the W&S Fund did, as Plaintiff points out, have cash reserves/investments in the amount of approximately $69 million on June 30, 2019, that fact is of no real note *in and of itself.* On the date the lawsuit was filed, for example (August 2020), the City actually only had about $58 million in its cash reserves. And as of right now, the City has only about $44 million in cash reserves/investments. (Ex. 2, Johnson, ¶ 24.) The City also expects to accomplish in the FY 2021/22 and 2022/23 next two budget years another $18 million in needed and planned projects

for the water and sewer system (some of which have commenced already), likely reducing that number to under $30 million (Ex. 1, Herczeg, ¶ 18.). The City also has a looming expenditure for capital improvements to the Wayne County system that its system users will have to pay for (the LT CAP), in the anticipated amount of $2 million to $7 million, as well as other budgeted CIP items. (Ex. 17.) Those CIP expenditures are about $38 million, and does *not* include all of the approximately $40 million asbestos pipe replacement program noted above.

Of course, that's just the money that will be spent from reserves, and not all of it can be attributed to the usage fees Plaintiff is objecting to. In fairness to the City, when reviewing the allegations that usage fees/rates have accumulated in the W&S Fund, the Court must "back out" of that calculation all the dollars in the reserves that come from *connection fees*—the $12 million noted above, certainly, but there's no reason why the evaluation should not include reserves accumulated earlier than 2015. (Ex. 2, Johnson, ¶ 16.)

Plaintiff likes to use the adjective "unrestricted" to describe the City's cash reserves. That's not just some word, however. It's an accounting term meaning that there is no City issued debt or other formal legal obligation attached to those monies. It doesn't mean, as Plaintiff infers, that those funds aren't *spoken for*, or designated by the City for some very real purpose. (Ex. 2, Johnson, ¶ 23.) It's easy for a person, like Plaintiff, to sit on the sideline, see a large dollar amount, in a vacuum, at a given point in time, and claim the City is hoarding money. But for the trained and experienced system professionals, who are actually knowledgeable about the system needs and costs, there is currently not nearly enough funding in place to do everything that is needed in the short term future.

One final fact about the allegedly "unreasonable" usage fees charged by the City for water and sewer service: for each and every year from 2015 forward to today, those fees have actually failed to cover the City's cost of providing that service (cost of water, cost of sewage discharge to Wayne or Oakland County, maintenance, etc.), meaning that the City's W&S Fund has operated *at a deficit*. (Ex. 2, Johnson, ¶ 26.) Plaintiff plucked from the City's website some documents that made certain projections showing a *potential* positive amount in certain years only because those amounts included the unchallenged capital connection charges that the City collected from new users each year, which Plaintiff fails to mention. In short, *the City hasn't been collecting too much in usage fees—it's been collecting too little*, while planning all along to make up for that, at least in part, by spending from the cash reserves that Plaintiff now wants.

STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(8) is appropriate where plaintiff has "failed to state a claim on which relief can be granted." Such a motion tests the legal sufficiency of a claim. *Koenig v City of Berkley*, 460 Mich 667, 674; 597 NW2d 99 (1999). A motion brought under MCR 2.116(C)(8) relies only on the pleadings, taking all factual allegations as true, and testing the legal sufficiency of the claim; summary disposition is proper where no factual development could support relief under the claim. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999).

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim and should be granted where the proffered evidence fails establish a genuine issue of material fact. *Maiden*, 461 Mich at 120. In ruling on the motion, the Court must consider not only the pleadings, but also any depositions, affidavits, admissions, or other documentary evidence submitted by the parties. MCR 2.116(G)(5).

ARGUMENT

I. The City's water and sewer rates (usage fees) are reasonable and its cash reserves are not too high. The user rates, viewed as a whole, are actually low compared to other communities and the funds that had temporarily increased to the City's cash reserves a few years ago have been, and continue to be, spent on needed water and sewer projects as planned.

The basic theory of Plaintiff's Complaint is that the City purposely accumulated some $69 million in its W&S Fund as of July 2019 through years of inflated usage fees (the "overcharges"), and either didn't really intend to spend those funds at all (it just wanted to "hoard" them) or intended to spend them on "future capital improvements" to the system, a use that would—according to Plaintiff anyway—be legally impermissible. It turns out that the "proof" Plaintiff puts forth for this theory is mostly just an uninformed misreading of various City financial and planning documents (either that or he is trying to mislead the Court). On the undisputable facts and documentary evidence described above and, in particular, the Affidavits of Messrs. Johnson, Herczeg, and Juidici, Plaintiff fails to clear the very first hurdle in a utility rate-making case: the presumption of reasonableness that this Court must give to the City's rates.

"Michigan courts, as well as those in other jurisdictions, 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 the presumption is, in part, simply

practical, as the Michigan Supreme Court has explicitly conceded that **"[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.**" *Novi, supra,* at 430. In addition, the Court recognized that it is also a question of statutory deference: "[t]he rate-making authority of a municipal utility is expressly reserved to the legislative body given the power to set rates under the municipal charter." *Id.,* citing MCL 141.103(d); MCL 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 Inkster,* 311 Mich App 594, 597-598; 876 NW2d 582 (2015) (emphasis added), *citing 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, supra.,* 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)(no "clear evidence of illegal or improper expenses" in city's water and sewer rates existed where expert reports showed no evidence that challenged rates accounted for "expenses unrelated to water and sewer.")

A. The increase in cash reserves that Plaintiff claims as evidence of unreasonable fees is primarily the result of two things that Plaintiff—not being experienced with the realities of the City's infrastructure, rate structure, and municipal financial accounting practices—apparently does not know: (i) the completion of certain planned improvements/ expenditures took longer than expected and resulted in accounting rollovers; and (ii) the City collected a significant amount of connection charges, which are not challenged in this case.

Leaving aside the lack of legal merit in Plaintiff's claims (addressed below), as a matter of *fact* the whole theory of Plaintiff's case turns out to be based on a trifecta of misinformation and misunderstanding (or, again, misrepresentations) on Plaintiff's part:

- Plaintiff assumes that the City's annual Budget documents can be read, for any given year from 2015-2020, to state how much the City actually intends to spend that year on water and sewer capital projects. He is wrong, and not by just a little. While the City's annual Budget document shows potential *new* spending for the upcoming year, it does not reflect the accumulated totals of previous budget years, where the money was not paid out but is currently owed or earmarked—otherwise known as budget "rollovers" from prior years. (Ex. 2, Johnson, ¶ 14-22.) This is a monumental flaw in Plaintiff's Complaint, because it hinges on his incorrect contention that each budget includes "all" of the City's spending for the year. Yes, the City budgets for projects every

year, but those projects don't always get done during that budget year. When they don't, the expenses from those projects are not reflected in future years' budget documents. Instead, they are accounted for in different documents, which Plaintiff doesn't mention or account for in making his allegations. Factoring in these rollover expenses, as one should, shows the annual deficit. (*Id.*)

- Plaintiff thinks that the City's CIP for any given year reflects the only projects that the City plans to do (or finish) for that year. He is wrong, and once again, not by a little. The CIP certainly reflects many of the known and planned projects. (Ex. 1, Herczeg, ¶ 13; Ex 2. ¶ 25.) When Plaintiff filed his Complaint, he clearly had no idea what projects were actually budgeted or rolled over or were underway at the City.

- Plaintiff thinks the City's various statements that it is using "rates" or "current rates" to fund improvements mean that it is referring to the fact that the usage fees it is collecting each year will pay for all capital improvements for that year. He is wrong and grievously so. As the City's Finance Director testified during his deposition, when he indicates in his memos and otherwise that the City is paying for improvements "through rates" or "through current rates," he means all the money in the City's W&S Fund, including cash reserves and connection charges. (Ex. 8, Deposition of Carl Johnson, p 66, lines 5-22.)

How and why do these fundamental errors/misrepresentations in Plaintiff's claims matter? Let's look at one of Plaintiff's foundational allegations. In ¶ 17 of his Complaint, Plaintiff quotes from the 2015/2016 budget for the Water and Sewer Department, and states "the City's budget for the fiscal year ending June 30, 2016 [2015/2016] projected that the revenues of the Water and Sewer Fund would exceed its expenses by (1) $3,494,314 in the fiscal year ending June 30, 2016, (2) $2,729,524 in the fiscal year ending June 30, 2017 and (3) $3,233,800 in the fiscal year ending June 30, 2018."

This allegation is incomplete and unhelpful information on the question of whether the water and sewer rates are unreasonable or excessive. As explained in the Affidavit of the City's Finance Director, here is what Plaintiff doesn't tell the Court: The alleged "excess" revenue of $3,449,314 projected in the budget for 2016 was based on a planned "original budget" for capital spending in 2016 of $1,561,067—but the amount of "rollover" spending during FY 2015/2016 still planned from *previous budget years* amounts to an additional planned expenditure of $4,208,305. That money is not referred to in the 2015/2016 budget or Plaintiff's Complaint—but it is money that the City still intended to spend on needed water and sewer projects in the City. *So when that "rollover" amount is added to the new budget amount, it totals planned expenditures of $5,769,372—not a "surplus" for that year at all, but rather a* ***deficit*** *of $758,991.* (See generally Ex. 2, Johnson, ¶14-22; Chart at Ex. 2-E.)

Fast forward to FY 2020/2021 and the budget that City Council adopted in May of 2020, just *before* Plaintiff filed his Complaint alleging the City had too much money in its cash reserves. This

budget actually forecasted a deficit of $1,075,000. But again, let's look a little deeper. What was the amount—not shown in that 2020/2021 budget—of "rollovers" from necessary projects that had been budgeted in previous years but not completed? $17,783,883. That amounts to a total planned "deficit" spending of $18,858,883 in FY 2020/21. Those figures were certainly available to Plaintiff in August 2020—and they explode the absurdly uninformed theory of his Complaint. (Ex. 2, Johnson, ¶ 19, Chart at Ex. 2-D.)

Today, the W&S Fund cash reserve sits at about $44 million. But the City has more system spending obligations scheduled in the next budget year. As detailed in the Herczeg and Juidici Affidavits, the projects for 2021/22 and 2022/23 add up to more than $18 million. (Ex. 1, Herczeg, ¶ 18; Ex. 3, Juidici, ¶ 12.). If all those projects are completed, that will take those reserves down to roughly $27 million. And to anticipate Plaintiff's inevitable attempt to claim that it was only because of his heroic filing of this lawsuit that the City intends to spend those additional amounts, Mr. Herczeg's Affidavit shows that each and every one of the projects on which that money will be spent was "born" well *before* Plaintiff filed this lawsuit. (Ex. 1, Herczeg, ¶ 18.) The City doesn't have a "hoard" of money; it doesn't have enough when you consider all the other projects it also has to do.

B. Plaintiff cannot rebut the presumption of reasonableness that the usage fees enjoy, and cannot satisfy the test for an equitable unjust enrichment claim with respect to the usage fees or the level of cash reserves in the W&S fund.

Plaintiff's Complaint never tells the Court what any of the City's rates actually are. (See, however, Ex. 2, Johnson, ¶ 12, for those figures.) He provides no context for any conclusion that any specific fees or charges are objectively unreasonable, choosing instead just to point to the size of the City's cash reserves alone. He chooses unjust enrichment or assumpsit as the vehicle for his rate challenge—which, frankly, a number of Court of Appeals panels have very conclusively held is not a good vehicle for this sort of argument.

(1) The elements of Plaintiff's unjust enrichment claim.

Claims for unjust enrichment require a plaintiff to show:

> (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). And because unjust enrichment is an **equitable** claim, "the propriety affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947).

Assumpsit is a related legal theory. While the Court of Appeals has acknowledged that assumpsit may be a vehicle for recovering unlawful utility charges in some instances, the Court specifically emphasized that, even if the collection was unlawful, "such an action, 'will not lie against one who has not been personally **enriched** by the transaction because the fundamental 'basis' of the action 'is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same.'" *Youmans v Bloomfield Township*, 336 Mich App 161; 969 NW2d 570 (2021) (Emphasis in original), quoting *Trevor v Fuhrmann*, 338 Mich 219, 224-225; 61 NW2d 49 (1953).[2]

(2) Plaintiff can't invoke the unjust enrichment theory until he *first* proves the unreasonableness of the usage fees/rates, as a whole. But Plaintiff not only failed to plead any facts to that effect, he has not produced any evidence to support such a claim.

Youmans involved a similar assertion that the usage fees were too high and the cash reserves excessive. The Court noted early in its ultimate rejection of those claims that "in contemporary municipal utility rate making cases, a similar focus on principles of 'unjust enrichment' is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable." *Youmans, supra*, at 214, *citing Novi, supra; Trahey, supra*. Because of that presumption of reasonableness, the Court said, *before* being allowed to try to prove the fundamental elements of unjust enrichment, the plaintiff must *first* establish that the rates are unreasonable:

> 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 he would be correct that the presumption of

[2] *Youmans* acknowledged that assumpsit as a cause of action was abolished, leaving only "the substantive **remedies** traditionally available under assumpsit," and indicated that the "'assumpsit' claim is modernly treated as a claim arising under 'quasi-contractual' principals, which represent a 'sub-set of the law of unjust enrichment.'" *Youmans, supra* (Emphasis added); *quoting Genesee Co. Drain Comm'r v. Genesee Co.*, 504 Mich 410, 421; 934 NW2d 805 (2019). So while Plaintiff has brought both assumpsit and unjust enrichment claims, under *Youmans* they can be treated as overlapping for purposes of this Court's legal analysis.

> reasonableness would be irrelevant. Instead, however, by asserting his 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

Youmans, at 219. With that, the Court dismissed plaintiff's equitable claim that the working capital reserve was excessive and unreasonable.

The Court of Appeals just recently underscored this order of things in *Brunet v City of Rochester Hills*, unpublished per curiam opinion of the Court of Appeals, issued December 2, 2021 (Docket no. 354110) (Ex. 9), where the Court once again said that **before** a plaintiff can even start attacking particular fees and charges, he must first show that they 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. (Emphasis in original.)

While Plaintiff's expert, Mr. Damico, has all sorts of opinions about how the City's capital/cash **reserves** in this case are too high, one thing he made clear he had no opinion whatsoever about is whether the City's usage **rates** were themselves excessive—in fact, he admitted he didn't even know what the City's usage rates were when he issued his report:

> Q. You referred to the reserve fund amounts in relation to the rates as being a macro review of the rates, right?
> A. The specific rate. You asked me what the--you asked me if I knew what the rate was.
> Q. And you don't know what the rates are?
> A. Correct. I said that.

(Ex. 10, Damico Deposition, p 71.) The City's expert, on the other hand, did acknowledge this Court's direction in *Youmans*. Mr. Rothstein—a nationally-known rate expert and author of AWWA and WEF rates manuals used nation-wide—dismissed out of hand the idea that the City's rates were either high or unreasonable: "Novi's **rates**...cannot conceivably be construed to be unreasonable...." (Ex. 7, Rothstein Report, p 14.) Mr. Rothstein also noted that surveys of comparable communities both nationally and in Michigan demonstrate that the City's rates, as a whole, are fair and reasonable. (*Id., supra*, at p 3.)

So, the **only** evidence presented on this threshold issue of whether the City's "water and sewer rates, viewed as a whole," are reasonable is the City's, and that evidence conclusively

establishes that the fees charged are, in fact, quite fair, and reasonable, and not at all excessive. Based on the above, Plaintiff not only failed to plead the facts necessary to get around the presumption that the usage fees were reasonable, his own expert fails to address the *Youmans* standard and state and national surveys establish that the City's rates, viewed as a whole, are reasonable and not excessive as compared to rates in other communities. Respectfully, the Court's analysis can and should stop right at this point with summary disposition in favor of the City.[3]

(3) The Court of Appeals has been consistent in its rejection of Plaintiff's claim of "excessive reserves" or "overcharges" as an equitable theory.

The appellate courts of this state have recently made it quite clear that setting the level of the City's cash reserves is not something within Plaintiff's purview, or that of his expert or, respectfully, the courts generally. Between 2019 and 2021, the Court of Appeals affirmed the dismissal of five separate class actions challenging water and sewer rates under nearly identical theories as those asserted here: *Youmans, supra; Brunet, supra*; *Shaw v Dearborn,* 329 Mich App 640; 944 NW2d 153 (2019)*; Bohn v City of Taylor,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2019 (Docket no. 339306), lv den'd 947 NW2d 811 (2020) (Ex. 18); and *Deerhurst v Westland,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2019 (Docket no. 339143), lv den'd 947 NW2d 811 (2020) (Ex. 11). The Michigan Supreme Court has denied applications for leave to appeal in four of these cases, so far.

In *Youmans, Brunet, Bohn, and Deerhurst,* the Court rejected the very "excessive" water and sewer fund reserve claim Plaintiff has rolled out again in this case. This brief has already discussed *Youmans*. In *Bohn*, the Court upheld the legality of Taylor's capital reserve fund, which the City used to fund future "renewal and replacement" of its utility:

> [T]he size of the [city of Taylor's] reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced.

Id. at*4. The Court also rejected the plaintiff's claim that Taylor needed to "have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive," noting that there was no legal

[3] It bears mention here that the cash reserves of Defendant Rochester Hills in the *Brunet* case were upheld by the Court as reasonable in the amount of about $46 million. *Id.* at *3. Comparatively, Novi's cash reserves sit at about $44 million.

authority to support this contention. *Id.* at *3. It was enough for Taylor to have undertaken "processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system." *Id.* The Court concluded:

> This evidence shows that the City is currently inspecting its system and planning infrastructure improvements for which it will use the reserve fund. **Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.** (Emphasis added.)

Id. at 4. And, finally, the Court found that the City's lack of compliance with a written policy or guidelines in the rate-making process or an estimate of the amount a municipality needs to reserve to fund its capital expenditures was not evidence of unreasonableness. *Bohn, supra.* at *6.

Here, although not required per *Bohn*, the City **has** undertaken extensive capital improvement planning for necessary repairs, replacement, and rehabilitation of various parts of its system in the near term, further substantiating the reasonableness of its rates and rate-setting efforts. (See Ex. 1, Johnson, & Ex. 3, Juidici.) Also, while Plaintiff follows Mr. Bohn's failed path of trying to attack the City's policies and ratemaking explanations (e.g., Mr. Johnson's annual memorandums), the Court in *Bohn* says those things aren't even necessary in the first place.

In *Westland,* the Court again upheld, as reasonable, rates that included amounts used for purposes of "creating a reserve fund for future unspecified infrastructure improvements to its water and sewer systems." *Westland, supra.* at *6. Foretelling its future analysis and decision published in *Youmans*, the Court was critical of the plaintiff's strategy of disputing individual cost components of water and sewer rates "without respect to whether the actual water and sewer rates are reasonable," finding that it was "at odds with" the clear Supreme Court precedent directing a "limited role of the judiciary in reviewing the municipal utility rates." *Id.* at *4, citing *Novi,* 423 Mich at 425-26, 428, 430. As in *Bohn,* the Court upheld the use of allegedly "excessive" reserves to finance future capital projects that would "benefit all users of the water and sewer services . . . [who] contribute to wear and tear of the water and sewer system." *Id.* at *8. By including the cost of future capital projects in its rates, *Westland* ensured that the users will pay a fee proportionate to the necessary costs of service. *Id.* The Court also confirmed that maintaining a capital reserve for these future purposes is commonly used "to provide fiscal stability," and that the use of rate revenue to maintain reserve levels was "a reasonable ratemaking practice." *Id.* at *6.

Then, in *Brunet*, the plaintiff argued—as Plaintiff hints in his Complaint and argued in his

Motion for Partial Summary Disposition filed on March 10, 2022—that Rochester Hills could not use fees collected from current ratepayers to fund future capital improvements, citing *Wolgamood v Village of Constatine*, 302 Mich 384; 4 NW2d 697 (1942) and *Bolt v Lansing*, *supra*. The Court concluded that the plaintiff "overstates the principle derived from such cases," and found that it is entirely appropriate for a municipality to "accumulate a cash reserve" through the rates in order to pay cash, as opposed to incurring bonded indebtedness, "for future capital improvements to the utility." *Brunet, supra,* at *6, citing *City of Detroit v City of Highland Park*, 326 Mich 78; 39 NW2d 325 (1949).

Finally, in *Shaw v Dearborn, supra,* the Court of Appeals dismissed yet another plaintiff's claim that the city's water and sewer rates were inequitable, unreasonable, and/or unlawful taxes. The Court noted that, while the plaintiff selectively challenged "components" of a rate as unlawful, he provided no authority to suggest that it is even appropriate to analyze a **portion** of the rates that is not separately or distinctly assessed by a governmental agency. *Id. at *11*. The Court further emphasized that "it is not this Court's role to audit each and every aspect of the City's expenditures" and "[i]t is not this 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." *Id.* at *9, *11.

These decisions all support dismissal here, strongly rebuking efforts to second-guess municipal ratemaking, and reaffirming the Supreme Court's mandate that trial courts refrain from scrutinizing the municipal ratemaking process. *Novi v Detroit, supra.*

Mr. Rothstein's expert opinions in this case dovetail with the ultimate conclusion that it's up to the municipality to set its rates. His report exposes every "Unfounded Opinion" rendered by Plaintiff's so-called expert (Ex 7, p 27-35), while reaching his own careful and considered conclusions, which include (but are by no means limited to):

- In general, Novi's water and sewer rates and charges were and are reasonable. Claims of overcharge are without basis. All rate revenues, even those held in reserve, are being used or will be used for the benefit of the City's water and sewer system. Reserves are held expressly and solely for the purpose of maintaining and preserving the functionality of the two systems. The concept of "overcharge" would imply that the City is retaining this money for profit or for purposes unrelated to its water and sewer systems. That is not the case.

- Novi rates and service bills are by no means an outlier signaling imposition of unreasonable charges. Rather, the City's rates are reasonable, compare favorably to other systems in Michigan and nationally, and are anticipated to remain so – in part due to the availability of reserves to finance needed system maintenance, upgrades and

improvements. The City's practices reflect common sense and appropriate exercise of its discretion.

- The Plaintiff's claims that the City has accumulated unreasonable levels of reserves fail to recognize the City's substantial needs for system investment to implement, for example, asbestos pipe replacements, Novi's share of "LT Cap" projects, and upgrades to address known capacity exceedances in compliance with contractual and regulatory obligations. These claims similarly fail to recognize the merit of using reserves to smooth and limit rate increases required to fund the City's water and sewer system investments which are necessary to ensure that the system is in compliance with regulatory requirements, continues to provide high quality services, and remains in good repair and working order.

- The City's reserve practices are reasonable and appropriate. The Plaintiff's claim that the City's reserve practices have imposed overcharges because they do not align to their [mis]understanding of cited general guidance is without merit.

- The City's capital reserve levels are not excessive and, in fact, could still prove inadequate to fund prospective asset maintenance, upgrade and improvement needs.

See Ex. 7, Rothstein, p 4-7.)

Plaintiff also tries to rebut the City's assertion that its W&S Fund reserves are reasonable by raising the 2017 City Council authorization of a temporary advance from the W&S Fund to the City's new CIP Fund, which was to be funded over the next 10 years by a millage. (Ex. 12, Council Resolution.) The intention was to pre-fund some CIP projects early in that 10-year period, with the understanding that the W&S Fund would be paid back over time at a good interest.[4] Plaintiff's argument is uninformed and one-dimensional: If the W&S Fund has money to advance to other City funds, then it must have too much money. (Plaintiff's Complaint, ¶ 23-24.)

In scratching just below the surface, the Court will note that City Council's resolution mandated repayment of any advanced funds with interest on a monthly basis and full repayment within 90 days, if needed by the W&S Fund at any time for system improvement projects, emergencies, etc. (Ex. 2, Johnson, ¶ 32.) Furthermore, the resolution provided for the payment of interest at a rate guaranteed to surpass (intentionally) the return on other invested monies within the W&S Fund. (Ex. 2, Johnson, ¶ 31.) In this respect, the advance is really just like the other investments of public funds the City makes—in the "market"—until needed.

The City's rate expert, Mr. Rothstein, explained that the advance was "not evidence of rate overcharges. It is a common and well-accepted practice for which industry and accounting guidance is provided."[5] Mr. Rothstein concludes that "This transaction says nothing about

[4] The Council resolution authorized up to $17 million, but the advances that occurred over the next few years only ever reached slightly more than $10 million, and currently sit at just over $4 million.

[5] (Ex. 7, Rothstein Report, p 6.) There is also no law precluding this investment. To the contrary, MCL 123.391 authorizes municipalities owning a public utility to make "contributions from the operating

whether the City has overcharged its own ratepayers. It simply reflects the fact that Novi is smart enough to use well-accepted interfund borrowing to reduce costs for both ratepayers and taxpayers."(Ex. 7, Rothstein Report, p 24.) In the context of an unjust enrichment claim, it is fatal that the system users—including Plaintiff and the putative class—actually **benefitted** from the transfers.[6]

(4) The City has not received or retained a benefit, and has not been unjustly enriched.

The first element of an unjust enrichment claim is that the Defendant must get a "benefit" from Plaintiff. But, the *City* doesn't actually benefit from those funds during the temporary period of time it holds them while it undertakes the sometimes arduous and time-consuming process of identifying, evaluating, planning for, engineering, designing, bidding, and completing improvements, because **they are held, essentially in trust, for the benefit of the system users** who will ultimately benefit from them. (Ex. 2, Johnson, ¶ 23, 27.)

Even if the Court gets past that, the second element—a defendant "retaining" the benefit and being "enriched" by it unjustly—is even less arguable. "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." *Dumas v Auto Club Ins Ass'n,* 437 Mich 521, 546; 473 NW2d 652, 663 (1991).[7] To start, the City is not *retaining* anything. It is *expending* the funds for all sorts of planned and necessary project for the benefit of the system users and not "the City." Nor is what the City has done to maintain, repair and rehabilitate its system in any way "unjust." The claim that the City's conduct is "unjust" comes only from Plaintiff's conclusory statements that the City's water and sewer rates are too high and the cash reserves "excessive." As established above, neither assertion is true.

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revenues of the utility in such amounts and for such purposes as shall be determined by the governing body of the public utility to be in the public interest, subject to the approval of the legislative body of the municipality."

[6] Even Plaintiff's alleged expert agrees that investing reserve funds is a good thing that benefits ratepayers by generating revenue for the system. Ex. 10, Damico Dep., p. 124, ln. 18 to p. 127, ln. 11.

[7] *See also NL Ventures VI Farmington, LLC v City of Livonia,* 314 Mich App 222, 241; 886 NW2d 772, 784 (2015) ("That a person benefits from another is not alone sufficient to require the person to make restitution for the benefit.. . . 'Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'"); *Karaus v Bank of New York Mellon,* 300 Mich App 9, 22-23; 831 NW2d 897, 905 (2012) ("[T]he key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit. . . . unjust enrichment describes 'the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.").

Because unjust enrichment is an equitable claim, "the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Youngs v West, supra*. Plaintiff asks the Court to enter judgment in this case without first reviewing any of those circumstances or exigencies, and without any explanation of just how the temporary retention of monies as authorized by law is unjust.[8]

II. The City's comparatively low water and sewer usage fees didn't somehow transform into a tax because the City had an accumulation in the capital reserves of its water & sewer fund. *Bolt* does not require—or even lead anywhere near to—that conclusion.

Plaintiff really makes two different kinds of *Bolt* claims in this case. There's the one he made in his Motion for Partial Summary Disposition, filed on March 10, 2022. In that filing he claims there's a disguised tax "embedded" in the water and sewer usage fees due to the City funding its Eight Mile Retention Facility from water and sewer usage fees, which he claims violated *Bolt* because, allegedly, a city cannot use usage fees to make improvements to its water and sewer system that might benefit not just existing users of the system but also future users. The City filed its response to that nonsensical claim on April 6, 2022. As to any *Bolt* arguments that Plaintiff is making as to the use of W&S Funds for "future capital improvements," that prior City response remains its position in this case.

But that's not the *Bolt* argument that Plaintiff makes **in his Complaint**. Plaintiff's argument in the Complaint is, once again and like the reasonableness argument discussed above, that the W&S Fund just has too much money in cash reserves. (Plaintiff's Complaint, ¶ 16-34.) He argues that the usage fees must somehow contain what he has labeled an "overcharge" amount, though he does not say how much that is. The *Bolt* argument he makes relies on MCL 141.91, which says "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 alleged overcharge, he says, is a disguised tax that violates this statute. But he brings this claim

[8] Plaintiff also assumes, without explanation, that if any portion of the water and sewer rate is unreasonable, the remedy is to refund it. Why would that be the case? How is that equitable? Here, equity swings against Plaintiff given that *it is uncontested* in this case that all the planned work on these public utility systems is necessary to keep the systems operating properly and safely for public use, meaning the City will simply have to collect any refunded money from the class members another way, and the future amounts collected from them will end up exceeding the amount of the refund. (Ex. 2, Johnson Aff., ¶27-28).

not directly as a violation of that statute but as an unjust enrichment claim like the other four counts of the Complaint. (See Complaint, Cts. II & V.)

Argument I above explains why there has been no unjust enrichment on the City's part, but Plaintiff claims, specifically under MCL 141.91, that the usage fees are a "disguised tax" also fail because he fundamentally misreads the test in Michigan for when a fee is actually a disguised tax. But if the Court gets to the disguised tax issue, *Bolt* says that a fee must serve ***a regulatory purpose*** rather than a primarily revenue-generating purpose, although it can 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 plus "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). Finally, *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. These three criteria are not to be considered in isolation, however, but in their totality. *Id.* at 167.

But the *Bolt* "test" can't be separated from what actually confronted the *Bolt* Court, which was a separate, stand-alone stormwater charge that Lansing had imposed on all properties in the City to raise funding for a new $176 million stormwater system separation project. That improvement project was needed just for 25% of the city that did not already have its storm sewers separated from its sanitary sewers. *Bolt,* at 163. And while it was aimed at an issue affecting 25% of the City's stormwater utility customers, the charge was imposed on 100% of the system's customers—including the 75% who didn't need separating storm and sanitary anymore. Moreover, before the new fee was imposed, Lansing's stormwater system, including prior separated system improvements, had been funded by property taxes or assessments, which, to the Court, was a strong indicator that the new fee was an attempt to disguise a tax in avoidance of the Headlee Amendment requirement for voter approval of new taxes. *Bolt*, at 168.

Here, by contrast, the City's rates are just the standard usage fees that customers pay to be in an enterprise system like this for water and sewer service. Unlike in *Bolt*, Novi did not actually impose something called an "overcharge," or a separate fee of any kind, that was specifically for the purpose of raising revenue to construct a single, new improvement project. There is no such fee in Novi. The "overcharge" is a term made up by Plaintiff. The City simply charges a general

usage fee. Plaintiff thinks it's too high. That's a *Trahey analysis*, not a *Bolt* analysis. 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 those usage fees (or the reserve amount) or find them unreasonable. *Id.* at 595. And also unlike in *Bolt*, everyone in the system is benefiting from the usage fees.

That said, if the Court decides that it needs to go through the *Bolt* analysis for this equitable claim, the test for a defensible fee is met here.

There's no revenue raising here, just regulation. The *Youmans* case makes it all but impossible to prove a water and sewer usage fee to be non-regulating:

> Addressing the first factor, in *Shaw,* 329 Mich. App. at 666, 944 N.W.2d 153, this Court held that it was
>
> > ***beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents.*** Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose * * * Further, the [charge at issue], i.e., the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.
>
> 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.*** (Emphasis added.)

Id. at 228.

In this case, all the charges are likewise related to the provision of water and sewer service throughout the community. The City has the regulatory obligation to charge rates that are sufficient to run the system under the Revenue Bond Act and City Charter/Ordinance as noted above, which lays this question to rest.

The rates are proportionate to the City's cost of providing the services. *Bolt* does not say that those usage fees cannot include capital charges that can be accumulated in a capital reserve or cash reserve. In fact, it 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.)

In its answer to Plaintiff's Motion for Partial Summary Disposition, the City explained that the City's usage fees contain only a modest "capital investment component" (somewhere between 4% and 12% in any given year—much less than the 63% that the *Bolt* Court found to be too much. (See City's Brief in Response, p 16-20.) That remains the City's position, and it remains the City's position that those fees can in fact be used to fund "future capital improvements" under the very language of *Bolt*.

As the Court of Appeals said in *Taylor*, *supra*, in which it completely dismissed the argument of Plaintiff's lawyers that using rates from current customers to pay for capital investment was an "intergenerational unfairness" while quoting the Novi's expert in this case:

> 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.

Id. at *5-6.

The City uses its water and sewer reserves to cash fund necessary system repairs, rehabilitation and replacement, as well as for capital improvements, but those reserves are significantly less than what the City has determined is necessary and appropriate to have available for those planned improvements, catastrophic events, and the like. They are, in every normal sense, proportionate to the cost of those necessary and planned improvements, as explained in Argument I above.

The charges are voluntary. As stated in *Youmans*, *supra*, at 232-233, the 3-part *Bolt* test is a "balancing" act (even more so here given Plaintiff's equitable claims). 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 and, therefore, voluntary.[9]

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the Court should grant Defendant summary disposition of Plaintiff's Complaint, under MCR 2.116(C)(8) and (10).

Respectfully submitted,

ROSATI, SCHULTZ, JOPPICH &
AMTSBUECHLER, P.C.

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PROOF OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein at their respective addresses disclosed on the pleadings on June 14, 2022.

BY: ☐ U.S. Mail ☐ Telefacsimile
☐ Hand Delivered ☐ Overnight courier
☐ Federal Express ☒ Other: ***E-file***

Signature:
/s/ Julie Hinkle

[9] Keeping in mind that Plaintiff's claims are in equity, ***this just isn't a Bolt case***. What happens if Plaintiff is successful here? The Court would presumably order some amount of money given back to ratepayers. But because the projects that the City needs to have done in the coming years would still need to be done (like the $40 million asbestos drinking water pipes), the money would need to come from somewhere. The City could annually spike rates to pay for each of those projects, causing rates to swing wildly up and down in the years that each of the projects is undertaken and paid for, which would create hardships for a lot of ratepayers. But what Plaintiff really wants is for these projects to be funded through property taxes. Where is the equity in that? If a property tax were imposed instead of the current fees based on the amount of use, then improvements to the City's water and sewer system would be paid for at least in part by the owners of vacant land that aren't even in the system. How is that fair? And property tax exempt landowners (like schools and hospitals and the City itself) that are in the system and use huge amounts of water and sewer services would get a free water and sewer service on the backs of all the non-exempt property owners in the City. How is that just? Maybe more importantly, how does that even help the class of Plaintiffs in this case, who are the actual ratepayers who would fare *worse* if they win here? Plaintiff brought this as an equitable claim, but his position is not one of equity.