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.

Kickham Hanley PLLC
Gregory D. Hanley (P 51204)
Edward F. Kickham, Jr. (P 70332)
Attorneys for Plaintiff and the Class
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500

Randal Toma & Associates, PC
Randal S. Toma (P 56166)
Attorney for Plaintiff and the Class
500 S. Old Woodward Avenue, Floor 2
Birmingham, MI 48009
(248) 948-1500

Rosati, Schultz, Joppich
& Amtsbuechler, P.C.
Thomas R. Schultz (P 42111)
Steven P. Joppich (P 46097)
Stephanie Simon Morita (P 53864)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

DEFENDANT CITY OF NOVI'S REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO THE CITY'S MOTION FOR SUMMARY DISPOSITION

Defendant's Main Brief addresses head-on all the claims asserted by Plaintiff in his Complaint and makes legal arguments as to why those claims fail, as a matter of law and fact. Unsurprisingly, Plaintiff doesn't really engage with the arguments in Defendant's Brief. Instead, he hopes to divert the Court's attention toward a (self-created) list of what he wants the Court to think are "the governing standards that the Court must apply." (Pl's Brief, p 4.) That asks the Court to ignore all of the unrebutted facts, affidavits, and law that the City supplied in its Brief. Here, then, are the four "standards" that the Court should consider in deciding this motion:

(1) All of Plaintiff's claims are claims in equity for unjust enrichment (or assumpsit), but he never mentions the elements of that cause of action. So, summary disposition is appropriate where Plaintiff doesn't even try to explain how the City has "retained" money to which it is not entitled, or how it has been "enriched" in any way, let alone unjustly.

Morris Pumps v Centerline Piping, Inc., 273 Mich App 187, 195 (2006), says that a plaintiff in an unjust enrichment case must 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." Plaintiff cites only *Lochinvar Corp v Rosen* (Pls' Exhibit 27), an unpublished case relating to salary compensation of an individual. That's probably because under the case that applies unjust enrichment to usage fees, *Youmans v Bloomfield Township,* 336 Mich App 161 (2021), Plaintiff's two-fold burden is intentionally difficult and a standard that Plaintiff is simply unable to meet in this case:

> . . . the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenge to 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 overcharge plaintiff and the plaintiff class for 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.

There is no doubt that Plaintiff cannot meet *either* burden in this case, where Defendant has shown through unrebutted affidavits and other evidence that the W&S Fund reserves is being spent for the benefit of water and sewer ratepayers, not retained by the City.

(2) Plaintiff argues that he can overcome the presumption that the City's rates/usage fees are reasonable by simply alleging that they are excessive, with the support of a nominal "expert." But *Trahey v Inkster*, 311 Mich App 582 (2015), says it is much, much more than that—that Plaintiff must produce "clear evidence of illegal improper expenses," including "what amount, if any, of water and sewer rate account(s) for expenses *unrelated to water and sewer*." That standard cannot be met here.

Trahey found error below because the trial court "openly acknowledged that it could not specifically identify what amount, if any, of the water and sewer rate accounted for **expenses**

unrelated to water and sewer." *Id.* at 595-596. The mere existence of cash reserves (of any size) is not evidence that the City is spending money from the W&S Fund on things "unrelated to water and sewer." And Plaintiff here has no evidence (clear or otherwise) that the City is using any of the monies in the W&S Fund for anything other than water and sewer purposes. The City, on the other hand, has the unrebutted Affidavit of its Finance Director that expressly states otherwise—that it is all used for proper purposes. (See, e.g., Exhibit 1 to the City's Brief, ¶27.) Plaintiff falls literally out of the blocks.

(3) Under *Youmans*, Plaintiff cannot nitpick the rate setting process or grab at loose threads; he has to show the resulting rates are unreasonable "as a whole." While Plaintiff asserts that he's raised questions of fact on that issue, he's done no such thing—especially given the presumption of reasonableness and the fact that he's chosen to bring *equitable* actions.

The City painstakingly laid out in its Brief how that is simply false, and explained how the City has spent and spends its reserves over time on projects or payments—perhaps not exactly as soon as it would have liked, but eventually as planned. Plaintiff accuses the City of "dismissing" its own budget documents in favor of affidavits. To the contrary, the City attached relevant budget excerpts to Finance Director Johnson's Affidavit. But it bears pointing out that the City is not even required to include the W&S Fund—an enterprise fund—in its annual budget. MCL 141.422a(4). The chart attached to Director Johnson's Affidavit as Exhibit 2-E was created by the City finance staff, after hours of work reviewing journal entries and the like, to produce a sworn and attested compilation to this Court showing: (1) the expense to the City to buy water from GLWA and sanitary sewage from Oakland and Wayne Counties; and (2) the expense to the City to operate and maintain the system (DPW worker salaries, etc.). Any minor leftover revenue from the fees over expenses—in some years as low as 4%, in some around 10%—is available for capital expenses to benefit the system. These are classic, typical, normal, objectively not-excessive fees—and even *Bolt v Lansing*, 221 Mich App 79, 87 (1997), says so.

As part of his efforts to manufacture a genuine question of material fact where there is none, Plaintiff makes a number of misstatements:

- Plaintiff alleges, without producing any affidavit or other evidentiary support, that the City has no need for infrastructure improvement projects. But the City has provided affidavits of professionals establishing that there are a significant number of *necessary* infrastructure projects that need to be done over the coming years, and the reserve funds will be used to help to fund those projects. Affidavits of Herczeg and Judici, Exs. 1 (¶18) and 3 (¶12) to City's Motion.
- Plaintiff asserts that the fact that the City advanced monies from the W&S Fund to the CIP Fund proves that the W&S Fund reserves are excessive. As explained in the Brief (and Affidavit of the Finance Director), the advance was an investment, and it proved to be a good one: while the rest of the sewer fund is losing money as an investment, the portion advanced to the CIP Fund continues to make money on behalf of the ratepayers. And while Plaintiff refers to the fact that the Department of Treasury in 2020 repealed guidance that was in place when it made the advancement, the fact remains that the advancement is still permissible, and was clearly so under the guidance in place in 2017.
- Plaintiff argues that the City told residents and/or customers that its reserves were sufficient and it was setting rates to be cash neutral when that was in fact (according to Plaintiff) not true. The statement by the City in this regard was true and is still true given the fact that, based on a correct reading of the City's financial documents, the City operated every year in question at a loss as explained in the City's Motion and Brief and unrebutted affidavits.
- Plaintiff cites *Association of Home Builders v City of Troy*, 504 Mich 204 (2019), as supporting his argument that the usage fees are excessive because the W&S Fund has cash reserves. However, the Court in *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), concluded that *Home Builders* does not apply to water and sewer rate cases, because the state statute at issue in that case specifically precluded accumulating a reserve, which is not the case.
- Plaintiff cannot seriously suggest that because developers built and dedicated sewer and water line to the City (along with streets, likely) ratepayers don't have to pay usage fees? Or that the "capital component" allowed by *Bolt* can't be collected? Or spent to maintain and repair and rehabilitation and replace system assets? *Brunet v Rochester Hills* (Pls Ex. 32) mentions city-issued bonds as a thing that "might" create such an argument—that just doesn't apply here.

Plaintiff alternatively tries to create issues of fact on reasonableness by reference to his expert's report and deposition. He faults the City for using an expert, Eric Rothstein, whose testimony has been favorably received by trial and appellate courts in other cases brought by Plaintiff's counsel, they are trying out a new expert, Mr. Damico, who:

- Didn't evaluate the City's actual rates/usage fees because his task was just to review "the reserves." (Damico, p 68.)
- Didn't do a rate study of any kind—a fact that the Court in *Deerhurst, supra*, found disqualifying.
- Didn't evaluate what the usage fees paid for.
- Never mentions connection charges or how they affected cash reserves.
- Relied primarily on a publication, "M54 Developing Rates for Small Systems," that does not apply to Novi, which is not a small system. (Damico, p 85.)
- Treats the guidelines described in that publication as requirements or prescription, as opposed to targets or guidelines—which is what they are called in the publication.

- Never even refers to the AWWA's "Cash Reserve Policy Guidelines," which are in fact the most directly applicable guidelines for a system like Novi's and that Mr. Damico appears to be completely unaware of. (Rothstein, pp 24-25.)[1]

(4) No appellate court has ever bought into Plaintiff's theories—indeed *Youmans,* a published case, basically eviscerates all of the arguments. Rather than an "invitation to error" as Plaintiff asserts, ruling in the City's favor here is entirely consistent with appellate rulings in every recent case addressing Plaintiff's claims here.

Plaintiff repeatedly says that the mere fact he has an expert with an opinion creates issues of fact and entitles him to a trial. But trial courts grant summary disposition under MCR 2.116(C)(10) in cases with competing experts all the time. Indeed, maybe the most telling aspect of Plaintiff's response is its complete failure to engage the five Court of Appeals cases that the City cites in its Brief and that involve the very same questions that are at issue in this case—*Shaw v Dearborn,* 329 Mich App 640; 944 NW2d 153 (2019, *Brunet v Rochester Hills,* unpublished per curiam opinion of the Court of Appeals, issued December 2, 2021 (Docket no. 354110), *Deerhurst v Westland, supra, Bohn v Taylor,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2019 (Docket no. 339306), lv den'd 947 NW2d 811 (2020) and *Youmans*. All of those cases, save *Youmans,* were decided by the trial court on (C)(10) motions. And *Youmans* pretty clearly should have been, as the trial court's decision after trial was summarily rejected. Every one of these cases considered the arguments Plaintiff is rehashing in this case, and as the City laid out in its Brief, the Court of Appeals summarily disposed of every one of them. This Court should not fear making an equitable determination here as well.

Respectfully submitted,

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

/s/ Thomas R. Schultz
Steven P. Joppich (P46097)
Thomas R. Schultz (P 42111)
Stephanie Simon Morita (P53864)
Attorneys for Defendant

[1] See also Rothstein (Def. Ex 7, pp 29-35) regarding Mr. Damico's "Unfounded Opinions #1 thru #4."

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.

Kickham Hanley PLLC
Gregory D. Hanley (P 51204)
Edward F. Kickham, Jr. (P 70332)
Attorneys for Plaintiff and the Class
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500

Randal Toma & Associates, PC
Randal S. Toma (P 56166)
Attorney for Plaintiff and the Class
500 S. Old Woodward Avenue, Floor 2
Birmingham, MI 48009
(248) 948-1500

Rosati, Schultz, Joppich
& Amtsbuechler, P.C.
Thomas R. Schultz (P 42111)
Steven P. Joppich (P 46097)
Stephanie Simon Morita (P 53864)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

PROOF OF SERVICE

I hereby certify that on July 8, 2022, I electronically filed the Defendant City of Novi's Reply to Plaintiff's Brief in Opposition to the City's Motion for Summary Disposition with the Clerk of the Court using the MiFILE system which will send notification of such filing to all attorneys of record.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Julie A. Hinkle
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100