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,

-v-

Case Number: **2020-183155-CZ**
Honorable Nanci J. Grant

CITY OF NOVI, MICHIGAN,
a municipal corporation,

Defendant,
_____/

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 23rd day of September, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Plaintiff's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10) as to Counts I and II of the Complaint as well as Defendant the City of Novi's (herein the "City") Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). The Court heard oral argument and took the matter under advisement. After reviewing the pleadings, relevant caselaw, and evidence presented by the parties, the Court denies Plaintiff's Motion, grants the City's Motion, and dismisses the case.

Background

This is a class action lawsuit wherein Plaintiff alleges that, since 2015, the City set its water and sewer rates at a level which far exceeds what was necessary to finance the actual costs of providing water and sewage disposal services. According to Plaintiff, these unreasonably high rates have left the City with a surplus of funds, and the rates far exceed established water and sewer

rate-setting methodologies. Plaintiff argues the City should be required to "disgorge the amounts" or Plaintiff should "recover the amounts" which the City has collected exceeding what it was "entitled" to collect.

Plaintiff contends these rate overcharges are unlawful taxes in violation of the Prohibited Taxes by Cities and Villages Act, MCL 141.91; are unreasonable under the common law because they generate revenue far exceeding the City's actual cost of providing water and sewer service; and violate the City's Charter, Section 13.3, because they are not "just and reasonable." Plaintiff's Complaint consists of six counts, three counts for "unjust enrichment" and three counts for "assumpsit."

Plaintiff makes its Motion for Partial Summary Disposition only as to Counts I and II of the Complaint, which claim that the City's alleged overcharges constitute unlawful taxes in violation of the Michigan Prohibited Taxes by Cities and Villages Act, MCL 141.91. Defendant's Motion seeks dismissal of Plaintiff's Complaint in its entirety pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). This Court denied Defendant's previous Motion for Summary Disposition pursuant to subsection (C)(8), holding that Plaintiff's Complaint was sufficient as plead.

The City's Authority to Collect Utility Fees and Plaintiff's Claims

As a matter of legal background, the City is required to charge and collect the public water and sanitary sewer fees under State statutes, the City Charter, and the City Code. The Michigan Legislature mandates that the City establish rates to support its Utility Systems under Section 21(1) of the Revenue Bond Act (herein "RBA"). The RBA states as follows:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> > (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
> >
> > (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable.
> >
> > (c) The creation of any reserve for the bonds as required in the ordinance.

(d) Other expenditures and funds for the public improvement as the ordinance may require. [MCL 141.121(1)].

Consistent with MCL 141.121(1), Section 13.3 of the City Charter states, as a general authorization that:

> The Council shall have the power to fix, from time to time, such just and reasonable rates as may be deemed advisable for supplying inhabitants of the City and others with such public-utility services as the City may provide. There shall be no discrimination in such rates within any classification of users thereof nor shall free service be permitted, but higher rates may be charged for services outside the City limits.

Sections 34-145(b), 34-17, and 34-19 of the City Code further provide more specific legal authority for the City to establish sewer and water rates, as follows:

> Section 34-145(b):
>
> (b) The rates and charges established pursuant to subsection (a) shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance, and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance, and equipment replacement expenses.
>
> Section 34-17
>
> The water system shall be operated on a public utility rate basis, pursuant to the provisions of Act No. 94 of the Public Acts of Michigan of 1933 (MCL 141.101 et seq.), as amended. The system shall be operated under the management and direction of the city manager, subject to the overall general supervision and control of the council, and/or as a division of the sewer and water department as the council shall direct.
>
> Section 34-19
>
> The rates to be charged by the water system shall be established and charged in accordance with the schedule of rates set by resolution of the council.

According to the City, it has the authority to set water and sewer rates, as well as the authority to take any surplus rates and transfer them to another fund pursuant to the Michigan Department of Treasury's Uniform Charts of Accounts. Regarding water and sewer funds,

"[m]oney that accumulates as unrestricted net position of this fund may be transferred to another fund if authorized by the governing body." See Michigan Department of Treasury's Uniform Charts of Account, pp. 117, 130-132.

Plaintiff claims the City was unjustly enriched by its alleged violations of MCL 141.91, and Section 13.3 of the Charter, cited above. Critically, Plaintiff has not sought redress directly under MCL 141.91 or Section 13.3 of the Charter. Instead, he makes equitable claims: the City was unjustly enriched by the funds collected in violation of the statute and Charter.

Facts

Novi is 33 square miles in area and has approximately 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. This infrastructure dates back to the 1950s. According to Defendant, a significant portion of the system is nearing the end of its useful life. The cost to replace this infrastructure over the years will be approximately $900 million.

The City receives drinking water from the Great Lakes Water Authority (GLWA). The City's sanitary system is split, and discharges 2/3 of its sanitary sewage to Wayne County as part of the Rouge Valley Sewage Disposal System (RVSDS). This arrangement involves an agreement between Wayne County and Oakland County on behalf of the City of Novi, which is granted a specified capacity to discharge waste within the Wayne County system. The remaining 1/3 of the waste is serviced directly through the Oakland County Water Resource Commissioner (WRC). The City pays for the right to discharge its sewage in the Wayne County and Oakland County systems.

Novi charges its customers fees to cover the cost of maintaining the sewage system and disposing of the waste (herein "rates"). The rates are based upon metered use of the water. Critically, the City also charges "connection fees" to new property owners that join the systems. Therefore, the City's water and sewer fund is made up of rates charged to current property owners as well as connection fees. Plaintiff's Complaint does not challenge the connection fees.

The City sets its rates on an annual basis to ensure 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 the Great Lakes Water Authority, Wayne County, and Oakland County for their services, but an annual amount that the City anticipates will cover maintenance, repair, rehabilitation, and replacement expenses.

Every year the City's Finance Department gathers information regarding the City's anticipated costs for the water and sewer system. The Finance Director and City Manager then jointly make a recommendation to the City Council as to the rate cost. The City Council then reviews and makes the decision on setting the water and sewer rates for the year. This process is guided by various state and local laws, outlined above, that require the City to charge rates sufficient to cover the costs of providing the water and sewer services, including the RBA, the City Charter, and the City Ordinance.

The City attempts to keep the rates as low as possible. The City's utility rate expert, Eric Rothstein, stated as follows in his report: "even at their highest levels, [the rates] 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." 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 can 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." See City's Brief at 3.

The Retention Facility

As stated above, Plaintiff's Motion concerns only Counts I and II of his Complaint. Specifically, this Motion seeks a determination that the portion of the charges that the City imposed on its water and sewer customers between 2015-2019, which generated revenues that the City used to cash-finance a new sewer facility (herein the "Retention Facility"), constituted unlawful taxes that were imposed in violation of MCL 141.91. The Retention Facility costs exceeded $10 million.

As mentioned above, the City sends its sanitary sewage to Wayne County under an agreement between Wayne County and Oakland County, originally made in 1962, involving the RVSDS (herein "the RVSDS Contract"). Following an amendment to the RVSDS Contract in 1988, the City's authorized sanitary sewage capacity was set at 20.48 cfs. As the City 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 this excess sewage was a violation of the RVSDS Contract and 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.

The City and Oakland County began planning and construction of the Retention Facility to address these capacity issues. On January 23, 2018, the engineering firm Hubbell, Roth & Clark (HRC) sent a report to the City to address the current excess sewage. The HRC report recommended a storage facility of a minimum of .33 million gallon capacity to handle the excess sewage. According to the report, to address future capacity needs, the Retention Facility would need to eventually hold .48 million gallons of sewage and could potentially require .50 million gallons, depending on the City's growth.

The City Council authorized the project on June 3, 2019 and signed an agreement with Oakland County shortly thereafter. The project cost $10 million, paid by the water and sewer fund. When completed, the Retention Facility will belong to and be operated by Oakland County.

According to Plaintiff, the City's use of water and sewer rates to finance the Retention Facility was unlawful because it was designed to accommodate significant future expansion of the City's sewer system. Asking current water and sewer customers to finance a project which will benefit future users of the system who have not been required to pay for the benefit is, according to Plaintiff, a clear violation of the tax prohibitions of *Bolt v City of Lansing*, 459 Mich 152 (1998).

The Class Period begins on July 1, 2015. As of June 30, 2015, the City's water and sewer fund had approximately $56 million in unrestricted cash and investments. Notwithstanding, the City planned to keep increasing its cash reserves through at least June of 2019. The City's budget for the fiscal year ending June 30, 2017 projected the revenues of the water and sewer fund would exceed its expenses for the next three fiscal years. On June 30, 2017, the City had $63.9 million in unrestricted cash and investments in the water and sewer fund. On June 30, 2018, the City's water and sewer fund had reached $66.5 million in cash. By June 30, 2019, the Fund accumulated a total of $69 million in cash and investments. Plaintiff argues this $11 million accumulation of cash in just three years corresponded to the exact budgeted cost of the Retention Facility.

According to Plaintiff, as part of its effort to "spend down" its cash reserves, the City paid at least $10 million in cash up-front for the Retention Facility. According to the City's engineer, the Retention Facility was designed to accommodate future sewer capacity, which is required by the RVSDS Contract. The Contract states, "It is understood and agreed by the parties hereto that

the Project is to serve the Municipality and not the individual property owners and users thereof, unless by special arrangement between the County Agency and the Municipality."

The City's Cash Reserves

Between June of 2019 and the date of this Motion, the City's cash reserves have fluctuated between 44 million and 69 million. As of the date of the Motion, the City has $44 million in reserve cash and investments, but expects that over the next two years it will need $18 millionfor necessary and planned projects for the water and sewer system, as well as a looming expenditure related to capital improvements to the Wayne County system, totaling approximately $2-7 million. Additionally, because of the age of the system, the City expects that it will have to expend approximately $40 million to replace asbestos in the pipes. Additional planned capital improvement expenditures will cost approximately $38 million. The City's cash reserves are made up in part by approximately $12 million in connection fees. Again, Plaintiff's Complaint does not challenge the connection fees.

According to the City, each year from 2015 through the date of this Motion, the rates failed to cover the City's cost of providing water and sewer services; therefore, Plaintiff's view of its "cash hordes" is simply a misunderstanding of what the City refers to as "rollover" rates, i.e., cash earmarked from the previous fiscal year for projects which were not completed on time.

Plaintiff claims the City misrepresents the facts. According to Plaintiff, the City intentionally accumulated over $11 million between 2016-2019 despite knowledge that its future rates should be "cash neutral," i.e., not generate additional cash reserves, and now simply argues that this excess cash was earmarked for future projects. According to Plaintiff, the City created this defense in response to this litigation.

In support of his claim of "unreasonableness," Plaintiff notes that the City's 2017 water and sewer fund had so much extra cash it was able to extend a $17 million line of credit to the City's Capital Improvement Fund[1]. Plaintiff argues that the water and sewer budget for the fiscal years beginning July 1, 2015 and ending June 30, 2021, as formally approved by the City Council, contemplated just $9.8 million in total capital improvement expenditures over the span of those six years. This averages out to about $1.6 million per year. Plaintiff contends that all the projects were designed to enhance or extend the water and sewer system instead of replacing aging infrastructure.

[1] The Capital Improvement Fund is a separate City fund tasked with financing capital improvements unrelated to the City's water and sewer system.

Plaintiff also points to a 2016 Memorandum prepared by the City's Finance Director, Carl Johnson. In the 2016 Memorandum, Johnson stated that the City's cash reserves "appear sufficient" and that "future rates are being set to maintain neutral cash flow." Plaintiff contends that contrary to the June 2016 Memorandum, the City did not adopt budgets that would set the rates at a "neutral cash flow" level in the ensuing fiscal years. According to Plaintiff, the City's budget inexplicably planned for a "massive additional accumulation of unnecessary cash." See Plaintiff's Brief at 8. The City's budget for the fiscal year ending June 30, 2017 projected water and sewer revenues would exceed its expenses by 1) $5,729,340 in the fiscal year ending June 30, 2017, 2) $4,288,919 in the fiscal year ending June 30, 2018, and 3) $4,102,752 in the fiscal year ending June 30, 2019. This totals an additional $13 million in cash, which, according to Plaintiff, belies the Financial Director's claims that it would run as a "neutral cash flow."

Plaintiff also argues that during the 2016 fiscal year, where the water and sewer fund allegedly had a deficit of $700k, the City increased its cash reserves from $56 million to $58.5 million. By June 30, 2017, Plaintiff argues that the City had $63.9 million in unrestricted cash and investments such that it decided to establish a $17 million line of credit for the benefit of another City fund—the Capital Improvement Fund—to finance capital improvements unrelated to the water and sewer system. The resolution authorizing these advances contemplated that the Capital Improvement Fund may take up to ten years to repay the advances. Plaintiff points to Johnson's deposition, wherein he testified that the $17 million loaned to the Capital Improvement Fund were "not immediately needed by the water and sewer fund to support its operations." The City Council's Resolution, in allowing this line of credit, required full repayment within 90 days if needed by the water and sewer fund at any time for system improvement projects, emergencies, etc.

Plaintiff supports his claims of unreasonableness through an expert, John Damico. Mr. Damico found, "during the period from July 1, 2015 through June 30, 2020, the City's Rates have been excessive primarily because they have been set at a level that allowed the City to accumulate and maintain inappropriate, excessive, unnecessary cash reserves as compared to industry standards, guidelines, and accepted practices and the City's own needs."

I. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Plaintiff's claims are all equitable in nature. He claims the City was unjustly enriched by the retention of excess funds, and the use of water and sewer funds to finance the Retention Facility violates MCL 141.91. Plaintiff relies on the holding in *Bolt v Lansing*, 459 Mich 152 (1998), despite not bringing a Headlee Claim. For the reasons set forth below, the Court denies Plaintiff's Motion.

According to the Court of Appeals, "water and sewer charges are not always user fees" and such charges must be measured against the "relevant criteria for determining whether a charge is a fee or a tax." *Shaw v City of Dearborn*, 329 Mich App 640 (2019). Whether a disputed charge is a "user fee" or a tax is a question of law for the Court. *Gorney v Madison Heights*, 211 Mich App 265, 267 (1995). According to Plaintiff, the revenues the City received from its water and sewer customers, which it used to cash-finance the Retention Facility, constituted "taxes" as a matter of law, and because they are not ad valorem property taxes and were first imposed after January 1, 1964, these charges violate MCL 141.91.

The Michigan Supreme Court held, "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, supra, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161. A true user fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham v Township of Kochville*, 236 Mich App 141, 151 (1999).

The *Bolt* Court, in enforcing the Headlee Amendment, identified "three primary criteria to be considered when distinguishing between a fee and a tax." Specifically:

1) A user fee must serve a regulatory purpose other than a revenue-raising purpose;

2) User fees must be proportionate to the necessary costs of the service; and

3) Payment of the fee is voluntary. [*Bolt*, supra, 459 Mich at 161-62].

"These criteria [in *Bolt*] are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665 (2005).

According to Plaintiff, *Bolt* rejected the idea that charges for sanitary sewers are "always user fees." *Id.* at 162. Instead, the Court held that sewerage can properly be viewed "as a utility service for which usage-based charges are permissible, and not as a disguised tax," only where "the charge for ... sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component." *Id.* at 164.

The court in *Shaw*, supra, held that charges which "force current ratepayers to finance major infrastructure projects that will last decades and benefit future ratepayers" are considered unlawful taxes. *Shaw* held:

> Voters approved the Headlee Amendment to ensure that local taxpayers would have ultimate control over spending on local public works. The purpose of the amendment would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." [*Shaw*, supra 329 Mich App at 643.].

While the Supreme Court in *Bolt* recognized that sewer rates could include a "capital investment component," the Court held that it was impermissible to impose charges to finance capital improvements that would "enable the city to fully recoup its investment, in a period significantly shorter than the actual useful service life of the particular public improvement." *Bolt*, supra, at 164.

In Response, the City argues that the Court should not even reach the tax v. fee analysis as outlined in *Bolt* because Plaintiff failed to first address the reasonableness of the City's water and sewer rates. Count I of Plaintiff's Complaint is titled "Unjust Enrichment—Unreasonable Water and Sewer Rates." Count II of Plaintiff's Complaint is titled "Unjust Enrichment—Violation of MCL 141.91." Plaintiff brought common law equity claims; he did not bring Headlee claims. Plaintiff completely ignores this, and his brief is devoid of any legal argument related to unjust enrichment.

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 (1989). The reason for this is because "courts 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*, supra, at 414.

Because municipal utility rates are presumptively reasonable, "the 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 (2015). "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." *Id.* at 595. A prospective plaintiff must identify "what amount, if any, of the water and sewer rate account[s] for expenses unrelated to water and sewer." *Id.*

According to the City, Plaintiff singled out the fees used for the Retention Facility but has not explained what any of the rates are or whether they are objectively unreasonable. Moreover, Plaintiff is using MCL 141.91 as a "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 case to this effect—that the *Bolt* test would apply under common law to a claim under MCL 141.91.

The City argues, and the Court agrees, that the Court in *Youmans v Bloomfield Township*, 336 Mich App 161 (January 7, 2021) rejected this argument. The *Youmans* Court held:

> 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." 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." 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. [*Id.* (internal citations omitted)].

The Court of Appeals, more recently in *Brunet v City of Rochester Hills*, Unpublished Per Curiam Opinion of the Court of Appeals, December 2, 2021 (Docket No. 354110), held that before a plaintiff can start attacking specific expenditures, he must first show that the municipality's rates 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].

Plaintiff failed to first show that the City's water and sewer rates were unreasonable, as required by *Youmans*, supra. Therefore, the Court does not need to reach the *Bolt* analysis

The City argues that even in applying the *Bolt* analysis, the Motion should be denied. The Court agrees. The factual situation in *Bolt* is distinguishable from the case at bar. The fee that the City of Lansing had imposed in *Bolt* was an annual fee to implement a stormwater separation program for the 25% of the city that did not already have it storm sewers separated from its sanitary sewers. This separation program was to cost $176 million over a 30-year period of implementation. The charge in *Bolt* was therefore primarily intended as a capital charge. The *Bolt* Court held, "A major portion of this cost (approximately 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*, supra at 163. Here, the City has only had approximately 4%-12% in "net revenue" i.e., revenue left over after usage cost, in any given year during the class period. This is a fraction of the 63% at issue in *Bolt*.

In *Bolt*, the city was funding a specific capital improvement, using a delineated charge, and was doing so for a specific period of 30 years. Here, Plaintiff complains that the City used its "net revenue" (described above) to fund the Retention Facility. Plaintiff's argument that there is a "charge" specifically for the Retention Facility "embedded" in the City's usage fees fails. In *Shaw*, supra, "[p]laintiff 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." *Shaw*, supra.

Conclusion

In sum, the Court finds that Plaintiff has not made the requisite showing that the City's rate charges were unreasonable. Plaintiff did not bring a Headlee claim, and this case is factually distinguishable from the situation in *Bolt*, as explained above. Plaintiff's Motion is denied.

II. THE CITY'S MOTION FOR SUMMARY DISPOSITION

The City's Motion seeks dismissal of Plaintiff's Complaint in its entirety pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) because Plaintiff failed to establish a fact issue as to the reasonableness of the City's water and sewer rates.

According to Plaintiff, the City purposely accumulated $69 million in its water and sewer fund as of July 2019 through years of inflated usage fees and either did not intend to spend those funds at all, or intended to spend them on future capital improvements to the system, a use that would—according to Plaintiff—be legally impermissible.

Again, Plaintiff does not bring Headlee claims but makes his claims under equitable theories of unjust enrichment and assumpsit. Unjust enrichment claims 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 (2006). Assumpsit is a remedy "sounding in unjust enrichment." *Woods v Ayres*, 39 Mich 345, 348-49 (1878). Like unjust enrichment, assumpsit involves the recovery of money invalidly collected. *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704 (1970).

The Michigan Supreme Court has also instructed courts to essentially stay out of complex analyses of ratemaking, "[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 v Detroit*, 433 Mich 414, 432-33 (1989). The Court held, "the rate-making authority of a municipal entity is expressly reserved to the legislative body given the power to set rates under the municipal charter." *Id.* at 429-30. The authority for the City's ratemaking is cited above. See MCL 141.121(1), Section 13.3 of the City Charter, and Sections 34-145(b), 34-17, and 34-19 of the City Code.

The Michigan Court of Appeals has held, "[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 (2015). The *Trahey* Court further stated, "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." *Id.* at 595.

Plaintiff's Complaint "never tells the Court what any of the City's rates actually are." See the City's Brief at 8. Plaintiff does not support how the rates themselves are objectively unreasonable, choosing instead to point to the size of the City's cash reserves alone. During oral argument, Plaintiff's counsel was unable to articulate how the City's rates are unreasonable.

Because Plaintiff's claims arise from unjust enrichment or assumpsit, Plaintiff must first establish that the rates themselves are unreasonable and overcome the presumption of reasonableness outlined in *Trahey*, supra. See *Youmans v Bloomfield Township*, 336 Mich App 161 (2021). The *Youmans* Court held:

> 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." 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." 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. [*Id.* at 218-19 (internal citations omitted)].

The *Youmans* Court dismissed the plaintiff's equitable claim that the city's working capital reserve, i.e., excess cash, was excessive and unreasonable because the plaintiff did not first prove that the rates themselves were unreasonable. The Court of Appeals in *Brunet v City of Rochester Hills*, unpublished per curiam opinion of the Court of Appeals, December 2, 2021 (Docket No. 354110) stated as follows:

> [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 actions 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 n 12].

Here, Plaintiff's expert, Mr. Damico, opined as to how the City's cash reserves are too high. However, he had no opinion whatsoever about whether the City's usage rates were themselves excessive. He even admitted he did not know what the City's usage rates were when he issued his report.

In Response, Plaintiff cites the Court's January 2022 Opinion denying the City's (C)(8) Motion. Plaintiff selectively quotes the Opinion, wherein the Court stated that to sufficiently plead an unjust enrichment claim, a plaintiff need only allege that the municipality's rates are unreasonable. This Court denied the City's (C)(8) Motion because a (C)(8) Motion is based on the pleadings alone. As plead, Plaintiff's claims survive a (C)(8) Motion. However, to survive a (C)(10) Motion, Plaintiff must provide at least some documentary evidence giving rise to a genuine issue of material fact as to whether the City's rates are unreasonable.

Plaintiff stands firm in his circular logic: the City's rates are unreasonable because the City has a large cash reserve. Plaintiff provides no evidence to suggest that possessing a cash reserve is unreasonable or unlawful.

The Court of Appeals in five recent cases rejected identical arguments, i.e., that the offending city's rates are unreasonable because the municipality had a large cash reserve: See *Youmans*, supra; *Brunet*, supra; *Shaw v Dearborn*, 239 Mich App 640 (2019); *Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, January 29, 2019 (Docket No. 339306); and *Deerhurst v Westland*, unpublished per curiam opinion of the Court of Appeals, January 29, 2019 (Docket No. 339143).

In *Bohn*, the Court of Appeals upheld the legality of the defendant city's capital reserve fund, which it used to fund future "renewal and replacements" of its utilities:

> ...the size of the 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. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The 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.
>
> ...

> Instead, plaintiffs contend that the City must 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. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There was also testimony that the City's reserves are insufficient to meet its infrastructure renewal needs.

The Court of Appeals in *Deerhurst*, supra, also found that a city's reserve fund for the purpose of "future unspecified infrastructure improvements" was reasonable. The *Deerhurst* Court confirmed that maintaining a capital reserve for these future purposes is commonly used "to provide financial stability" and that the use of rate revenue to maintain reserve levels as "a reasonable ratemaking practice." *Id.*

In *Brunet*, the Court addressed Plaintiff's argument, made in his Motion for Partial Summary Disposition, i.e., a municipality cannot use fees collected from current ratepayers to fund future capital improvements, citing *Wolgamood v Village of Constatine*, 302 Mich 384 (1942) and *Bolt v Lansing*, 459 Mich 152 (1998). The Court concluded this argument "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 to pay cash, as opposed to incurring bonded indebtedness, "for future capital improvements to the utility." *Brunet*, supra citing *City of Detroit v City of Highland Park*, 326 Mich 78 (1949).

In *Shaw v Dearborn*, supra, the trial court dismissed the plaintiff's complaint in part because he selectively challenged "components" of the defendant city's rates as unreasonable and/or unlawful taxes. The Court of Appeals affirmed. The Court held, "...it 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.*

Plaintiff has not met his burden under the above-cited cases to establish that the City's rates are unreasonable. His expert report merely states that because the City has a large cash reserve, its rates must be unreasonable. Under the above-cited cases, this is not enough to win the day. Plaintiff brought equitable claims—unjust enrichment and assumpsit. The first element of an unjust enrichment claim requires a showing that the defendant obtained a "benefit" from the plaintiff. *Morris Pumps*, supra, at 195. Plaintiff has not demonstrated that the City reaps a benefit from the temporary period during which it possesses a cash reserve while it undertakes the process of identifying, evaluating, planning for, engineering, designing, bidding, and completing

improvements. Apart from the $17 million line of credit loaned in 2017, Plaintiff does not provide one shred of evidence that the City used the funds for something which benefitted itself over Plaintiff. The City's cash reserve fluctuates between $44-69 million. The reserve was used for sewer improvement projects. Finally, Plaintiff has not provided any evidence that the $17 million line of credit to the Capital Improvement Fund was improper[2] or unlawful.

Conclusion

Plaintiff failed to establish that the City's rates were unreasonable. Plaintiff failed to establish that the City was unjustly enriched by the surplus funds, or that the City's accumulation of the funds to maintain the sewage system is unlawful in any way. For these reasons, the Court grants the City's Motion pursuant to MCR 2.116(C)(10).

This is a final order and closes the case.

IT IS SO ORDERED.

NANCI J. GRANT, Circuit Court Judge

[2]The Michigan Department of Treasury specifically authorizes such transfers by a City Utility System "enterprise fund." The Michigan Department of Treasury Uniform Charts of Accounts states as follows, "Money that accumulates as unrestricted net position of this fund may be transferred to another fund if authorized by the governing body." Additionally, MCL 123.391 also allows municipalities owning a public utility to make "contributions from the operating 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."