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STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES HEOS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff/Appellant,

v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellee.

Supreme Court Case No. 165763

Court of Appeals Case No: 361138
Ingham County Circuit Court Case No. 20-199-CZ
Hon. Wanda M. Stokes

Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff/Appellant and the Class

Andrew Abood (P43366)
Abood Law Firm
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900
Counsel for Plaintiff/Appellant and the Class

Charles E. Barbieri (P31793)
Michael Homier (P60318)
Brandon M. H. Schumacher (P82930)
Foster Swift Collins & Smith, PC
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant/Appellee

PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

The City of East Lansing (the "City") imposes a "Franchise Fee" on citizens who receive electric service in the City from the Lansing Board of Water and Light ("LBWL"). This certified class action alleges that the Franchise Fee is an unlawful tax that violates the Headlee Amendment to the Michigan Constitution and the Prohibited Taxes By Cities and Villages Act, MCL 141.91.

The Circuit Court held that the Franchise Fees were unlawful taxes and that Plaintiff's claims were not barred by applicable statutes of limitation.

The Court of Appeals did not disturb the Circuit Court's finding that the Fees were unlawful taxes but held that the tax-based claims of Plaintiff and the Class were all barred by the one-year statute applicable to Headlee Amendment claims because this lawsuit was not filed within one year of the City's enactment of the ordinance authorizing the Fees.

Plaintiff filed a timely Application for Leave to Appeal in this Court. On April 25, 2024, this Court entered an Order (Exhibit A, hereto) granting oral argument on the Application and requiring the parties to file supplemental briefs addressing the following questions and issues:

1. "[T]he criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer;"

2. "[W]hether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility;"

3. "[I]f so, what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility;"

4. "[W]hat authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91;" and

5. "[W]hether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations."

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STATEMENT OF FACTS

This is a certified class action on behalf of thousands of persons and entities in the City of East Lansing (the "City") challenging the so-called "Franchise Fees" the City imposes on people who pay for electric service from the LBWL, a municipal utility owned by the City of Lansing, Michigan. It is undisputed that the Franchise Fees were imposed pursuant to a City ordinance without the approval of a majority of the City's voters. Thus, if the Franchise Fees are "taxes," as the Circuit Court ruled, they clearly violate Section 31 of the Headlee Amendment. If the Franchise Fees are "taxes," they also violate Michigan's Prohibited Taxes By Cities And Villages Act, MCL 141.91, which provides that "[e]xcept 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."

Since 2017, the City has extracted millions of dollars from the payers of the Franchise Fees, at a rate of about $1.4 million per year, and has used those revenues to finance general governmental functions that are wholly unrelated to the LBWL's franchise. Indeed, the City has used the vast bulk of the Franchise Fee revenues to partially satisfy its underfunded public pension obligation which, according to the City, "could bankrupt us unless we begin to address it now." *See* App.Ex.3 (Appx.83).[1]

While certain franchise fees imposed upon and collected from utility providers may be lawful under certain circumstances, the City's "franchise fees" are not "franchise fees" at all. A **lawful** franchise fee is one where (1) the legal incidence of the fee falls upon the **utility** and (2) the revenues are utilized to pay the costs a municipality incurs as a result of the utility's use of the municipality's infrastructure. **Here, however, as the Circuit Court properly found, the legal incidence of the tax**

[1] Exhibits to Plaintiff's Application for Leave to Appeal to this Court, filed on June 15, 2023, are cited as "Exhibit __ to App." and are designated with letters. Exhibits that were part of Plaintiff's Appendix on Appeal are cited as "App.Ex. __" and are designated with numbers as well as appendix page numbers per MCR 7.312(B)(1). Plaintiff's Appendix on Appeal was filed in the Court of Appeals on November 16, 2022 and is thus part of the record in this case. There are additional new exhibits to this Supplemental Brief, which are cited as "Exhibit _ hereto."

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falls upon East Lansing's electrical customers in the LBWL's service area (*i.e.*, Plaintiff and the Class)[2] **and the revenues are utilized for purposes wholly unrelated to the LBWL's use of the City's infrastructure**. Indeed, as the undisputed facts demonstrate, the Franchise Fees were intentionally designed by the City and the LBWL to be imposed directly on some (but not all) of the City's residents, with the LBWL acting as a mere collection agent—having no financial responsibility other than to "collect" the fees and "remit" them to the City. Simply, the City enacted an ordinance memorializing its contract with the LBWL requiring the LBWL to collect an additional, but unlawful, tax. The City did this even though it admits it "has no ability to impose Franchise Fees directly on its citizens." *See* App.Ex.4, City's Response to RFA No. 18 (Appx.106).

Because the 5% Franchise Fee is legally imposed on end-users, it cannot be a true "franchise fee." The electricity users upon whom the City imposes the Fee, and who actually pay it, do not receive the franchise, any franchise rights, or any property interests. The City's Ordinance grants those valuable rights and interests **only to the LBWL**, the electricity supplier. Because the Ordinance requires the LBWL's customers to pay for rights and interests the City has granted to LBWL, the charge does not constitute a "franchise fee."

To avoid redundancy in this Brief but still provide this Court with access to the full background, Plaintiff incorporates by reference the relevant facts, procedural history of the case, and the rulings of the Circuit Court and the Court of Appeals which are set forth in detail in the Statement of Facts in Plaintiff's Application for Leave to Appeal at pp. 1-13.

[2] The City is serviced by two electric utilities, the LBWL and Consumers Energy, each of which holds the right to provide exclusive service to some parts of the City. Citizens in the areas of the City serviced by Consumers Energy do not incur the Franchise Fees, because the City's Franchise Agreement with Consumers Energy does not require payment of any Franchise Fees. *See* App.Ex.4 (Appx.102), City's Response to RTA No. 2.

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ARGUMENT

I. INTRODUCTION

At this point, the relevant and material facts are either undisputed or indisputable.

1. In 2017, the City of East Lansing (the "City") needed another revenue stream to help meet its ever-increasing financial obligations. The City decided to impose a new and unapproved tax on its own citizens, but it knew (and conceded in this case) that it had no authority to impose such taxes directly. The City thought it could disguise the tax by nominally imposing a "franchise fee" on the LBWL, which the LBWL would recoup from citizens in the City who received their electric service from the LBWL.
2. The LBWL initially balked at the scheme to deputize the LBWL as the City's revenue agent, but finally agreed to participate, but only if (1) the franchise agreement explicitly provided that the LBWL was acting **only** as the City's "collection agent" and (2) the LBWL obtained an exclusive service territory in the City. This latter condition provided the primary *quid pro quo* for this unholy alliance.
3. The Franchise Agreement, **memorialized and implemented through a City ordinance**, had a variety of provisions making clear the LBWL's special and limited role, including provisions: (1) explicitly confirming that the LBWL had an obligation only to "collect and remit" the Fees to the City, (2) completely exonerating the LBWL from the obligation to remit the Fees if the Fees weren't actually collected from City residents and (3) granting the LBWL monetary compensation for its role in collecting the Fees.

The Circuit Court saw this transparent scheme for what it was: the City had enlisted the LBWL to impose the Franchise Fees on City residents in an effort to evade the Headlee tax limitations. In other words, by contracting with the LBWL to "collect and remit" the Franchise Fees, the City had indirectly imposed a tax that the City admitted it could not directly impose.

Notably, in reversing the Circuit Court, the Court of Appeals did **not** address, much less disturb, the Circuit Court's finding that the Franchise Fees were "taxes." Perhaps that is because the Franchise Fees bear all of the relevant characteristics of a tax, to wit: (1) as applied to Plaintiff and the Class, the Fees "regulate" nothing and therefore are motivated by a revenue-raising purpose, (2) the Fees are not proportionate to the costs of any "service" provided by the City to Plaintiff and the Class (but instead are based upon a fixed percentage of each end-user's electricity bill), and (3) payment of the Fees is essentially compulsory because electricity is a necessity and the LBWL is the exclusive provider of electric services to Plaintiff and the Class. *See* discussion in Plaintiff's Brief on Appeal in the Court

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of Appeals at pp. 26-37.

Unfortunately for the City's residents, however, the Court of Appeals found another way to deny them a refund of the unlawful Fees. The Court of Appeals held that Plaintiff's claims were barred by the statute of limitations applicable to Headlee actions, which provides that "(3) A taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued." MCL 600.308a (3). Moreover, the Court of Appeals held that the cause of action accrued when the City first enacted the Ordinance establishing the Franchise Fees, not when Plaintiff and the Class made any payment of the Franchise Fees because, said the Court of Appeals, the LBWL was the "taxpayer," not Plaintiff and the Class.

The Court of Appeals based its core ruling on this Court's decision in *Taxpayers Allied for Constitutional Taxation [TACT] v Wayne Co*, 450 Mich. 119, 125 (1995), as later interpreted by *Morgan v. City of Grand Rapids*, 267 Mich. App. 513, 705 N.W.2d 387 (2005). Once it decided Plaintiffs and the Class were not the actual "taxpayers," the Court of Appeals relegated them to mere members of the "public," who, under *TACT*, were required to bring their Headlee claim within one-year after the City approved the Franchise Agreement in May 2017—but this suit was not filed until April 2020. This is because, under *TACT*, "**the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public,** as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax." 450 Mich. at 124 n.7 (emphasis added). *See also Id.* ("**We note that where a plaintiff's only basis for invoking a court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public,** the right to bring suit expires one year after the alleged Headlee violation") (emphasis added).

The principle that *TACT* established was that any Michigan citizen can "butt in" and bring a Headlee challenge to a tax that does not affect him or her personally, but they must do so quickly and cannot expect a refund because they did not pay the taxes at issue. The people who actually pay the tax can challenge it at any time, and they can obtain a refund, but their refund under Headlee will be limited

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to the taxes they paid within one year of when they sue. By contrast, MCL 141.91 provides a six-year limitations period and thus a six-year "look back" for taxpayers. *See* discussion, *infra*, at Section VI.

The Court of Appeals misapplied the Headlee limitations period by holding that the LBWL, not Plaintiff and the Class, actually paid the Franchise Fee, such that Plaintiff and the Class were merely the "public." In reaching this decision, the Court inexplicably disregarded both the form and substance of the arrangement between the City and the LBWL. Make no mistake, the Court of Appeals' core ruling in this case, while nominally based upon the Headlee one-year statute of limitations, is really about standing. And the statute of limitations ruling is far broader and more pernicious than it might appear at first blush. By finding that the **LBWL** is legally obligated to pay the Fees, the Court of Appeals effectively ruled that the affected citizens cannot sue for a refund **regardless of the timing of the lawsuit**. This is because, if Plaintiffs and the Class are bringing claims "merely on behalf of the public," as opposed to persons who have been or is about to be subject to the tax," they cannot sue for refunds under any circumstances. *See TACT*, 450 Mich. at 12 n.7 ("Nor would such a plaintiff [suing merely on behalf of the public] suffer damages, the requisite for a damage action").

Under the Court of Appeals' reasoning, only the alleged middleman, here the LBWL, could even theoretically sue for a refund. But the LBWL obviously would not do so because (a) it expressly agreed to collect and remit the Fees in exchange for an exclusive territory in the City, and (b) it has suffered no financial loss by collecting and remitting the Fees to the City.

The end result is that, for the time being at least, the City's clever but pernicious municipal financing scheme not only has received judicial approval, but it also has been insulated **forever** from any challenge mounted by the affected citizens. The City and the LBWL have both received and continue to receive substantial financial benefits from this scheme. By using the LBWL as its collection agent and middleman, the City has indirectly garnered, and continues to garner, millions of dollars from its citizens that it could not procure directly. The LBWL maintains an exclusive service territory in the City, where it is free to charge the City's citizens unlimited rates without concern about having to meet

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its competition, Consumers Energy.[3] The only losers in this Headlee Amendment case are the citizens who Headlee was designed to protect.

Fortunately, the Court of Appeals' palpable error can be easily corrected by applying prior published precedents instructing the lower courts how to identify the "real" taxpayers. Indeed, the Michigan courts have long recognized that "**[o]ne may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**." *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (emphasis added); *see also Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) and other authorities discussed in Section II, *infra*.

Moreover, it is commonly understood that a "collection agent" is not itself obligated to pay the underlying debt but is instead tasked with collecting the debt on behalf of its principal. As this Court has observed, "[a]s long as there have been debts, there have been people tasked with collecting them." *Badeen v. PAR, Inc.,* 496 Mich. 75, 853 N.W.2d 303 (2014). There is not a single provision of the Franchise Agreement that even remotely suggests that the LBWL is legally obligated to pay the Franchise Fees without regard to its ability to collect the Fees from its customers.

This Court's April 25, 2024 Order did not ask the parties to brief the issue of whether the Franchise Fees were taxes under the three-factor test of *Bolt v. City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). Instead, the Court ordered the parties to submit supplemental briefs addressing the following questions and issues:

- "[T]he criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer;"

[3] Unlike Consumers Energy and other public utilities, the rates and charges of municipal utilities like the LBWL are not subject to regulation by the Michigan Public Service Commission or any other regulatory agency. In this regard, MCL 460.6(1) states, "The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state **except a municipally owned utility**, the owner of a renewable resource power production facility as provided in [MCL 460.6d], and except as otherwise restricted by law." (Emphasis added.)

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- "[W]hether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility;"
- "[I]f so, what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility;"
- "[W]hat authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91;" and
- "[W]hether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations."

We address each of these questions and issues in Sections II through VI below.

II. PLAINTIFF AND THE CLASS – THE CUSTOMERS – ARE THE "TAXPAYERS" BECAUSE THEY BEAR THE "LEGAL INCIDENCE" OF THE "FRANCHISE FEES."

The Court's April 25, 2024 Order first requires the parties to identify "the criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer." As we will demonstrate below, the one and only criterion for this determination is whether the LBWL or the customers of its electric service – *i.e.,* Plaintiff and the Class – bear the "legal incidence" of the so-called "Franchise Fees." This is because, under *TACT*, "the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, **as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax**." 450 Mich. at 124 n.7 (emphasis added). Because the Plaintiff and the Class as a matter of law bear the "legal incidence" of the Franchise Fees, Plaintiff and the Class are the actual "taxpayers" who have been "subject to the tax" under Headlee and MCL 141.91.

A. THE UNDISPUTED FACTS RELEVANT TO THE DETERMINATION OF WHO BEARS THE LEGAL INCIDENCE OF THE FRANCHISE FEES

We begin with a summary of the evidence relevant to the "legal incidence" determination. In concluding that the Franchise Fees are imposed on the LBWL, the Court of Appeals failed to credit **undisputed** evidence that supported the Circuit Court's conclusion that the Fees were imposed upon end-users in the City:

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First, during the Franchise Agreement negotiations, the LBWL insisted that the Franchise Agreement be structured so that the end-users of LBWL's electric service had the legal responsibility to pay the Franchise Fees. *See* November 15, 2016 LBWL Board meeting minutes, App.Ex.12, (Appx.171):

> General Manager Peffley stated that there is a concern that this fee could be illegal and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the BWL would only be the collection agency for the City of E. Lansing. However, the BWL does not want to get in the middle of a law suit, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:

Second, consistent with the LBWL's dictates, the final Franchise Agreement has at least **six** separate provisions which make clear that the LBWL has no independent legal or contractual responsibility to pay the Franchise Fees, but rather is obliged only to collect the Fees on behalf of the City, to wit:

1. The LBWL's obligation with respect to the Franchise Fees is only to "collect and remit" the Fees to the City [App.Ex.14, Section 2 (Appx.186)];[4]
2. The City holds the LBWL harmless from any losses associated with the collection and remittance of the Franchise Fees [*Id.*];
3. The LBWL has no obligation to remit any Fees not collected from end-users [*Id.*];
4. "[T]o the extent the [LBWL] is precluded from collecting such franchise fees remittance to City will cease." [*Id.*]
5. The LBWL is required to include the Fees as a line item on its bills to end-users [*Id.*]; and
6. The City actually pays the LBWL a fee for collecting the Franchise Fees. [*Id.*, Section 14]

Third, in addition to the LBWL Board meeting minutes, the history of the Franchise Agreement negotiations makes clear that the "collect and remit" language was inserted at the behest of the LBWL to effectuate its demand that that it be a mere "collection agency for the City." Indeed, the Franchise

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[4] There is a fundamental difference between a Franchise Agreement imposing upon the LBWL the obligation to "pay" the Franchise Fees to a municipality, and the obligation to "collect and remit" such Fees. Indeed, the LBWL has several Franchise Agreements with other municipalities which expressly require the LBWL to "pay" Franchise Fees instead of imposing the obligation to "collect and remit" from end-users that is found in the Franchise Agreement in this case. None of these other Franchise Agreements contain the "collect and remit" language, nor do any of these require the Franchise Fees to be set forth as a line item on the utility bills or allow the LBWL to recover a fee for collecting the Franchise Fees on behalf of the municipalities. Each of these other Franchise Agreements were submitted to the Circuit Court as Exhibits 16, 17, and 18 to the Brief in Support of Plaintiff's Motion for Partial Summary Disposition.

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Agreement that ultimately was executed differed materially from the Franchise Agreement first proposed by the City.

On February 27, 2017, the City's outside counsel, Derk Beckerleg, sent a draft of the proposed Franchise Agreement to the LBWL. *See* Exhibit B, hereto. This draft did not have "collect and remit" language, but instead stated that "[d]uring the term of this Franchise to provide electricity and electric service to the defined service area in the City of East Lansing, the **Grantee shall pay** to the City of East Lansing … an annual franchise fee in the amount of five percent (5%) of the revenue excluding sales tax from the retail sale of electricity and electric service by the Grantee in the defined service area of the City of East Lansing." [emphasis added]. The draft also had none of the other provisions in the final version which further solidified the LBWL's role as a collection agent.[5]

On May 15, 2017, Brandi Ekren of the LBWL sent a revised draft to Beckerleg. *See* Exhibit C, hereto. This draft had the "collect and remit" language and several other provisions which demonstrate that the LBWL was a mere collection agent, including:

1. "Such fee will appear on the corresponding energy bills."
2. "The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee."
3. "However, to the extent the Grantee is precluded from collecting such franchise fees remittance to the City will cease."
4. "Grantor shall indemnify, hold harmless and defend the Grantee from any and all claims, losses or litigation which result from the Grantee's compliance with this Ordinance."
5. "The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the collection and remittance of the Franchise Fee described in Section 2."
6. "A BWL administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply."

[5] On March 15, 2017, following communications with the LBWL's outside counsel, Beckerleg sent another draft of the proposed Franchise Agreement to the LBWL. *See* Exhibit D hereto. This revised draft primarily eliminated provisions relating to the Michigan Public Service Commission ("PSC"), after the LBWL pointed out that it is not subject to the jurisdiction of the PSC. This draft also did not have the "collect and remit" language but instead said the LBWL "shall pay" the Franchise Fees.

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In order to effectuate their client's desires, the lawyers representing the LBWL apparently knew the law, because each of the above-referenced provisions was intended to confirm that the LBWL did **not** bear the "legal incidence" of the Franchise Fees. Indeed, the specific phrase "collect and remit" the LBWL lawyers insisted upon has been recognized as a term of art evidencing an intent to relegate the "collector and remitter" to a mere agent of the taxing authority. This special status of such collection agents was concisely described by the Court in *Couer D'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264 (D. Idaho 2002), *aff'd*, 384 F.3d 674 (9th Cir. 2004):

> A party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector. *Oklahoma Tax Comm'n*, 515 U.S. at 461-62, 115 S.Ct at 2222. **Under such a "collect and remit" scheme, the state enlists one party in a commercial transaction to collect the tax from the other party**. [224 F. Supp. 2d at 1269 (emphasis added)]

This further confirms that the "collect and remit" language was intended to create a materially different relationship between the City and LBWL than originally proposed.

B. Under Michigan Law, Plaintiff And Other End-Users Of The LBWL's Electric Services Bear The Legal Incidence Of The Fees Because The LBWL Is A Mere Collection Agent For The City.

Given the undisputed facts, the LBWL's status as a collection agent for the City demonstrates that Plaintiff and the Class are the actual taxpayers here for at least two reasons.

1. Under Agency Law, The LBWL Is The City.

First, the LBWL cannot bear the "legal incidence" of the Franchise Fees – *i.e.*, cannot be the "taxpayer" – because, under agency principles, the LBWL has a shared legal identity with the City for purposes of collecting and remitting the Fees. In other words, the LBWL as a matter of law **is** the City for those purposes.

An agency relationship arises when there is a manifestation by the principal that the agent may act on the principal's account. *Merretta v. Peach*, 195 Mich. App. 695, 697, 491 N.W.2d 278 (1992). There can be no question that the Franchise Agreement is a manifestation by the City that the LBWL act on the City's account in collecting and remitting the Franchise Fees, which creates a principal/agent

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relationship between the City and the LBWL.

This is dispositive of the "legal incidence" inquiry because, "the law creates a **practical identity** between a principal and his or her agent. *Potter v. McLeary*, 484 Mich. 397, 424, 774 N.W.2d 1 (2009) (quotation marks and citation omitted). That means the principal and agent legally are one and the same entity for purposes of their dealings with third parties. *See, e.g., Nippa v. Botsford Gen. Hosp.*, 257 Mich. App. 387, 392, 668 NW2d 628 (2003), (observing that "the law creates a **practical identity** between a principal and an agent," and, "by a legal fiction," a principal "is held to have done what its agents have done") (emphasis added).

In *Burton v. Burton*, 332 Mich. 326, 51 N.W.2d 297 (1952), this Court perfectly described the principal/agent relationship as follows:

> An agency is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. **He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do**. [332 Mich. at 337 (emphasis added)].

Stated simply, there is no "middleman" here. Because of their agency relationship, the City and the LBWL as a matter of law are legally combined as a single taxing entity. Absent a "middleman," there is only one possible group of "taxpayers" – the customers of the LBWL's electric services.

2. Regardless Of Its Agency Relationship With The LBWL, The City Imposes The Franchise Fees On The End-Users

Further, even if the LBWL and City did not share a legal identity, Michigan law is fully consistent with the "legal incidence" rule recognized in *Couer D'Alene Tribe, supra*. The Michigan courts hold that where a third party is required to collect the challenged charges from end-users and remit the charges to the government, the legal incidence of the charges falls on the end-users who incur the charges. For example, in *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998), the Court recognized that Michigan's use tax is legally imposed on consumers, even though the applicable statute imposed upon retailers the burden to collect and remit the tax to the state. In

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reaching this result, the Court observed:

> Contrary to the Department of Treasury's argument, however, § 7 suggests that there is no joint tax liability. Rather, § 7 specifically provides that the appropriate use taxpayer is the consumer. Indeed, the Supreme Court in *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959), recognized that, **although the seller is required to collect the use tax on behalf of the state, the ultimate burden of paying the tax is on the consumer or purchaser, which is the party exercising the privilege of use, storage, or consumption**. We believe that this is an important concept, because it represents one of the primary distinctions between the use tax and the sales tax, the legal incidence of which falls upon the seller only in the case of the sales tax. MCL 205.52; MSA 7.522. As the Court in *Lockwood, supra* at 527, explained:
>
> > As a practical proposition [the use tax and the sales tax] are assessed on different privileges, and the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. **The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage, or consumption, as the case may be. <u>One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him</u>**. [229 Mich. App. at 215-216 (emphasis added).]

There is a fundamental legal difference between (1) a situation where the government requires a service provider to collect a tax from its customers and remit it to the government and (2) a situation where the government imposes the tax on the service provider but allows the service provider to recoup the amount paid from its customers. This has long been the law in Michigan. *Compare Sims v. Firestone Tire & Rubber Co.*, 397 Mich. 469, 474, 245 N.W.2d 13 (1976) ("While retailers are considered to be the taxpayers, the law allows them to shift the economic burden of any tax levied to the shoulders of the consumers") *with Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (recognizing that Michigan's use tax is imposed on ultimate purchasers and that the sellers' duty to collect the tax does not make the sellers primarily liable for the tax).

Here, the Court of Appeals' finding that the Franchise Fees were an obligation of the LBWL was patently erroneous because the City was only entitled to Franchise Fees that the LBWL actually collected from end-users. This Court's decision in *World Book v. Revenue Division*, 459 Mich. 403, 590

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N.W.2d 293 (1999) is particularly instructive on this point. In *World Book*, a state statute (MCL 205.95(a)) requires sellers "with sufficient connection to Michigan" to "collect the [state's use] tax and remit it to the Department of the Treasury." 459 Mich. at 408. This Court held that the plaintiff, a bookseller, was not personally liable for use taxes it did not collect from end-users in Michigan. In reaching this conclusion, the Court first acknowledged the long-establish distinction between sales taxes (legally imposed on sellers) and use taxes (legally imposed on end-users):

> Defendant would have this Court interpret the Use Tax Act at MCL 205.99; MSA 7.555(9) as permitting defendant to assess the tax against a seller whenever the consumer does not pay it. It argues that the language of this section does not excuse the seller from collecting the use tax from consumers after the seller has reasonably attempted to do so. Essentially, defendant asks us to interpret the Use Tax Act in a way that requires a seller to become, without condition, its customers' use-tax payment guarantor. We decline to do so. We note first that the appropriate party to pay a use tax is the consumer, not the seller. Previously, in *Lockwood v. Comm'r of Revenue*, we recognized that the seller is required to collect the use tax on behalf of the state. However, the Legislature placed the ultimate burden of paying the tax on the consumer or purchaser, because it is the party exercising the privilege of use, storage, or consumption. MCL 205.97; MSA 7.555(7). We stated:
>
> > As a practical proposition [the use tax and the sales tax] are assessed on different privileges, and **the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage or consumption, as the case may be**. One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him. [459 Mich. at 415-416 (emphasis added) (quoting *Lockwood,* 357 Mich. at 527.]

Given plaintiff's role in this taxing scheme, the Court concluded that plaintiff only needed to act in a commercially reasonable manner in collecting the taxes, and could not be personally liable for any uncollected use taxes unless plaintiff acted "wrongfully." [459 Mich. at 416]

As in *World Book*, the fact that the LBWL has been tasked with collecting and remitting the Franchise Fees from end-users does not make the LBWL "primarily liable" for the Franchise Fees, as the Court of Appeals held. Instead, Plaintiff and the Class bear **both** the legal incidence and the

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economic burden of the Franchise Fees. Accordingly, the Court of Appeals' ruling, which is based on its finding that Plaintiff and the Class are not the actual "taxpayers," is clearly erroneous.

C. THE FOOTE ACT PRECLUDES A FINDING THAT THE FRANCHISE FEES ARE IMPOSED ON THE LBWL

The Court of Appeals held that Plaintiff's lacked standing to enforce the Foote Act, but this misses the point. The Foote Act is relevant because it confirms that the City was powerless to impose the Franchise Fees on the LBWL, and therefore the conclusion is inescapable that the Franchise Fees are imposed on the end-users of the LBWL's electric services. *See* discussion in Plaintiff's Application at § II (B) pp.24-26, which is incorporated by reference here.

D. UNDER FEDERAL LAW, THE REQUIREMENT THAT A MIDDLEMAN COLLECT AND REMIT THE FRANCHISE FEES AS A MATTER OF LAW DEMONSTRATES THAT END-USERS BEAR THE LEGAL INCIDENCE OF THE FRANCHISE FEES.

Independent of the Michigan authorities described above, federal case law provides additional guidance as to how to determine the party who bears the legal incidence of a tax under these circumstances. Those authorities further confirm the conclusion that the Franchise Fees here are imposed upon the customers of the LBWL's electric service.

1. A Mandatory Pass-Through Provision Is "Dispositive Language Of Legal Incidence"

The U.S. Government and Indian tribes are generally exempt from state taxation, but they are not exempt from charges imposed by providers of goods and services which merely pass-on the economic burden of taxes imposed on those providers. As a result, federal cases generally involve determining which party bears the "legal incidence" of the subject taxes in those situations.

In *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 2220, 132 L.Ed.2d 400 (1995) ("*Oklahoma Tax Comm'n*"), the Supreme Court considered a tribal challenge to Oklahoma's fuel excise tax. The tribe contended that Oklahoma's tax fell on the tribe, as retailer of gasoline at its on-reservation convenience stores. The state countered that its tax did not fall upon retailers (and therefore upon the tribe), but rather on the fuel distributors or fuel consumers. *See id.*

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The Supreme Court first recalled that, generally, a state may not levy a tax on an Indian tribe or its members for on-reservation activities. 515 U.S. at 458. In the Court's view, "[t]he initial and frequently dispositive question in Indian tax cases, therefore, is who bears the *legal incidence* of a tax." *Id.* (emphasis added). The Court specifically rejected a test that would focus on economic realities, finding that legal incidence provided a predictable and certain test for state taxing authorities. 515 U.S. at 459-60.

The Supreme Court recognized a per se rule that a mandatory 'pass through' provision requiring a tax to be passed on to the consumer is "dispositive language" of legal incidence." *See* 515 U.S. at 461 (emphasis added). But "[i]n the absence of such dispositive language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Id.* (quoting *Cal State Bd of Equalization v Chemehuevi Indian Tribe*, 474 US 9, 11; 106 S Ct 289; 88 L Ed 2d 9 (1985)(per curiam)).

Because the Oklahoma statute did not contain dispositive language, the Court analyzed several factors in concluding that the legal incidence of the fuel tax fell on the tribal retailers. First, the Court observed that the statutory language required the distributor to remit the tax due "on behalf of a licensed retailer." 515 U.S. at 461 (emphasis omitted). Second, the Court took into account the fact that the tax was not imposed on sales between distributors, but was imposed on sales from a distributor to a retailer. 515 U.S. at 461. Third, the Court noted the distributor's ability under the law to deduct any subsequently uncollected amount of tax previously paid. *Id.* And fourth, the fact that the distributor was able to retain a small portion of the tax as compensation for serving as the state's tax collector also pointed towards the determination that the legal incidence of the fuel tax fell on the tribal retailers. 515 U.S. at 462. In view of these circumstances, the Court determined that the distributor served as merely a "transmittal agent" for taxes imposed on the retailer. 515 U.S. at 462. The lack of any similar statutory language regarding the relationship between retailers and consumers, the Court concluded, meant that the tax was legally imposed on the retailer. *Id.*

Similarly, in *First Agric. Nat'l Bank of Berkshire Cty v. State Tax Comm'n*, 392 U.S. 339, 347, 88

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S.Ct. 2173, 20 L. Ed. 2d 1138 (1968), the Court held that a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser," because the text of the statute indisputably provides that the tax "must be passed on to the purchaser." *United States v Tax Comm of Miss*, 421 US 599; 95 S Ct 1872; 44 L Ed 2d 404 (1975) (where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser).

Here, the Franchise Agreement explicitly requires the LBWL to "collect and remit" the Franchise Fees and to list the Fees as a separate line item on its utility bills to end-users. These requirements constitute a clear declaration of legal incidence and a "mandatory 'pass through' provision" which are "dispositive" of legal incidence. *See Oklahoma Tax Comm'n,* 515 U.S. at 461. Moreover, under the Franchise Agreement, the LBWL is obligated to "remit" only what it "collects," and "collect" means "to gather or **exact from a number of persons** or sources." *See, e.g.,* Merriam Webster Dictionary (emphasis added) (defining the transitive verb "collect" and giving the following example: to "collect taxes.") This alone is dispositive of the "legal incidence" issue.

Even in the absence of this dispositive language, *Oklahoma Tax Comm'n* demonstrates that the legal incidence of the Franchise Fees falls on the end-users because the LBWL does not have to remit any "uncollected amount" and the LBWL is "able to retain a small portion of the tax as compensation for serving" as the City's tax collector.

2. Cases Addressing The Legal Incidence Of Utility Franchise Fees Recognize That End-Users Bear The Legal Incidence Of Such Fees If The Utility Is Required To Pass-Through The Fees To The End-Users.

Courts applying the federal Constitution's prohibition on state taxation of the federal government have used the same "legal incidence" analysis specifically with respect to so-called utility franchise fees and taxes. For example, in *U.S. v. Delaware*, 958 F.2d 555 (3d Cir. 1992), the Dover Air Force Base – a federal facility -- received electric service from a utility company. The State of Delaware

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required the utility to collect and remit a tax based on the revenues it received from its customers, including the federal government. The federal government sued the State alleging that it, and not the utility company, bore the legal incidence of the tax, so that the tax was an unconstitutional exercise of state taxation upon the federal government.

The Third Circuit first reiterated the long-standing Supreme Court rule that where the government "requires that a sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." 958 F.2d at 561. The Court then invalidated that tax on Dover Air Force Base because the state statute establishing the tax, like the Franchise Agreement here, expressly required the utility to pass-through the tax to its customers:

The Court bolstered its decision by relying on two circumstances also present here: (1) the "requirement" of "separate itemization [of the tax] on customer's bills," and (2) a provision of the Delaware statute that "provides that distributors can take credits against the tax owed for amounts billed to consumers but not collected." 958 F.2d at 562. *See also Id.* ("Thus, if the consumer does not pay the tax to the distributor, the distributor is not liable for the tax, which suggests that the consumer is expected to pay the tax in reality.")

The *U.S. v. Delaware* decision should be persuasive because the Franchise Agreement (1) requires the LBWL to "collect and remit" the Franchise Fees, (2) requires the LBWL to list the Franchise Fees as a separate line item on its bills to end-users, (3) imposes no liability on the LBWL for uncollected Fees, and (4) compensates the LBWL for the costs it incurs in collecting the Fees from end-users.

3. The Court Of Appeals' Misapplied Morgan v. City of Grand Rapids

Morgan v. City of Grand Rapids, 267 Mich. App. 513, 705 N.W.2d 387 (2005) is completely **consistent** with the foregoing principles, but the Court of Appeals misapplied *Morgan*. It is clear that *Morgan* did not authorize the Court of Appeals to conclude that the Franchise Fees are legally imposed

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on the LBWL. Notably, the franchise fee in *Morgan* was "specifically permitted" by the federal Cable Communications Policy Act, 47 USC 521, et seq. *Morgan*, 267 Mich. App. at 514-515. That governing federal statute makes absolutely clear that the authorized franchise fee is imposed on cable providers and not end-users of cable services:

> **(a) Payment under terms of franchise.** Subject to the limitation of subsection (b), **any cable operator may be required under the terms of any franchise to pay a franchise fee**. [47 USC 542(a) (emphasis added)].

Given these facts, *Morgan* held that cable companies were the parties that were legally obligated to pay the franchise fees, even though they ultimately passed-through those charges to their customers. The court noted, "when the tax obligation falls primarily on the retailer, 'retailers are considered to be the taxpayers. *Sims, supra* at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich. App. at 515.

Morgan also makes clear that Plaintiff and the Class in this case are the payers of the Franchise Fees imposed by the City:

> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, **but the inclusion of the charge on the bill was Comcast's action, not defendant's**. **Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff**. [267 Mich. App. at 516 (emphasis added)].

Under the Franchise Agreement, the City required the LBWL to include the Franchise Fees "**on the corresponding energy bills."** Franchise Agreement, Section 2. Thus, "inclusion of the charge on the bill" was a requirement of **the City**, as opposed to a unilateral act by the LBWL. In contrast to *Morgan*, the City's collection of the Franchise Fees here would not be a wrong against the LBWL because the City and the LBWL **expressly agreed** that the LBWL – as collection agent for the City – would collect and remit the Franchise Fees to the City. Thus, *Morgan* is completely inapposite and should not have informed the Court of Appeals' resolution of any issue in this case.

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In relying upon *Morgan*, the Court of Appeals purported to bolster its conclusion that Plaintiff and the Class were not the real taxpayers because "[i]f Plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff." But the Court's conclusion that the City has no recourse ignores the LBWL's power as a utility. If an end-user of the LBWL's electric service does not pay the LBWL all of its charges, including the separately-itemized Franchise Fee, the LBWL, as the City's collection agent, can discontinue providing electric services to the end-user. *See* LBWL Terms of Service (Exhibit E, hereto) at p. 7, 22 ; City Charter, § 5-206 (Exhibit F, hereto). The City's alleged inability to directly recover unpaid Franchise Fees from end-users is irrelevant because, by deputizing the LBWL as its collection agent, the City makes sure that it has "recourse" against customers who do not pay the Franchise Fees.

III. PLAINTIFF AND THE CLASS HAVE NO CAUSE OF ACTION AGAINST THE LBWL BASED ON THE LBWL'S MERE COLLECTION AND REMITTANCE OF THE FRANCHISE FEE.

In its April 25, 2024 Order, the Court asked the parties to address "whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility." Plaintiff is unsure whether the Court is asking the parties to address whether the fee in such circumstances should be considered a component of the utility's "rates," or whether a plaintiff can bring suit against the utility if a pass-through fee **is** included in the utility's "rates," or both. Plaintiff therefore will address both issues. For the reasons set forth below, the Franchise Fees are not properly considered part of the LBWL's utility "rates" and, because the LBWL acts as a mere collection agent for a disclosed principal – the City – customers of LBWL's electric services have no cause of action against the LBWL based upon its actions in collecting and remitting the Fees to the City.

A. THE FRANCHISE FEES ARE NOT PART OF THE LBWL'S "RATES"

First, the illegal Franchise Fees are not components of the LBWL's "rates" for at least two reasons: (1) the Fees do not cover expenses the LBWL incurs in providing electric service to end-users

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and (2) the Franchise Fees are not paid to LBWL in its capacity as a utility provider but are paid to the City through the LBWL in its capacity as collection agent. Each of these reasons is discussed below.

First, a utility rate is intended to recover a utility's "revenue requirements" a/k/a its "costs of service." The City concedes that its rates "are set on a cost of service basis." *See* Exhibit G hereto at p. 36. Therefore, the Franchise Fees here are in no way used to cover the actual costs the LBWL incurs to provide electric services to end-users. The LBWL merely collects the Franchise Fees and remits them to the City. Indeed, the LBWL's cost of service – its "revenue requirement" -- would be the same with or without the Franchise Fees.

The LBWL's Terms of Service (Exhibit E hereto) and Rate Schedules for electric service (Exhibit H hereto) make this clear. The LBWL itself defines its "Rates" as "[t]he unit prices as established by the BWL's rate-making body and the quantities to which they apply as specified in the Rate Schedule." Exhibit E hereto at p. 6. The LBWL's Rate Schedule for residential services, for example, confirms that the rates are comprised of a "basic service charges," "commodity charges," and "surcharges and riders as defined on a separate surcharge or rider schedule." Exhibit H at p. 11. None of these charges include the Franchise Fees.

Second, the Franchise Fees are not part of the LBWL's "rates" because the Franchise Fees are not revenues of the LBWL but instead are revenues of the City, which are merely collected by the LBWL. As discussed above, because the LBWL is an agent of the City, it is legally indistinguishable from the City. See *Burton v. Burton*, 332 Mich. 326, 51 N.W.2d 297 (1952) (observing that an agent "**is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do**." [332 Mich. at 337 (emphasis added).] Therefore, the Franchise Fees never became part of the LBWL's rates because the LBWL **is** the City in collecting and remitting the Fees.

Further, it is well-established that a collection agent does not obtain ownership of collected funds, which, by operation of law, become the property of the principal at the moment they are collected. *See, e.g., Malarney v. Michigan Mut. Auto Ins. Co.*, 216 Mich. 649, 651, 184 N.W. 742 (1921)

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("Strictly speaking, the relationship of Tripp to plaintiff with respect to the insurance money was not debtor and creditor. It was more nearly akin to that of principal and agent. Tripp had collected the money which belonged to plaintiff. **When received by him, it was plaintiff's money**. It was his duty to turn it over to him without any demand therefor") (emphasis added). Indeed, this Court has long held that an agent who fails to turn over a principal's money under such circumstances is liable for conversion. *See, e.g., Tanner v. Page*, 106 Mich. 155, 160, 63 N.W. 993 (1895) ("when a person assents to act as trustee in receiving money for the benefit of another, he becomes liable to an action for money had and received, if he fails to pay it over according to his duty."); *Warren Tool Co. v. Stevenson*, 11 Mich. App. 274, 299, 161 N.W.2d 133 (1967) (holding that a defendant who "is authorized to collect a note and remit the proceeds may be sued for conversion if he collects but does not remit the proceeds.")

These authorities further demonstrate that the Franchise Fees are not rate revenue earned by the LBWL, but rather constitute the property of the City from the moment they are collected.

B. Because (1) The Franchise Fees Are Not A Part Of The LBWL's Rates, (2) Plaintiff and the Class Bear The Legal Incidence Of The Fees, And (3) The LBWL Acts As A Mere Collection Agent For The City, Plaintiff And The Class Have No Cause Of Action Against The LBWL

A principal has the right to control the conduct of his agent with respect to the matters entrusted to him. *St. Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n,* 458 Mich. 540, 558; 581 N.W.2d 707 (1998). As a result, it is generally understood that "an agent may work on behalf of a principal within the scope of the agency agreement as if the agent had stepped into the shoes of the principal without incurring any personal liability." *PM One, Ltd v Dep't of Treasury,* 240 Mich. App. 255, 266-267, 611 N.W.2d 318 (2000). Under this line of cases, an agent may be held personally liable when he acts only on his own behalf rather than on behalf of the principal, *Baranowski v. Strating*, 72 Mich. App. 548, 558-559, 250 N.W.2d 744 (1976), or when he personally engages in tortious conduct on

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behalf of the principal. *Hartman & Eichhorn Bldg. Co., Inc. v. Dailey*, 266 Mich. App. 545, 549, 701 N.W.2d 749 (2005). Neither of these exceptions to nonliability is present here.[6]

As the Court of Appeals observed in *Huizenga v. Withey Sheppard Assoc.,* 15 Mich. App. 628, 633; 167 N.W.2d 120 (1969):

> It is a well-accepted rule that where the principal is disclosed and the agent is known to be acting as such, the agent cannot be made personally liable unless he agreed to become personally liable. 1 Michigan Law & Practice, Agency, § 79; *Hall v. Encyclopedia Britannica* (1949), 325 Mich 35. *Also see Bailey v. Cornell,* (1877), 66 Mich. 107. We find no such agreement here.
>
> Further, **in the absence of an actionable fraud, an agent of a disclosed principal is not liable in a transaction with a third party**. *Van Wie v. Fidelity Trust Co*., (1931), 254 Mich. 108. Plaintiffs herein have at no time indicated any claim of fraud. [emphasis added].

Here, the LBWL did not agree to become "personally liable," did not act "only on its own behalf," and did not commit "actionable fraud." Instead, in collecting and remitting the Franchise Fees, the LBWL acted on behalf of the principal (the City) "within the scope of the agency agreement." Therefore, the LBWL has no liability to Plaintiff and the Class.

For the reasons discussed below, however, the Court need not definitively resolve this issue because Plaintiff and the Class retain the ability to sue the City for a refund of the Franchise Fees even if they also could sue the LBWL.

C. In Any Event, Plaintiff's Claims Against The City Are Unaffected By Any Claims Plaintiff Could Assert Against The LBWL.

The Court's April 25, 2024 Order further requires the parties to address the following question: If "a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility," "what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid

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[6] Even if the LBWL personally engaged in the collection and remittance of illegal taxes, illegal exactions by or on behalf of the government are not torts, and equitable actions seeking return of such exactions are not based in tort. *See* authorities discussed *infra* at Section V.B.

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to the utility." For the reasons discussed above, Plaintiff believes that no answer to this question is necessary because Plaintiff cannot properly assert claims against the LBWL. But to the extent the Court concludes that Plaintiff could have sued the LBWL, the availability of that course of action has no legal impact on Plaintiff's claims against the City.

The principal/agent arrangement between the LBWL and the City as it relates to the Franchise Fees means that there are no circumstances under which Plaintiff and the Class would be precluded from suing the City in a case challenging these particular "Franchise Fees." This is true for at least three reasons:

First, the City is the party that actually imposes the Franchise Fees and, as such, it has primary liability to the end-users of the LBWL's electric service who bear the "legal incidence" of the Fees and pay the Fees. *See* discussion, *supra*, at Section II.

Second, if Plaintiffs and the Class had viable claims against the LBWL, those claims necessarily would be based on the LBWL's authorized actions as the City's agent. But under such circumstances, the City is still liable under well-established agency principles. *See, e.g., Nippa v. Botsford Gen. Hosp.*, 257 Mich. App. 387, 392, 668 NW2d 628 (2003) (observing that "the law creates a **practical identity** between a principal and an agent," and, "by a legal fiction," a principal "is held to have done what its agents have done") (emphasis added). There can be no question that the LBWL collected and remitted the Franchise Fees with the actual authority of the City.

Finally, even if Plaintiff and the Class **could** sue **both** the LBWL and the City, Plaintiff and the Class could elect to sue **only the City**. This is because under general agency principles, "a plaintiff need not necessarily name the agent as a defendant when suing the principal. Alternatively stated, a plaintiff may elect to sue the principal alone, or to sue the principal and the agent together." *Grimmer v. Lee*, 310 Mich. App. 95, 101, 872 N.W.2d 725 (2015). Any other rule in this context would encourage municipalities to evade Headlee and other tax limitations by employing a middleman/agent to collect and remit a tax that the municipalities cannot impose directly.

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IV. PLAINTIFF AND THE CLASS HAVE STANDING TO PURSUE RECOVERY OF AN IMPROPER TAX PURSUANT TO MCL 141.91 AND ARE ENTITLED UNDER EQUITABLE PRINCIPLES TO A REFUND.

In its April 25, 2024 Order, the Court also asked the parties to address this issue: "[W]hat authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91." Plaintiff is unsure whether the Court is requesting that the parties address standing in the sense of who is the "taxpayer" under MCL 141.91 or whether the Court is requesting that the parties address whether Plaintiff has a remedy for the City's violation of MCL 141.91. We therefore address both issues below.

A. Plaintiff And The Class Are The "Taxpayers" And Therefore Are The Proper Parties To Challenge The City's Violation of MCL 141.91.

Initially, for the reasons discussed more fully in Section II, *supra*, Plaintiff and the Class have standing to challenge the unlawful tax imposed via the City's "Franchise Fee" because they indisputably bear the "legal incidence" of the tax. Stated simply, they are the "taxpayers." There is no basis for concluding that Plaintiff and the Class bear the "legal incidence" of the Franchise Fees for Headlee purposes, but not for purposes of MCL 141.91.

B. Plaintiff And The Class May Assert Equitable Claims Seeking Refunds Of Taxes The City Has Imposed In Violation Of MCL 141.91, And Their Claims Are Not Impermissible "Direct" Claims For "Money Damages" Under That Statute.

Under Michigan law, Plaintiff and the Class have "standing" to maintain an equitable cause of action for a refund against the City for violation of MCL 141.91.[7] Count II of Plaintiff's complaint asserts a claim for equitable relief under the theory of assumpsit for violation of MCL 141.91 and Count III asserts a claim for equitable relief under the theory of unjust enrichment for violation of MCL 141.91. Thus, Plaintiff and the Class seek a refund of the money collected via the City's unlawful

[7] MCL 141.91 provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

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exaction of the Franchise Fee in violation of MCL 141.91 under equitable theories—Plaintiff and the Class do **not** seek to enforce the statute in a private right of action for money damages.

1. This Court Has Held That An Equitable Action Seeking A Refund Of Illegal Exactions Based Upon A Statutory Violation Is Not A Claim For Money Damages.

This Court has recognized a distinction between a private action for compensatory/money damages and an equitable claim brought by a plaintiff who seeks to disgorge an unlawful exaction from a governmental unit in violation of a statute. In *Hyde Park Cooperative et. al. v. The City of Detroit et. al,* 493 Mich. 966; 829 NW2d 195 (2013) the plaintiff challenged a building inspection fee imposed by the City of Detroit on the grounds that it violated the Housing Law of Michigan because the fee exceeded the "actual, reasonable cost of providing the inspection" under MCL 125.526(12). The Court of Appeals' opinion (*Hyde Park Coop v City of Detroit*, 2012 Mich. App. LEXIS 1408 (2012), Exhibit P, hereto) found that there was a factual issue as to whether the fee was reasonable and remanded the case to the trial court for a trial on that issue. In disposing of the appeal the Court of Appeals added a footnote which stated in relevant part:

> We note that plaintiffs would not be entitled to money damages. The Housing Law does not expressly authorize a private cause of action against a municipality for money damages. … [Exhibit P, *Hyde Park Coop.* fn. 5 at **12-13].

Plaintiffs sought leave to appeal the Court of Appeals' decision to this Court. In lieu of granting leave, this Court specifically vacated Footnote 5, expressly delineating between a case seeking "damages" and one that sought a "refund" for sums unlawfully collected:

> Moreover, we note that a claim for 'money damages' such as the one rejected by this Court in *Lash v Traverse City, 479 Mich 180, 191-197; 735 N.W.2d 628 (2007)*, **is not identical to an action for a refund of an allegedly unlawful exaction**. *See, e.g.*, *Beachlawn Building Corporation v City of St. Clair Shores,* 370 Mich 128; 121 N.W.2d 427 (1963); *Bolt v City of Lansing,* 459 Mich 152; 587 N.W.2d 264 (1998) [*Hyde Park,* 493 Mich. 966.]

The *Hyde Park Cooperative* holding was recently affirmed by the Court of Appeals in *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948 (Exhibit Q, hereto). In *Kincaid,* the plaintiff

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challenged the City of Flint's water and sewer charges on various grounds, including that certain rate increases violated the city's own ordinances. The Court of Appeals held that **even where a private right of action does not exist under a city ordinance,** if a municipality has obtained money through an unlawful exaction in violation of the ordinance, the plaintiff has a common law equitable claim for a refund. The Court of Appeals expressly recognized the distinction that Plaintiff asserts here – **namely, that there is a difference between a private cause of action for money damages (which is not at issue here) and an equitable claim to compel a refund of money obtained in violation of the law (which is at issue here)**:

> We first consider defendant's argument that the Flint Ordinances at issue here, Flint Ordinances, §§ 46-52.1 and 46-57.1, did not afford plaintiffs a private cause of action. We agree only in part.
>
> "[N]o cause of action can be inferred against a governmental defendant." *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014). Absent "express legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity[.]" *Lash*, 479 Mich at 194 (quotation marks and citations omitted; emphasis added). **Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute**." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895**). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions**. *See id. Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."). Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's mere violation of a City Ordinance, *Lash*, 479 Mich at 194, **but it is equally clear that plaintiffs <u>may</u> maintain a cause of action for a refund of an unlawful exaction**. [Exhibit Q, hereto at p. 8 (emphasis added) (footnote omitted)].

The Court then found that the Circuit Court erred in dismissing the plaintiff's unjust enrichment claims because they were "premised on an unlawful exaction:"

> In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*,

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> Count IV properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. [*Id.* at pp. 8-9 (emphasis added).]

Similarly, in *Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020) (Exhibit R, hereto), the Court of Appeals held that where a statute does not provide a private right of action for its violation, courts retain the equitable power to require refunds of monies collected in violation of the statute under principles of unjust enrichment. In *Logan*, the plaintiff challenged certain fees imposed by a municipality's building division that allegedly were excessive and imposed in violation of the state construction code act ("CCA"), MCL 125.1501 *et seq*. The plaintiff brought claims for (1) statutory violation of the CCA, (2) violation of the Headlee Amendment and (3) unjust enrichment premised on the municipality's violation of the CCA. In an opinion dated January 11, 2018, (Exhibit S), the Court of Appeals held that, even though the plaintiff did not have a private right of action under the CCA, he could seek a refund of the excessive fees under the equitable doctrine of unjust enrichment:

> Although the circuit court correctly recognized that the statute did "not expressly allow a private cause of action for recovery of fees collected in violation of its provisions," it failed to take the next, necessary step; the court did not ask whether any remedy was available to plaintiffs with regard to their claim that the township had violated MCL 125.1522(1). And plaintiffs did properly state an unjust enrichment claim.
>
> In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count. [Exhibit S at *7-8, emphasis added.]

The Court of Appeals vacated the circuit court order partially granting summary disposition in the township's favor. *Id.* The township applied for leave to appeal to this Court, which ultimately vacated the Court of Appeals' January 11, 2018 Opinion and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich. 204; 934 NW2d 713 (2019) ("MAHB"), and *Wright v. Genesee County*, 504 Mich. 410, 934 N.W.2d 805 (2019). *Logan v West Bloomfield Charter Twp*, 505 Mich. 863; 935 NW2d 42 (2019).

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On remand, the *Logan* Court affirmed its prior ruling, holding that "*MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order." Exhibit R, hereto at p. 1. The Court of Appeals characterized the plaintiff's equitable claims as follows:

> As noted, in the current case, plaintiffs are individuals who seek the return of excessive fees assessed in violation of the CCA. But **plaintiffs have not sought redress directly under the statute; rather, plaintiffs claimed that the township was unjustly enriched by the funds collected in violation of the statute**. [emphasis added]

Similarly, in this case, in Counts II and III, Plaintiff has not "sought redress directly under" MCL 141.91. Instead, Plaintiff claims the City was "unjustly enriched by the funds collected in violation" of the statute—a claim which the Court of Appeals in *Logan* determined was proper:

> The current matter is similar to Genesee Co in that while the plaintiffs in both actions do seek money from the defendants, the money is not meant as compensation. Rather, plaintiffs in this action, like the plaintiff in Genesee Co, seek the return of monies paid over to defendant that should not have been charged in the first instance and therefore was unjustly held by defendant. **Requesting the return of the funds was not a tort or contract action, but an action to divest the township of benefits unjustly retained. As the relief sought is equitable in nature, the claim is not barred by MAHB**. Accordingly, we again conclude that the circuit court improperly dismissed plaintiffs' unjust enrichment claim. [Emphasis added.]

It makes sense that the City should not retain monies it has collected unlawfully. Thus, based upon the foregoing, if a court concludes that a municipality has violated the law by overcharging some or all of its citizens, the court retains equitable authority to grant a plaintiff relief in the form of disgorging the illicitly collected funds and granting refunds to the overcharged citizens.

2. The Assumpsit And Unjust Enrichment Claims Asserted By Plaintiff And The Class Are The Proper Vehicles For Obtaining Refunds Of Illegal Exactions

It is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for

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money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

For example, in *Bond*, 383 Mich. at 696-97, plaintiffs sued the Ann Arbor public school district alleging that the district's fees for books and supplies violated a provision of the Michigan Constitution that required "a system of free public elementary and secondary schools." Plaintiffs claimed that "large amounts were illegally collected by defendant from its pupils as general fees, so-called, determined pursuant to a schedule adopted by the board of education of defendant." *Id.* at 697. Plaintiffs thus sought a "judgment for the full amount of the general fees collected." *Id.* at 698. This Court ruled in their favor, stating: "We remand this cause to the circuit court for the entry of a judgment against defendant for the amount of the general fees collected by it in the sum of $140,862, plus interest from date of collection of same…" *Id.* at 705. Thus, in *Bond,* as here, the plaintiffs sued because the defendant had imposed unlawful charges. The court ordered the defendant to repay the amounts it had unlawfully collected—and the Court here should do likewise.

Indeed, the Court of Appeals recently reaffirmed these principles in *Corey v. Wayne County*, 2016 Mich. App. LEXIS 513 (2016) (App.Ex.36) (Appx.407). There, the Court of Appeals observed:

> **. . . we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received.** *Yellow Freight Sys Inc v State of Mich,* 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds *Yellow Freight Sys, Inc v State,* 464 Mich 21; 627 NW2d 236 (2001), rev'd 537 U.S. 36 (2002). *See also Serv Coal Co v Mich Unemployment Comp Comm,* 333 Mich 526, 531; 53 NW2d 362 (1952). Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist,* 383 Mich 693, 704; 178 NW2d 484 (1970). [2016 Mich. App. LEXIS 513 at *19 n.7 (emphasis added).]

Moreover, the same remedy is available for unjust enrichment claims. In *Wright v. Genesee County*, *supra*, this Court observed the following about the doctrine of unjust enrichment:

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> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. Restatement Restitution, 1st, Sec. 1, comment a, p 12. It is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at another's expense." *McCreary v. Shields*, 333 Mich. 290, 294, 52 N.W.2d 853 (1952) (quotation marks and citation omitted). A claim of unjust enrichment can arise when a party "has and retains money or benefits which in justice and equity belong to another." *Id.* (quotation marks and citation omitted). … The remedy for unjust enrichment is restitution. [504 Mich. at 417-418.]

Indeed, the Court of Appeals has applied these well-established equitable refund principles to require a municipality that illegally collected funds to return those funds to the person or entity who paid the funds. In *Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 at *9-12 (App.Ex.29) (Appx.349-350) plaintiff, a tax-exempt entity, challenged an annual service charge imposed by a city on the grounds that it violated a state statute prohibiting the imposition of taxes on tax-exempt entities. After finding that the charge was unlawful, the Court held that the plaintiff could recover the charges paid because the city would be unjustly enriched if it were not required to return the funds to the plaintiff:

> Plaintiff paid defendant approximately $1,293,327.59 in annual service charges from 2002 through 2007. Defendant had no legal right to impose an annual service charge. Plaintiff was unaware of the impropriety of the charges, and therefore, simply paid what defendant asked. Defendant does not contest that this money constituted a benefit to it bestowed by plaintiff. **But an inequity plainly resulted to plaintiff when defendant retained improperly imposed annual services charges.**
>
> **… Although it is true that it would be burdensome for defendant to have to return to plaintiff six years worth of annual service charges on which defendant has relied, this does not render a refund inequitable. Defendant was never entitled to the annual services charges in the first place. In essentially all cases where a party has been unjustly enriched, it would be burdensome to the enriched party to require it to return the benefit; this alone is insufficient to defeat an unjust enrichment claim**. [*Id.* (Emphasis added.)]

The *Mercy Services* court ultimately concluded that, "[w]here funds are unlawfully collected by a governmental entity, the circuit court is empowered to order a refund." *Id.* (citing *Romulus City Treasurer v. Wayne County Drain Com'r*, 413 Mich. 728, 746-47; 322 N.W.2d 152 (1982)).

Here, in Counts II and III, the money sought is not "meant as compensation." Rather, Plaintiff seeks "the return of monies paid over to defendant that should not have been charged in the first

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instance and therefore was unjustly held by" the City. The City has been unjustly enriched by its collection and retention of the unlawful Franchise Fees and it would be inequitable to allow the City to retain these ill-gotten funds. Accordingly, Plaintiff properly seeks a refund of the unlawful Franchise Fees under the equitable theories of assumpsit and unjust enrichment for violation of MCL 141.91.

V. PLAINTIFF'S EQUITABLE CLAIMS BROUGHT TO REMEDY THE CITY'S VIOLATION OF MCL 141.91 ARE SEPARATE AND INDEPENDENT CLAIMS SUBJECT TO A SIX-YEAR STATUTE OF LIMITATIONS PERIOD.

Finally, in its April 25, 2024 Order, the Court required the parties to address the following issue: "whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations." For the reasons discussed below, there is ample authority that unjust enrichment and assumpsit claims both are subject to a six-year statute of limitations, and it would be nonsensical to subject these separate and independent claims to a one-year limitations period simply because they are paired with a Headlee Amendment claim.

This issue turns upon whether Plaintiff's equitable claims brough pursuant to MCL 141.91 may be deemed "analogous" to Plaintiff's Headlee Amendment claim. In its April 13, 2023 Opinion (Exhibit A to App.) the Court of Appeals concluded that "plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims" relying upon this Court's holding in *TACT*, that it "has long recognized that statutes of limitation may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. (Exhibit A to App. at p. 2, 6).

For the reasons discussed below. Plaintiff's equitable claims brought in Counts II and III of his Complaint are not "analogous" or "identical" to Plaintiff's Headlee Amendment Claim and should not be subject to the truncated the statute of limitations period provided for under MCL 600.308a.[8] The

[8] MCL 600.308a provides: "A taxpayer shall not bring an action **under this section** unless the action is commenced within 1 year after the cause of action accrued." MCL 600.308a(3) (emphasis added).

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Court of Appeals erred when it held that Plaintiff's claims based on MCL 141.91 were subject to Headlee's one-year statute of limitations because, among other things, such claims were "identical" to the Headlee claims.

A. Equitable Claims Seeking The Remedy Of Assumpsit and Unjust Enrichment Are Subject To A Six Year Statute of Limitations.

This Court has long held that equitable claims seeking the remedy of assumpsit are subject to a six-year statute of limitations. *German American Seminary v Kiefer*, 43 Mich 105, 112; 4 NW 636 (1880) (the statute of limitations requires an action of assumpsit to be brought within six years after the cause of action accrued); *Lenz v Detroit*, 376 Mich 156, 159; 135 NW2d 904 (1965) (War veteran's right of action in assumpsit barred by statute of limitations, where well over 6 years had elapsed from accrual date of claim); *Hurst v Charron*, 267 Mich 210, 213; 255 NW 419 (1934) (noting six-year statute of limitations applicable to assumpsit); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for sales tax refund subject to six-year statute of limitations).

To the best of Plaintiff's knowledge, this Court has never directly enunciated the length of the statute of limitations applicable to unjust enrichment claims. The Court of Appeals, however, has repeatedly ruled that the statute of limitations period for unjust enrichment claims is six years. MCL 600.5813 ("All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."). *See e.g. Dixon-Brown v Covenant Cemetery Servs,* 2022 Mich. App. LEXIS 837, n 5 at *6 (2022) (Exhibit I, hereto) (a six-year period of limitations also applies to unjust enrichment); *Ganson v Detroit Pub Sch*; 2021 Mich. App. LEXIS 419, at *8 (2021) (Exhibit J hereto); *Estate of Tyner v O'Bey*, 2021 Mich. App. LEXIS 4052, at *14 (2021) (Exhibit K hereto) (the statute of limitations for filing an unjust enrichment claim is the same six-year period as that prescribed for a breach of contract claim). *Carey v Foley & Lardner, LLP*, 2016 Mich. App. LEXIS 1499, at *3 (2016) (Exhibit L hereto) (unjust enrichment claim subject to a six-year limitations period, citing to MCL 600.5813).

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Indeed, the Court of Appeals has applied the six-year statute to claims seeking refunds of unlawful governmental exactions like the one at issue in this case and have required full disgorgement of such exactions for the entire six-year period. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 (2010) (App.Ex.29) (Appx.349-350) unjust enrichment claim for annual service charge subject to six-year statute of limitation).

B. MCL 141.91 AND THE HEADLEE AMENDMENT ARE NOT "IDENTICAL."

There is no basis for the Court to apply the Headlee statute of limitations to the separate and distinct assumpsit and unjust enrichment claims in Counts II and III on the grounds that the latter claims are "identical" to the Headlee claim.

First, we offer some history: MCL 141.91 was enacted pursuant to Article 7, Section 21 of the Michigan Constitution of 1963, which became effective on January 1, 1964. That section provides:

> The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxation for municipal purposes, and restrict the powers of cities and villages to borrow money and contract debts. **Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law**. [Emphasis added.]

MCL 141.91 clearly is a "limitation" and "prohibition" on the taxing power of cities and villages provided by the Legislature, as authorized by Article 7, Section 21. Further, the legislative history of MCL 141.91 shows that its simple, one-sentence provision was intended to permanently impose this significant limitation on the taxing power of cities and villages. Prior to its passage, the Senate proposed a change to the House bill that would have made the tax limitation expire on June 30, 1965. When the House refused the Senate's proposed change, the Senate relented. See Senate Journal for HB 705, Exhibit M hereto at p. 1029; House Journal for HB 705, Exhibit N hereto at p. 1880. Thus, the statute as ultimately enacted has no temporal limitation.

While the Headlee Amendment and MCL 141.91 both impose tax limitations, there are several key substantive differences between them, to wit:

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1. MCL 141.91 only applies to taxes that are not ad valorem property taxes, but Headlee applies to all taxes;
2. MCL 141.91 applies only to cities and villages, while Headlee applies to all local governments. *See* Mich. Const 1963, art IX, Sec. 33 (defining "local governments" to include any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government.");
3. Headlee does not apply to taxes authorized by a local government's charter when Headlee was ratified in 1978, but MCL 141.91 expressly invalidates any charter provision inconsistent with its terms; and
4. MCL 141.91 applies to taxes that were not being imposed as of January 1, 1964, but Headlee applies to new taxes imposed after Headlee's ratification in 1978.

Accordingly, the Court of Appeals erred as a matter of law when it concluded that "[i]t is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim." *See* Exhibit A to App. at p. 6.

C. There Is No Basis To Apply The Headlee Statute Of Limitations To The Separate And Independent Claims Alleging A Violation Of MCL 141.91 On The Grounds That The MCL 141.91 Claims Are "Analogous" To The Headlee Amendment Claim.

1. Plaintiff Is Entitled To Assert Alternative Claims Based On Different Substantive Rights.

Moreover, as the Circuit Court properly held, the Headlee Amendment is not the only legal vehicle available to Plaintiff to challenge the Franchise Fee. It is well settled that under MCR 2.111(A)(2), a party may allege alternative or even inconsistent claims based on the same set of facts, "regardless of…whether they are based upon legal or equitable grounds or both." *See e.g. Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 471 (2003); *Ludowese v. Golen*, 2008 Mich. App. LEXIS 2069 * 14 (2008) (App.Ex.23) (Appx.310) (a party may "state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both"); *Zervos Group v. Thompson Asphalt Prods.*, 2006 Mich. App. LEXIS 1520 *18 (2006) (App.Ex.24) (Appx.317); *Lofgren Harborside, Inc. v. Paull*, 2004 Mich. App. LEXIS 636, *5 (2004) (App.Ex.25) (Appx.326).

Here, not only may Plaintiff assert multiple legal and equitable claims arising out the same wrong committed by a defendant, but a court applying statutes of limitations to those claims must

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analyze each separate substantive claim.[9] Plaintiff's claims for violation of MCL 141.91 stated in Counts II and III seek equitable remedies of unjust enrichment and assumpsit and are distinct from his Headlee Amendment claim. These claims do not arise from, and are not analogous to, Plaintiff's claim under the Headlee Amendment.

When a plaintiff asserts two separate and distinct claims, different statutes of limitation may apply to those claims. *See, e.g. Bernstein v. Seyburn,* 2014 Mich. App. LEXIS 331 (2014) at *16 (App.Ex.28) (Appx.345) (holding that a malpractice claim and a breach of fiduciary duty claim are separate and distinct torts with separate statutes of limitations).

2. The Claims Based On The City's Violation of MCL 141.91 Are Not "Analogous" To Plaintiff's Headlee Amendment Claim

It is possible the Court's last question flows from one it asked in *Gottesman v. City of Harper Woods*, Michigan Supreme Court Case No. 160806. *See* Exhibit O hereto, September 29, 2021 Order. In *Gottesman*, 2019 Mich. App. LEXIS 7657 (2019) (App.Ex.18), the Court of Appeals rejected the assertion that where a plaintiff brings equitable claims in addition to a claim under the Headlee Amendment, all claims are subject to the one-year statute of limitations governing Headlee claims—expressly holding that a Headlee plaintiff could also simultaneously pursue claims for equitable relief based upon a city's alleged violation of MCL 141.91. The Court of Appeals thus recognized that the

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[9] *See Zervos Group, supra*, 2006 Mich. App. LEXIS at *17-19 (App.Ex.24) (Appx.317). In *Zervos Group,* the plaintiff alleged multiple claims under Michigan's Uniform Fraudulent Transfer Act ("UFTA"). The Court of Appeals reversed a ruling dismissing all of plaintiff's fraudulent transfer claims stating:

> **Furthermore, it is well settled that a plaintiff may allege more than one theory of liability with regard to the same set of facts, *and may pursue all available remedies*, even if legally inconsistent. See MCR 2.111(A)(2)(b).** Given this fact, and considering that there is no dispute that plaintiff brought its cause of action under the UFTA within six years of the time its claim accrued, we find that the trial court erred in applying the one-year period of limitations set forth in § 9(b) to dismiss as time-barred plaintiff's claim that the transfer at issue here was fraudulent under §§ 4(1) and 5(1) of the act. [*Zervos Group*, *supra*, *17-19, footnotes omitted; emphasis added.]

This is true **even when the claims asserted by a plaintiff seek a remedy at law as well as equitable relief**. *See Raby v. Bd. of Trs. of the Police & Fire Ret. Sys. of Detroit & Detroit*, 2011 Mich. App. LEXIS 520, *9-10 (2011) (App.Ex.26) (Appx.330); *Tkachik v. Mandeville*, 487 Mich. 38, 790 N.W.2d 260 (2010); *Dennis De Long v. Palm Beach Polo Holdings*, 2010 Mich. App. LEXIS 1178, *6-7 (2010) (App.Ex.27) (Appx.226)(rejecting the contention that an equitable claim for unjust enrichment was not available when plaintiff also plead claims of breach of contract, constructive trust, and trespass).

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one-year Headlee statute of limitations applied only to the Headlee claim and ruled that the Circuit Court had erred in dismissing plaintiff's alternative claims based upon the City's violation of MCL 141.91. [App.Ex.18 (Appx.220-221) (emphasis added).][10]

On consideration of the City's application for leave to appeal, this Court remanded *Gottesman* for further review by the Court of Appeals because, among other reasons, this Court believed the Court of Appeals had erred by holding that Plaintiff's equitable claims were ***necessarily*** governed by a six-year statute of limitations **without considering whether those claims *should* be subject to the one-year statute governing Headlee claims,** stating:

> In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" *Gottesman*, unpub op at 14. **As this Court has recognized, "statutes of limitations may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127 n 9 (1995) (*TACT*).** Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), does not **necessarily mean** that the equitable claims may proceed. [11] [Exhibit O, hereto at pp. 1-2 (emphasis added)].

Thus, in *Gottesman*, this Court expressly sought clarity on the issue now presented—whether Headlee Amendment claims are "analogous" to equitable claims brought pursuant to MCL 141.91 which, under *TACT,* would permit a court to apply Headlee's one year statute if limitations "by analogy" to these equitable claims. However, *Gottesman* settled via agreement of the parties and was dismissed, thereby leaving this question unanswered by the Court of Appeals.

For the reasons stated above, the answer to this Court's question of whether a plaintiff's equitable claims *should be* subject to the one-year statute governing Headlee claims is unequivocally: **No**.

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[10] In this regard, the Court of Appeals holding in *Gottesman* directly contradicts the Court of Appeals' finding in this case that Plaintiff's Headlee and MCL 141.91 tax claims are "analogous."

[11] Notably, this Court did not overrule or reverse the Court of Appeals' holding—though it was within its discretion to do so.

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The circumstances presented here, as in *Gottesman*, do not fall into *TACT's* "analogous claim" analysis. *TACT*, *supra,* 450 Mich. at 127, supports Plaintiff's position that claims under the Headlee Amendment are not "analogous" to claims under MCL 141.91. This Court's relevant dicta in *TACT* states:

> [T]his Court has long recognized that statutes of limitation may apply by analogy to equitable claims. **If legal limitations periods did not apply to analogous equitable suits, "a plaintiff [could] dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity."** *Id.* at 169. To illustrate, § 308a(3) might apply by analogy where a plaintiff seeks to enjoin collection of a long-overdue tax bill on the basis that the tax was constitutionally invalid. [*TACT*, 450 Mich. at 119 n.9 (citation omitted, emphasis added).]

Here, Plaintiff is not seeking to "dodge the bar" of Headlee's limitations period. He brings separate claims under an entirely different legal theory that are subject to a longer statute of limitations. On this issue, this case is distinguishable from *TACT*, which involved a plaintiff who sought three different types of relief (a refund, an injunction, and a declaratory judgment), **all under the Headlee Amendment**. *Id.* at 123-129. Here, Plaintiff seeks a one-year refund under Headlee and a six-year refund under MCL 141.91. Unlike the plaintiff in *TACT*, Plaintiff here does not seek to expand Headlee's limitations period to cover six years. Plaintiff asserts a substantively different claim with a longer limitations period, and he is entitled to recover on that claim because he can satisfy all of the elements of that claim—this is not "dodging the bar," it is **meeting a different bar.**

Courts have consistently recognized that a plaintiff may maintain claims for more than one theory of liability without each claim being subject to the same statute of limitation. For example, in *Joliet v. Pitoniak*, 475 Mich. 30, 42-45; 715 N.W.2d 60 (2006), this Court separately analyzed a plaintiff's claims alleging violations of Michigan's Civil Rights Act, breach of contract, and misrepresentation to determine whether each was time barred. This Court found that all of the plaintiff's claims were time-barred, but the relevant point is that this Court independently analyzed each claim; it did not simply apply the shortest possible limitations period to all of the claims "by analogy."

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In fact, this precise issue was recently addressed by the U.S. Court of Appeals for the Sixth Circuit in *PCA Minerals LLC v. Merit Energy Co.* LLC, 725 Fed. Appx. 342, 349 (6th Cir. 2018) (App.Ex.35) (Appx.400). There, the Court, citing *Joliet*, 475 Mich. at 42-45, recognized a distinction between duplicative claims that ignore "the true nature of the wrong alleged" by "recasting it as a claim subject to a longer statute," and claims which assert "multiple theories of liability that are legally viable and consistent with the facts". In recognizing that the latter type of claims are not subject to the same statutes of limitation, the Court observed:

> Michigan courts do, indeed, conduct a gravamen analysis when a plaintiff attempts to avoid the applicable statute of limitations by ignoring the true nature of the wrong alleged and recasting it as a claim subject to a longer statute. Michigan courts have made clear that a plaintiff may not plead a malpractice claim subject to a two-year statute of limitations as a general negligence claim subject to a three-year limitations period, see *Simmons v. Apex Drug Stores, Inc.*, 201 Mich. App. 250, 506 N.W.2d 562, 564 (1993), modified on other grounds, *Patterson v. Kleiman*, 447 Mich. 429, 526 N.W.2d 879 (Mich. 2004) ("A plaintiff may not evade the appropriate limitation period by artful drafting."), or as a breach-of-contract claim, see *Nicholson v. Han*, 12 Mich. App. 35, 162 N.W.2d 313, 317 (Mich. App. 1968) ("Count 1 does not allege two substantial causes of action. It is founded on allegations of breach of contract; but the gravamen of the action sounds in tort, that is, the substance of the allegations denominate a tort.")
>
> **On the other hand, nothing prohibits a plaintiff from pleading multiple claims when there are, in fact, multiple theories of liability that are legally viable and consistent with the facts; where a plaintiff has a contract claim, tort claim, and a claim for statutory violation, all may be pled**. [Emphasis added.]

This distinction should guide this Court's review and analysis here. Plaintiff asserts "multiple theories of liability that are legally viable and consistent with the facts." There is no basis to apply the shorter Headlee Amendment statute of limitations to Plaintiff's separate equitable claims based upon the City's violation of MCL 141.91. The Circuit Court recognized this when it denied the City's motion for summary disposition pursuant to MCR 2.116(C)(7). In sum, the Court of Appeals erred when it reversed the Circuit Court's reasoned opinion holding that Plaintiff's MCL 141.91 claims were governed by a different statute of limitations than the Headlee claim.

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CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, this Court should grant Plaintiff's Application for Leave to Appeal and hold further proceedings in this matter.

Alternatively, in lieu of granting this Application, Plaintiff requests that the Court summarily reverse the Court of Appeals and uphold/reinstate the Circuit Court's Opinions. Plaintiff requests that this Court: (a) find that the legal incidence of the tax falls on Plaintiff and the Class and that they have standing to pursue a refund of the improperly imposed tax; (b) find that Plaintiff's MCL 141.91 claims are not "analogous" to Plaintiff's Headlee Amendment claims and hold that Plaintiff's claims under MCL 141.91 are subject to a six-year statute of limitations; and (c) remand this case to the Circuit Court for further proceedings consistent with this Court's rulings.

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073s
(248) 544-1500
Counsel for Plaintiff/Appellee and the Class

ABOOD LAW FIRM

By: */s/ Andrew Abood*
Andrew Abood (P43366)
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900

Dated: June 6, 2024

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's brief on appeal contains **15,771** "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2024, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

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