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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

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

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I. INTRODUCTION

The City's Supplemental Brief glaringly omits any discussion of the genesis of the Franchise Agreement and fails to meaningfully address the import of the express terms of the Franchise Agreement. In this regard, we cannot possibly overstate the importance of the City's prior admission that it "has no ability to impose Franchise Fees directly on its citizens." *See* App.Ex.4 (Appx.106) Clearly, ***someone*** incurs the legal obligation to pay these "Franchise Fees." If they are imposed on Plaintiff and the Class, this Court must reverse the COA's ruling. The resolution of this appeal thus requires this Court to review *de novo* the legal relationships between (1) the City, (2) the LBWL, and (3) Plaintiff and the certified Class with respect to the Franchise Fees at issue.

The **final** Franchise Agreement—in stark contrast to earlier drafts—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)];
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 (Appx.188)]

The City utterly fails to address the fact that earlier drafts of the Franchise Agreement did not contain any of the above-referenced provisions but instead merely required the LBWL to "pay" the Franchise Fees to the City. At oral argument, the Court should require the City to answer the following questions, which the City left unanswered in its Supplemental Brief:

1. If the Franchise Fees are legally imposed on the LBWL such that the LBWL has the absolute obligation to pay the Franchise Fees, why was there a need to change the critical

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provision in the draft Franchise Agreement (Section 2) from one requiring the LBWL to "**pay**" a Franchise Fee to the City to one requiring the LBWL to merely "**collect and remit**" the Franchise Fees to the City? Why should the Court not deem this change consequential?

2. If the Franchise Fees are legally imposed on the LBWL such that the LBWL has the absolute obligation to pay the Franchise Fees, why was there a need for the Franchise Agreement to include a provision requiring the City to "at all times keep and save" the LBWL "harmless from and against all loss, costs, expense and claims **associated with the collection and remittance of this franchise fee**"? App.Ex.14, Appx.187, Section 2. (Emphasis added).
3. If the Franchise Fees are legally imposed on the LBWL such that the LBWL had the absolute obligation to pay the Franchise Fees, why does the Franchise Agreement excuse the LBWL from remitting the Franchise Fees if the LBWL is "precluded from collecting such franchise fees" from its customers in the City? *Id.* Why shouldn't the Court conclude that this provision imposes only a limited "pay when paid" obligation, instead of an absolute payment obligation?
4. If the Franchise Fees are legally imposed on the LBWL such that the LBWL had the absolute obligation to pay the Franchise Fees, why was the LBWL **required** by the Franchise Agreement to include the Franchise Fees as a separate line item on the LBWL's bills to its customers? *Id.* Wasn't it important in *Morgan* that the cable companies did **not** have this obligation?
5. If the Franchise Fees are legally imposed on the LBWL such that the LBWL had the absolute obligation to pay the Franchise Fees, why would the **City** agree to pay the **LBWL** a fee for collecting the Franchise Fees from **itself**? *Id.*, Section 14, Appx.188. Can you

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identify any other situation where the government pays a municipality to collect a fee for the government from itself?

There can be no question that the later inclusion of the six provisions summarized above was to effectuate the LBWL's unconditional demand that it act solely as the City's "collection agent." The COA decision overtly ignores this basic reality. Undaunted by the actual reality of its contract with the LBWL, the City continues to argue that the Franchise Fees are the legal obligation of the LBWL. The City's position – if adopted by this Court – would ensure that these types of municipal shenanigans effectively will be shielded from judicial review.

Below, we address the other specific arguments advanced by the City in its Supplemental Brief.

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." The City advances three arguments in response to the Court's first inquiry. We address each one of these meritless contentions below.

A. THESE SO-CALLED "FRANCHISE FEES" ARE NOT LAWFUL.

1. The Fact That True Franchise Fees Can Be Lawful Is Irrelevant Because The Charges At Issue Are Simply Not True Franchise Fees.

The City begins its response to the first issue by contending that franchise fees are lawful. This is an unremarkable, yet irrelevant proposition, because these particular "Franchise Fees" are franchise fees in name only and bear none of the characteristics of a true and lawful franchise fee.

First, as noted above, various provisions of the Franchise Agreement confirm that the LBWL is not the legal payer of the Fees, but rather merely collects the Fees from its customers and remits the Fees to the City. The Michigan Courts have expressly held 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**

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not rest on him." *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) (emphasis added) (quoting *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959)). 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 and other provisions identified above in the Franchise Agreement incorporated into Ordinance 1411 were intended to create a materially different relationship between the City and LBWL than originally proposed. Accordingly, these charges are not true "Franchise Fees."

Moreover, another provision of the Franchise Agreement proves that the Franchise Fees are not "true" franchise fees because they do **not** compensate the City for the LBWL's use of the City's infrastructure. In this regard, Section 7 of the Franchise Agreement (App.Ex.14) provides in pertinent part:

> 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. **As such either party may terminate the exclusive right to serve upon 60 days prior written notice. Therefore, to the extent either shall cease, both ceases**. [Emphasis added. (Appx.187-188).]

This provision confirms that the LBWL is not collecting and remitting the Franchise Fees to compensate the City for the expenses the City incurs to maintain the City's right-of-ways. Instead, the LBWL is collecting and remitting the Franchise Fees **solely to obtain an exclusive territory in the City**. Significantly, under Section 7, if the City exercised its right to terminate the exclusive territory, the LBWL would still be able to use the City's right-of-ways to provide electric service in the City, but it would not have the obligation to collect and remit the Franchise Fees. This is further evidence that these are not true Franchise Fees.

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2. The Franchise Fees As A Matter Of Law Cannot Be Imposed On The LBWL

Not only do the undisputed **facts** confirm that the LBWL is not the legal "payer" of the Fees at issue, but Michigan **law**—notably, the so-called Foote Act—precludes the City from collecting a Franchise Fee from the LBWL. This is further proof that the Franchise Fees here are not "true" franchise fees.

In its Supplemental Brief, the City does not address the Foote Act at all. Plaintiff fully addressed the applicability and the consequences of the Foote Act in Section II.B (pp. 24-27) of his Application for Leave to Appeal. Plaintiff incorporates by reference that analysis here.

Accordingly, the City cannot legally impose the "Franchise Fee" on the LBWL.

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. First, under agency law, the LBWL **is** the City. *See* discussion in Supplemental Brief at pp. 10-11. This is dispositive of the "legal incidence" inquiry because, "the law creates a **practical identity** between a principal and his or her agent" and, "by a legal fiction," a principal "is held to have done what its agents have done." *Nippa v. Botsford Gen. Hosp.*, 257 Mich. App. 387, 392; 668 NW2d 628 (2003) (emphasis added).

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.* *See* discussion of *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) and *World Book v. Revenue Division*, 459 Mich. 403, 590 N.W.2d 293 (1999) in Plaintiff's Supplemental Br. at pp. 11-14. Again, these authorities stand for the proposition 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.**" *World Book*, 459 Mich. at 415-416 (emphasis added).

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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." The City responds to this question by citing numerous cases holding that customers of a municipal utility can sue to challenge an allegedly unlawful charge. But the City is answering a different question, and its argument is wholly misplaced.

A. THE FRANCHISE FEES ARE NOT PART OF THE "RATES" IMPOSED BY THE LBWL

In each of the cases cited by the City at pp. 16-17 of its Supplemental Brief, there was no question that the municipal utility directly charged the plaintiff and the decision to impose the charges was unilaterally made by the utility. *See, e.g., Bolt v. City of Lansing*, 459 Mich. 152, 154, 587 N.W.2d 264 (1998) (stormwater management charges), *Mackinaw Area Tourist Bureau, Inc. v. Village of Mackinaw City*, 2024 Mich. App. LEXIS 4029 (2024) (water rates); and *Shaw v. City of Dearborn*, 329 Mich. App. 640, 645, 944 N.W.2d 153 (2019) (stormwater management charges). Thus, the charges at issue were indisputably part of the rates imposed by the defendant municipality.

Here, in contrast, the LBWL is acting as the City's authorized agent and the Franchise Fees are not part of the LBWL's "rates." As demonstrated in Plaintiff's Supplemental Brief (pp. 10-14), this precludes Plaintiff and the Class from suing the LBWL because (1) the Franchise Fees are not revenues of the LBWL but instead are revenues of the City, which are merely collected by the LBWL, *see Burton v. Burton*, 332 Mich. 326, 337; 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**.") (emphasis added); and (2) 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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The LBWL's unique role in this case insulates the LBWL from directly liability to Plaintiff and the Class because 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). *See also* the additional authorities discussed in Plaintiff's Supplemental Brief at pp. 21-22.

The City's Supplemental Brief fails to meaningfully address these authorities.

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

The City, relying on *Morgan*, argues that "the availability of that legal action [against the LBWL] means the customer does not have a direct 'taxpayer' claim against the local government." City Supp. Br. at p. 18. But again, the facts and circumstances here are dispositively different from the facts and circumstances of *Morgan*, which did not involve a principal/agent relationship between the municipality and the cable provider. *See* discussion in Plaintiff's Supp. Br. at pp. 17-19.

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: (1) 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 in Plaintiff's Supp. Br. at Section II;[1] (2) if Plaintiffs and the Class

[1] Importantly, the Franchise Agreement is not a free-standing private agreement, but instead it is incorporated into Ordinance 1411 enacted by the City's Council. The City's ordinances have the force of law vis-à-vis all of the City's citizens. *See, e.g.*, *White Lake Twp. v. Amos*, 371 Mich. 693, 699; 124

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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); and (3) 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). The City fails to meaningfully address these authorities, which confirm that there are no circumstances under which Plaintiff and the Class would be required to sue **ONLY** the LBWL.

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.

The City argues that Plaintiff lacks standing because the City has not imposed a fee against Plaintiff and the Class and MCL 141.91 does not give "taxpayer" standing to everyone in the State, as Headlee does. City Supp. Br. at pp. 19-21. But this argument – like virtually every other argument asserted by the City – is reliant on a finding that the Franchise Fees are legally imposed on the LBWL and not Plaintiff and the Class, which we have repeatedly demonstrated is untrue. Worse, the City does not really address the actual question posed by the Court – namely, can Plaintiff and the Class "pursue **recovery** of an improper tax pursuant to MCL 141.91." [Emphasis added.]

In Plaintiff's Supplemental Brief, Plaintiff extensively discussed the distinction between a private action for compensatory/money damages and an equitable claim brought by a plaintiff who

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N.W.2d 803 (1963) ("An ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens…").

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seeks to disgorge an unlawful exaction from a governmental unit in violation of a statute. The latter is always allowed, even if a plaintiff does not have a private right of action under a statute, charter provision, or ordinance that Plaintiff claims a government unit has violated. *See* discussion of *Hyde Park Cooperative et. al. v. The City of Detroit et. al,* 493 Mich. 966; 829 NW2d 195 (2013); *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948; and *Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020) at pp. 25-28 of Plaintiff's Supplemental Brief.

The City's Brief addresses **none** of these authorities, much less presents its own to support a finding that Plaintiff and the Class may not invoke the Court's equitable powers to compel a refund of the illegal Franchise Fees.

CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, this Court should grant the relief requested in Plaintiff's Supplemental Brief.

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's Supplemental Reply Brief on Appeal contains **3133** "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).

/s/ Jamie Warrow
Jamie Warrow

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 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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