**STATE OF MICHIGAN**
**IN THE COURT OF CLAIMS**

MATTHEW HENDERSHOT
and all those similarly situated,
Plaintiff,

Case No.: 24-_____-MZ
Honorable _____

v.

**COMPLAINT**

DIRECTOR OF THE MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

and

MICHIGAN PROPANE COMMISSION,
Defendants
_____/

OUTSIDE LEGAL COUNSEL PLC
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**VERIFIED CLASS ACTION COMPLAINT**

NOW COMES Plaintiff MATTHEW HENDERSHOT, both individually and as proposed class representative, by and through counsel, and complains unto this Court as follows:

**PARTIES**

1. Plaintiff MATTHEW HENDERSHOT is a Michigan resident who is a purchaser and user of Michigan propane.

2. Defendant DIRECTOR OF THE MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT is the state official serving and having under the authority provided by the *Propane Commission Act*.

3. Defendant MICHIGAN PROPANE COMMISSION is an entity formed under the laws of the State of Michigan and operates from its offices located at 629 West Hillsdale Street, Lansing, MI 48933.



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## JURISDICTION

4. This Court has jurisdiction pursuant to MCL 600.4401 and MCL 600.6419.

## GENERAL ALLEGATIONS

5. In 2020, the Legislature passed 2020 PA 332, the *Propane Commission Act*, which created Defendant Michigan Propane Commission, see **Exhibit A**.

6. The Commission is charged with the responsibility of "educat[ing] residents, business owners, and other users of propane on the safe use of propane, and promot[ing] the use of high efficiency appliances and equipment through rebate and incentive programs for Michigan residents." MCL 460.625(1).

7. The Legislature also allocated to retail propane marketers the legislative task of determining whether the price of propane would be subject to an "initial assessment" at a rate of one-tenth of one cent per gallon of odorized propane sold or placed into commerce that is later imposed upon the consumers of Michigan propane, see **Exhibit B**.

8. Upon their decision, Defendant Michigan Propane Commission's ability to collect the assessment depended on the result of a "referendum" conducted by voting by Michigan's retail propane marketers, see **Exhibit C** and MCL 460.627(1).

9. A retail propane marketer is "a person engaged in the business of selling odorized propane to consumers in containers larger than 240 pounds water capacity or selling odorized propane to retail propane dispensers." MCL 460.622(n).

10. The *Propane Commission Act* granted each retail propane marketer one vote, "representing a single firm, individual proprietorship, corporation, company, association, partnership, or spouse- or family-owned business, regardless of the number of bulk plants or retail sales outlets owned." MCL 460.631(1)(a).

11. "Passage of the referendum requires more than 50% of the votes of *all of the retail propane marketers with customers in this state*." MCL 460.631(1)(c).

12. The *Propane Commission Act* tasked the director of the Michigan Department of Agriculture & Rural Development (MDARD) with conducting the referendum. MCL 460.631(2); MCL 460.622(b)-(c).

13. The then MDARD director conducted the referendum.

14. A list of names and addresses of Michigan Retail Propane Marketers was obtained by from Defendant MICHIGAN PROPANE COMMISSION.

15. Using this address list, 119 ballots with complete instructions and return envelopes were mailed out on February 8, 2021 by or at the direction of Defendant DIRECTOR.



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16. Sixty-five ballots were returned, see **Exhibit D**.

17. Fifty percent of the votes of *all* of the retail propane marketers would have required approval of at least 60 of the 119 total retail propane marketers.

18. However, only 49 marketers voted in favor, and 16 voted against; 54 did not vote at all, see **Exhibit D**.[1]

19. Despite a lack of at least fifty percent of the votes of all of the retail propane marketers, Defendant DIRECTOR failed to recognize that the referendum failed to have fifty percent of the votes of *all* of the retail propane marketers as required by the *Propane Commission Act*.

20. When the referendum failed, Defendant MICHIGAN PROPANE COMMISSION was required to recommend repeal of the *Propane Commission Act*. MCL 460.631(4).

21. Yet, Defendant MICHIGAN PROPANE COMMISSION proceeded forward as if the legal prerequisites had been met to authorize assessments.

22. Based upon Defendant DIRECTOR's failure to act, illegal assessments were and have been collected on an ongoing basis from retail propane marketers.

23. Defendant MICHIGAN PROPANE COMMISSION directed and commanded retail propane marketer to pay the special assessment which becomes an expense that is passed along to Michigan consumers of propane.

24. Based upon the failure to act or act lawfully, Defendants, in their respective roles whether jointly or individually, should have not begun or today continue to collect the assessment and was instead required to have recommended to the Legislature that it repeal the law; phase out from Defendant MICHIGAN PROPANE COMMISSION's operations; and take no further action to further the purposes of the *Propane Commission Act*.

25. Defendants failed to follow its legal duty as required by the *Propane Commission Act*.

26. Plaintiff MATTHEW HENDERSHOT ordered and agreed to pay for approximately 271 gallons of propane on April 2024, see **Exhibit F**.

27. As a result of Defendants' illegal actions, the cost of the assessment was, on information and belief, added to and included in the per-gallon price of propane when purchased from the retail propane marketer.

[1] The hand-written numbering was placed upon the ballots was done by someone at MDARD. There are two "21" notated when produced after a prior FOIA lawsuit.



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28. Plaintiff MATTHEW HENDERSHOT expects and plans to purchase additional propane in the near and distant future and will be subject to the illegal propane assessment.

29. Members of the class expect and plan to purchase additional propane in the near and distant future and will be subject to the illegal propane assessment.

**CLASS ALLEGATIONS**

30. This action is brought by Plaintiff individually and by all those similarly situated.

31. The proposed class consists of all retailer propane marketers.

32. The number of injured individuals who have been injured is sufficiently numerous to make class action status the most practical method to secure redress for injuries sustained and class wide equitable relief.

33. There are clear questions fact raised by the named Plaintiff's claim common to, and typical of, those raised by the Class it seeks to represent.

34. There are clear questions of law raised by the named Plaintiff's claims common to, and typical of, those raised by the Class it seeks to represent.

35. The violations of law and resulting harms alleged by the named Plaintiff are typical of the legal violations and harms suffered by all Class members.

36. Plaintiff, as Class representative, will fairly and adequately protect the interests of the Class members and will vigorously prosecute the suit on behalf of the Class; and is represented by sufficiently experienced counsel.

37. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice, preventing possible inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

38. Defendants have acted, failed to act, and/or are continuing to act on grounds generally applicable to all members of the Class.

**COUNT I**
**MANDAMUS**
**(BOTH DEFENDANTS)**

39. The previous allegations are re-alleged word for word herein.

40. Despite a lack of at least fifty percent of the votes of all of the retail propane marketers, then Defendant DIRECTOR, contrary to law, ordered that the referendum passed when it had not.



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41. As a direct result of Defendants' falsity, whether individually or in civil conspiratorial concern, in asserting or acquiescing that the referendum passed (when it had not), Defendant MICHIGAN PROPANE COMMISSION commenced extracting initial assessment on the propane at the rate of 1/10 of one cent per gallon levied upon retailer propane markers who sell odorized propane in Michigan.

42. Defendant MICHIGAN PROPANE COMMISSION had a legal duty to recommend repeal of the *Propane Commission Act*. MCL 460.631(4).

43. Defendant MICHIGAN PROPANE COMMISSION had a legal duty to *not* commanded retail propane marketer to pay the special assessment which becomes an expense that is passed along to Michigan consumers of propane.

44. Defendants did not act in good faith as to their clear and unambiguous duties under the referendum.

45. Defendants had a clear legal duty to conduct and respect the result of the required referendum and correctly direct whether the referendum had passed or not passed as provided by MCL 460.631(1)(c).

46. Defendants breached such duty or duties and are not acting in accordance with law.

47. The act of required by the *Propane Commission Act* are ministerial.

48. As a direct result of Defendants violating their duties, losses were bore by Plaintiffs and members of the class and such is compensable in damages at least equal to the assessments extracted from members of the Class.

49. In addition to a writ of mandamus, mandamus-authorized damages can and should be awarded against Defendants for the past and ongoing breaches of its legal duties, see *CB v Livingston Cnty Community Mental Health*, __ Mich App __; 2023 Mich App LEXIS 8919 (2023).

**COUNT II**
**CONSTRUCTIVE TRUST**
**(DEFENDANT COMMISSION)**

50. The previous allegations are re-alleged word for word herein.

51. Defendant MICHIGAN PROPANE COMMISSION improperly collected and seized funds from retail propane marketers that Defendant MICHIGAN PROPANE COMMISSION was not authorized to collect.

52. A constructive trust is to be imposed under any circumstance that renders it unconscionable for the holder of legal title to retain and enjoy the property.



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53. This Court is requested to impose a constructive trust on the collected propone assessments and to order its return to Plaintiff and members of the Class as necessary to do equity and/or avoid unjust enrichment.

**COUNT III**
**ULTRA VIRES ACT**
**(DEFENDANT COMMISSION)**

54. The previous allegations are re-alleged word for word herein.

55. Because the Propane Act does not authorize Defendant MICHIGAN PROPANE COMMISSION to collect funds in the form of assessments, Defendant MICHIGAN PROPANE COMMISSION has acted and is acting in an ultra vires manner due to its lack of legal authority to perform in the manner it has.

56. This Court is requested to order Defendant MICHIGAN PROPANE COMMISSION to return to Plaintiff and members of the Class the funds collected by assessment as being the result of an ultra vires act.

**COUNT IV**
**UNJUST ENRICHMENT (ASSUMPSIT THEORY)**
**(DEFENDANT COMMISSION)**

57. The previous allegations are re-alleged word for word herein.

58. The remedy to recover illegal taxes or assessments paid is in assumpsit for money had and received. *Service Coal Co v Unemployment Compensation Comm*, 333 Mich 526, 531; 53 NW2d 362 (1952); *Salisbury v Detroit*, 258 Mich 235; 241 NW 888 (1932).

59. Michigan has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another.

60. An action in assumpsit for money had and received is not an action in tort and governmental immunity from tort liability, MCL 691.1407, does not apply.

61. Defendant MICHIGAN PROPANE COMMISSION has imposed and collected an illegal assessment when demanding and receiving retail propane marketers which was, in turn, paid by Plaintiff and members of the Class.

62. Said actions are actionable at law, and is remedied by a money judgment.

**RELIEF REQUESTED**

63. WHEREFORE, Plaintiff MATTHEW HENDERSHOT (and members of the class members upon certification) respectfully requests this Court to—

a. Enter an order certifying this case as a class action;



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b. Enter an order declaring the conduct of Defendants as being unlawful and contrary to the *Propane Commission Act*;

c. Issue appropriate writ(s) of mandamus including to correctly apply the outcome of referendum and require Defendant MICHIGAN PROPANE COMMISSION to recommend to the Legislature that the latter repeal the law; phase out from Defendant MICHIGAN PROPANE COMMISSION's operations; and required that Defendant MICHIGAN PROPANE COMMISSION take no further action to further the purposes of the *Propane Commission Act*.;

d. Award resulting damages, plus interest, for past and ongoing breach of its legal duty regardless whether this Court issues the mandamus writ or not pursuant to *CB v Livingston Cnty Community Mental Health*, __ Mich App __; 2023 Mich App LEXIS 8919 (2023);

e. Impose a constructive trust on the collected propane assessments and to order its return to the retail propane marketers from whom it was so extracted;

f. To the extent a constructive trust is not applied, award damages equal to the collected propane assessments plus interest;

g. Award any other nominal, exemplary, and/or punitive damages available at law;

h. Enter an order commanding Defendant MICHIGAN PROPANE COMMISSION to end its operations and enjoin it from taking any further action to further the purposes of the *Propane Commission Act*;

i. Enter an order for an award of reasonable attorney fees and litigation expenses pursuant to all applicable laws, rules, or statutes, including under MCR 3.501; and

j. Enter an order for all such other relief the court deems equitable.



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## VERIFICATION

I declare under the penalties of perjury that this document has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Consistent with 28 USC § 1746, I also declare under penalty of perjury that the foregoing is true and correct.

Executed on: 8/11/2024

Matthew Hendershot

Signed and sworn to before me, this 11th day of August, 2024 by Matthew Hendershot.

Notary's Signature: Philip L Ellison

Notary's Name: Philip L. Ellison

Notary Public, Saginaw County, State of Michigan

Acting in County of Saginaw, Michigan

My commission expires: 10/08/2029

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Date: August 11, 2024

RESPECTFULLY SUBMITTED:



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