

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF MECKLENBURG

21-CVS-4063

ROBERT WRIGHT, MARK MICHALEC,
and SCOTT SHIPMAN, individually and on
behalf of all others similarly situated.

Plaintiffs,

v.

CITY OF CHARLOTTE,

Defendant.

**DEFENDANT CITY OF CHARLOTTE'S
ANSWER TO "PLAINTIFFS'
AMENDMENT TO COMPLAINT"**

Defendant City of Charlotte ("the City"), by and through undersigned counsel, hereby serves its Answer to "Plaintiffs' Amendment to Complaint Alleging the [Waiver] of Sovereign Immunity and Adding a Third Alternative Claim for Relief in Equity and a Fourth Alternative Claim for Relief" (together with the initial Complaint, hereinafter collectively "Amended Complaint"), filed by Plaintiffs Robert Wright, Mark Michalec, Scott Shipman, individually and on behalf of all others similarly situated (hereinafter collectively—*i.e.*, both the named individuals and the alleged putative class members—referred to as "Plaintiffs") in the above-captioned matter.

FIRST DEFENSE

The City hereby responds to the "Background" section of the Amended Complaint as follows:

First Unenumerated Paragraph: The allegations contained in the First Unenumerated Paragraph are denied.

Second Unenumerated Paragraph: The City denies the allegation that "[t]he program was promoted, sponsored, and ultimately administrated by [the City]." As to the remaining allegations

in the Second Unenumerated Paragraph, the City lacks sufficient knowledge to form a belief such to admit or deny the allegations contained therein and thus denies the same.

Third Unenumerated Paragraph: The City lacks sufficient knowledge to form a belief such to admit or deny the allegations contained in the Third Unenumerated Paragraph and thus denies the same.

Fourth Unenumerated Paragraph: The City denies the allegations that it “sponsored” the Voluntary Police Pledge Fund and it denies that any funds thereof were “held in an account of the City of Charlotte.” As to the remaining allegations in the Fourth Unenumerated Paragraph, the City lacks sufficient knowledge to form a belief such to admit or deny the allegations contained therein and thus denies the same.

Fifth Unenumerated Paragraph: The Fifth Unenumerated Paragraph contains legal conclusions to which no response is required. To the extent a response is required, the City lacks sufficient knowledge to form a belief such to admit or deny the allegation that “the Voluntary Police Pledge Fund was never approved by an actuary or anyone with financial acumen, was not sustainable and was without any long-term chance of success absent active and prudent management of its corpus...” and thus denies the same. The City denies that it was required to provide any “active and prudent management of [the Voluntary Police Pledge Fund] corpus.” The City denies all remaining allegations contained in the Fifth Unenumerated Paragraph.

SECOND DEFENSE

The City hereby responds to each individually-numbered paragraph contained in the Amended Complaint as follows:

PARTIES

1. Upon information and belief, it is admitted that Wright is a resident of Mecklenburg County, North Carolina. It is admitted that Wright is employed by the City as a sworn law enforcement officer for a period less than 20 years. It is admitted that, since 2008, Wright authorized and requested the City to deduct five dollars (\$5.00) per pay period for payment to the Treasurer of the Voluntary Police Pledge Fund for, upon information and belief, purposes of membership in the Voluntary Police Pledge Fund. Except as expressly admitted, the allegations contained in Paragraph 1 are denied.

2. Upon information and belief, it is admitted that Michalec is a resident of Cabarrus County, North Carolina. It is admitted that Michalec is employed by the City as a sworn law enforcement officer for a period in excess of 20 years. It is admitted that, since 1994, Michalec authorized and requested the City to deduct five dollars (\$5.00) per pay period for payment to the Treasurer of the Voluntary Police Pledge Fund for, upon information and belief, purposes of membership in the Voluntary Police Pledge Fund. Except as expressly admitted, the allegations contained in Paragraph 2 are denied.

3. The City lacks sufficient knowledge such to admit or deny the allegation that Shipman is currently a resident of Union County, North Carolina and thus denies the same. It is admitted that Shipman was employed by the City as a sworn law enforcement officer for a period in excess of thirty (30) years. It is further admitted that, prior to his retirement, Shipman authorized and requested the City to deduct five dollars (\$5.00) per pay period for payment to the Treasurer of the Voluntary Police Pledge Fund for, upon information and belief, purposes of membership in the Voluntary Police Pledge Fund. Except as expressly admitted, the allegations contained in Paragraph 3 are denied.

4. The City denies the allegation that the Voluntary Police Pledge Fund “was sponsored, approved, and administered by the City of Charlotte.” As to all other allegations contained in Paragraph 4, the City lacks knowledge sufficient to form a belief such to admit or deny said allegations and thus denies the same.

5. The City admits that it is a municipal corporation created and existing under the laws of the State of North Carolina. The City admits that, in accordance with its Charter, it “operate[s] under the Council-Manager form of government,” and the powers and duties of the City Council and the City Manager are defined by law. Except as expressly admitted, the allegations contained in Paragraph 5 are denied as stated.

6. The City admits that since the 1930 decennial census, it has been the most populous municipality in North Carolina. Except as expressly admitted, the allegations contained in Paragraph 6 are both vague and conclusory and are accordingly denied.

7. The City admits that the Charlotte-Mecklenburg Police Department (“CMPD”) is currently one of its component departments. It is further admitted that CMPD was formed in 1993 and effectively merged the two separate police departments of the City and Mecklenburg County into a single law enforcement agency. Except as expressly admitted, the allegations contained in Paragraph 7 are denied.

THE CLASS

8. Denied as stated. The City admits that the alleged putative class are members of the Voluntary Police Pledge Fund but denies any involvement with its creation or administration. Except as expressly admitted, the allegations contained in Paragraph 8 are denied.

9. Paragraph 9 contains legal conclusions to which no response is required. To the extent a response is required, the City denies that Plaintiffs’ claims can be maintained as a class

action. The City admits, upon information and belief, that Plaintiffs' counsel is well-credentialed and competent to represent the alleged putative class. As to the remaining allegations contained in Paragraph 9, the City lacks knowledge sufficient to form a belief such to admit or deny said allegations and thus denies the same.

JURISDICTION AND VENUE

10. Paragraph 10 contains legal conclusions to which no response is required. To the extent a response is required, the City denies the allegations contained in Paragraph 10 for reasons set forth in the Seventh Defense herein, and preserves its defenses accordingly.

11. Paragraph 11 contains legal conclusions to which no response is required. To the extent a response is required, the City admits that this Honorable Court is the appropriate venue for the disposition of the above-referenced matter.

FACTS

12. The City admits that Exhibit A is a publicly-available writing appended to the Amended Complaint and, accordingly, speaks for itself. The City further admits that Exhibit A contains the following notation:

PAYROLL DEDUCTION OF FUNDS FOR VOLUNTEER POLICE PLEDGE FUND, AUTHORIZED.

Councilman Thrower moved approval of the use of payroll deductions for the Volunteer Police Pledge Fund, subject to the details being worked out satisfactorily. The motion was seconded by Councilman Short and carried unanimously.

Except as expressly admitted, the allegations contained in Paragraph 12 are denied.

13. The City admits that Exhibits A and B are writings appended to the Amended Complaint and, accordingly, speaks for themselves. The City specifically denies that it "approved a Volunteer Pledge Fund for the Police Department..." in 1966, as reflected by the recorded vote

of the City Council contained in the text of Exhibit A to the Amended Complaint. Except as expressly admitted, the allegations contained in Paragraph 13 are denied.

14. The City admits that Exhibits A and B are writings appended to the Amended Complaint and, accordingly, speaks for themselves. Except as expressly admitted, the allegations contained in Paragraph 14 are denied.

15. The allegations contained in Paragraph 15 are denied.

16. The City admits that Exhibit C is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 16 are denied.

17. Denied as stated. It is admitted that the alleged putative class, at all times relevant, authorized and requested the City to deduct five dollars (\$5.00) per pay period to the Treasurer of the Voluntary Police Pledge Fund. Except as expressly admitted, the allegations contained in Paragraph 17 are denied.

18. Upon information and belief, as of 2018, in and around 1,100 individuals authorized and requested the City to deduct five dollars (\$5.00) per pay period to the Treasurer of the Voluntary Police Pledge Fund for the purposes of membership in the Voluntary Police Pledge Fund. Except as expressly admitted, the allegations contained in Paragraph 18 are denied.

19. The City admits that Exhibit D is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 19 are denied.

20. The City admits that it had legal authorization from members of the Voluntary Police Pledge Fund to deduct five dollars (\$5.00) per pay period to the Treasurer of the Voluntary

Police Pledge Fund for the purposes of membership therein. Except as expressly admitted, the allegations contained in Paragraph 20 are denied.

21. The allegations contained in Paragraph 21 are denied.

22. Denied as stated. The City admits that the payroll deduction was “specifically approved” by virtue of the recorded vote of the City Council contained in the text of Exhibit A to the Amended Complaint. The City admits that the Voluntary Police Pledge Fund “is neither a parking pass, bus pass, or charitable organization.” The City admits that Exhibit C is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 22 are denied.

23. The allegations contained in Paragraph 23 are denied.

24. The City lacks sufficient knowledge to form a belief such to admit or deny the allegations contained in the Paragraph 24 and thus denies the same.

25. The allegations contained in Paragraph 25 are denied.

26. The allegations contained in Paragraph 26 are denied.

27. The City admits that Exhibit E is a copy of a Verified Complaint for Appointment of a Receiver and Wind-Down and Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction” brought before this Honorable Court, captioned *Graue et al. v. The Charlotte-Mecklenburg Voluntary Police Pledge Fund*, 19-CVS-13137 (Meck Co.) (hereinafter “the *Graue* Action”), and that it is appended to the Amended Complaint and, accordingly speaks for itself. It is specifically denied that the *Graue* Action takes the position that “such Pledge Fund moneys” were “being held by the City of Charlotte,” and the City specifically denies the same. Except as expressly admitted, the allegations contained in Paragraph 27 are denied.

28. Upon information and belief based on the publicly-available court file in the *Graue* Action, the City admits that, in its Order Granting Plaintiffs' Summary Judgment dated January 28, 2020, the Court appointed the Honorable F. Lane Williamson "as a permanent receiver to take control of the Police Pledge Fund's Wells Fargo account and corresponding books and records in order to make a recommendation to the Court about how to wind up the affairs of the Police Pledge Fund." The City admits that Exhibit F is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 28 are denied.

29. The City admits that Exhibit F is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 29 are denied.

30. The City admits that Exhibit F is a writing appended to the Amended Complaint and, accordingly, speaks for itself. Except as expressly admitted, the allegations contained in Paragraph 30 are denied.

31. The allegations contained in Paragraph 31 are denied.

[PUTATIVE] FIRST CLAIM FOR RELIEF

32. Paragraph 32 does not contain any factual allegations to which a response is required. To the extent a response is required, the enumerated responses to the previous paragraphs are realleged and incorporated herein by reference.

33. The allegations contained in Paragraph 33 are denied.

34. The allegations contained in Paragraph 34 are denied.

35. The allegations contained in Plaintiffs' new Paragraph 35 of the Amended Complaint are denied. The City of Charlotte avers that it asserts governmental immunity to the extent allowed by law.

[PUTATIVE] ALTERNATIVE SECOND CLAIM FOR RELIEF

36. Paragraph 36 does not contain any factual allegations to which a response is required. To the extent a response is required, the enumerated responses to the previous paragraphs are realleged and incorporated herein by reference.

37. The allegations contained in Paragraph 37 are denied.

38. The allegations contained in Paragraph 38 are denied.

39. The allegations contained in Paragraph 39 are denied.

In addition to the foregoing, any remaining allegations contained in the Amended Complaint not otherwise directly addressed are hereby denied.

**[PUTATIVE] ALTERNATIVE THIRD CLAIM FOR RELIEF IN EQUITY
(equitable claim for money had and received – money wrongfully deducted)**

The City hereby responds to the "Restated Alternative Background" section in the Third Claim for Relief of the Amended Complaint as follows:

First Unenumerated Paragraph: The allegations contained in the First Unenumerated Paragraph are denied.

Second Unenumerated Paragraph: The allegations contained in the Second Unenumerated Paragraph are denied.

Third Unenumerated Paragraph: The allegations contained in the Third Unenumerated Paragraph are denied.

Fourth Unenumerated Paragraph: The Fourth Unenumerated Paragraph contains legal conclusions to which no response is required. To the extent a response is required, the allegations contained in the Fourth Unenumerated Paragraph are denied.

The City hereby responds to each individually-numbered paragraph contained in the Alternative Third Claim for Relief in Equity as follows:

40. Paragraph 40 does not contain any factual allegations to which a response is required. To the extent a response is required, the enumerated responses to the previous paragraphs are realleged and incorporated herein by reference.

41. The allegations contained in Paragraph 41 are denied.

42. The allegations contained in Paragraph 42 are denied.

43. The allegations contained in Paragraph 43 are denied.

44. The allegations contained in Paragraph 44 are denied.

45. The allegations contained in Paragraph 45 are denied.

46. The allegations contained in Paragraph 46 are denied.

47. The allegations contained in Paragraph 47 are denied.

48. The allegations contained in Paragraph 48 are denied.

49. The allegations contained in Paragraph 49 are denied.

In addition to the foregoing, any remaining allegations contained in the Amended Complaint not otherwise directly addressed are hereby denied.

**[PUTATIVE] ALTERNATIVE FOURTH CLAIM FOR RELIEF
(Common Law Negligence)**

The City hereby responds to the “Restated Alternative Background” section in the Fourth Claim for Relief of the Amended Complaint as follows:

Unenumerated Paragraph: The allegations contained in the Unenumerated Paragraph are denied.

The City hereby responds to each individually-numbered paragraph contained in the Alternative Fourth Claim for Relief as follows:

50. Paragraph 50 does not contain any factual allegations to which a response is required. To the extent a response is required, the enumerated responses to the previous paragraphs are realleged and incorporated herein by reference.

51. The allegations contained in Paragraph 51 are denied.

52. The allegations contained in Paragraph 52 are denied.

53. The allegations contained in Paragraph 53 are denied.

In addition to the foregoing, any remaining allegations contained in the Amended Complaint not otherwise directly addressed are hereby denied.

THIRD DEFENSE

When viewed in light of the documents appended to the Amended Complaint and/or upon judicial notice of the court file in the *Graue* Action, the Amended Complaint: (i) fails to state a claim upon which relief can be granted; (ii) fails to join a necessary party; and, (iii) to the extent it is adjudicated that this action is brought to enforce a secondary right under N.C. R. Civ. P. 23(b), is not verified. Accordingly, dismissal under Rules 12(b)(6), 12(b)(7), 12(c), and/or 23(b) of the North Carolina Rules of Civil Procedure is appropriate.

FOURTH DEFENSE

Plaintiffs are not entitled to any of the relief sought in the Amended Complaint, including but not limited to, the prayer for relief therein.

FIFTH DEFENSE

The City hereby affirmatively raises the defense of contributory negligence as a complete bar to Plaintiffs' recovery in this action individually and of the alleged putative class' recovery in this action. This affirmative defense is raised as a total bar to recovery both (i) as to Plaintiffs' and/or the alleged putative class' individual actions *and* (ii) as to the conduct of those whose acts or omissions are attributable to them by law.

SIXTH DEFENSE

The City cannot be vicariously liable for the actions complained-of herein, including but not limited to the alleged negligent acts or omissions of public officers who would otherwise be entitled to public official immunity.

SEVENTH DEFENSE

The City hereby affirmatively asserts governmental immunity to the fullest extent allowed by law, as a complete or partial bar to recovery *sub judice*, under both Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

EIGHTH DEFENSE

In the event it is determined that Plaintiffs suffered any alleged damages, Plaintiffs failed, and continue to fail, to mitigate such alleged damages, and accordingly, Plaintiffs are barred from recovering such damages.

NINTH DEFENSE

This action is barred as to Plaintiffs, either all or a subset of Plaintiffs in the alleged putative class, by the relevant statute of limitations and the statute of repose.

TENTH DEFENSE

Plaintiffs' claims for damages are barred, in whole or in part, by the doctrine of laches.

ELEVENTH DEFENSE

Plaintiffs' claims for damages are barred, in whole or in part, by the doctrine of waiver.

TWELFTH DEFENSE

Plaintiffs' claims for damages are barred, in whole or in part, by the doctrine of estoppel.

THIRTEENTH DEFENSE

The City affirmatively pleads that the Voluntary Police Pledge Fund is an independent entity with a voluntary membership and the freedom to withdraw said membership at any time. Plaintiffs' complaint, if any, is with the Voluntary Police Pledge Fund of which they are alleged members. The Voluntary Police Pledge Fund is not a component part of the City of Charlotte. The City of Charlotte denies creating the Voluntary Police Pledge Fund, nor did it administer, sponsor, or promote the Voluntary Police Pledge Fund. Plaintiffs joined the Voluntary Police Pledge Fund on their own accord.

FOURTEENTH DEFENSE

As a matter of law, the City does not owe a fiduciary duty to Plaintiffs. Plaintiffs did not repose a special confidence in the City nor was the relationship between the City and the Plaintiffs one of domination and influence of the former over the latter. In fact, it is specifically averred that Plaintiffs are in a unique position among city employees to assert their own influence in that, for example, they are allowed to be members of a labor union and, upon information and belief, said union membership was consulted about the matters complained-of in this action. This also demonstrates that the Plaintiffs can reasonably discern between professional associations and their employment. Additionally or in the alternative, even if there was a fiduciary relationship, the complained of conduct neither breached nor caused any of Plaintiffs' alleged damages. Moreover, the City did not engage in any conduct for the benefit of itself.

FIFTEENTH DEFENSE

Negligent acts and/or intentional acts of misrepresentation by others were not reasonably foreseeable by the City. Said acts of negligence or intentional conduct, by their own natural and continuous sequence, caused Plaintiffs' alleged and resultant damages. Therefore, Plaintiffs' claims are barred because their alleged damages, if any, were not proximately caused by any act or omission of the City.

SIXTEENTH DEFENSE

In connection with the relief sought by Plaintiffs, some or all members of the alleged putative class have acted inequitably and with unclean hands. Accordingly, Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands.

SEVENTEENTH DEFENSE

None of the complained of actions related to the City's conduct possessed the tendency or capacity to mislead or created the likelihood of deception.

EIGHTEENTH DEFENSE

Plaintiffs' have not suffered any injuries or damages at this juncture and the alleged injuries and damages therefrom are purely speculative and, in any event, are directed at the wrong party.

NINETEENTH DEFENSE

The City denies that Plaintiffs' claims can be properly maintained as a class action. Plaintiffs' request for class certification is barred by their failure to satisfy the prerequisites of Rule 23 of the North Carolina Rules of Civil Procedure.

TWENTIETH DEFENSE

There is no pertinent legal definition of the term "benefit," nor is there any set of programs or services necessarily encompassed by that term under North Carolina law. In any event, there is

no evidence that the City represented to any member of the putative class that the City was contributing to the Pledge Fund or insuring the Pledge Fund in any way. Whether the Pledge Fund was a “benefit” for putative class members or not is not relevant to the application of law in this case.

TWENTY-FIRST DEFENSE

Given Plaintiffs’ claims in the Amended Complaint that the City acted *ultra vires* in taking the payroll deductions otherwise authorized by Plaintiffs, which the City denies, the City affirmatively pleads that, by operation of law, Plaintiffs are not entitled to recovery from the City of those deductions. “[T]he law holds those dealing with a City to a knowledge of the extent of the power and of any restrictions imposed. Persons dealing with a municipal corporation are charged with notice of all limitations upon the authority of its officers representing them.” *L & S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622, 471 S.E.2d 118, 120 (1996). Accordingly, under the doctrine of unclear hands and/or contributory negligence, or any other applicable legal doctrine, Plaintiffs are not entitled to recovery of said deductions. Further, Plaintiffs and each member of the putative class were on legal notice of such alleged *ultra vires* when they signed the authorization. Accordingly, Plaintiffs individually and all or most of each member of the putative class are additionally barred from recovery by the relevant statute of limitations, statute of repose, and/or by the doctrine of laches.

TWENTY-SECOND DEFENSE

As the City is a political subdivision of the State, interest may not be awarded against the City in this lawsuit. *See, Shavitz v. City of High Point*, 177 N.C. App. 465, 485, 630 S.E.2d 4, 18 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 430, 648 S.E.2d 845 (2007).

Accordingly, Plaintiffs are not entitled to the award of interest they purport to seek in their pleadings.

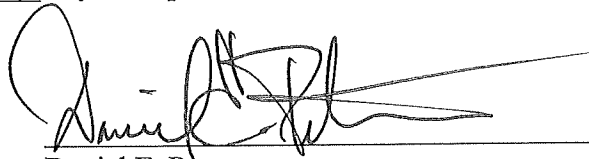
RESERVATION AND NON-WAIVER

The City reserves the right to assert such other and further defenses, including affirmative defenses, as may become apparent during the course of this litigation.

WHEREFORE, the City of Charlotte respectfully requests the following relief:

1. Plaintiffs' Amended Complaint be dismissed with prejudice;
2. Plaintiffs' claims against the City be dismissed with prejudice;
3. Plaintiffs' have and recover nothing from the City;
4. The City recover its costs incurred in this action, including reasonable attorneys' fees, as may be allowed under applicable law; and
5. The Court order such further relief in favor of the City as it deems just and proper.

Respectfully submitted, this the 24th day of September, 2021.



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CERTIFICATE OF SERVICE

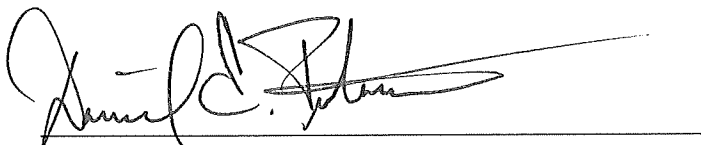
This is to certify that on this date I served the foregoing **DEFENDANT CITY OF CHARLOTTE'S ANSWER TO "PLAINTIFFS' AMENDMENT TO COMPLAINT"** via email and by depositing a copy thereof in the United States mail, postage prepaid, upon the following:

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This 24th day of September, 2021.



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