UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

WILLIAM HOWARD, et al,
Plaintiffs,

v.

UBP BAY CITY, LLC, et al
Defendants
_____/

Case No.: 25-cv-10926
Hon. Mark A. Goldsmith

RESPONSE

**** CLASS ACTION ****

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RESPONSE IN OPPOSITION OF DEFENDANT CITY OF BAY CITY'S PREANSWER MOTION TO DISMISS

ISSUE(S) PRESENTED

Whether dismissal is warranted under Rule 12(b)(6) regarding the two claims pressed against the City of Bay City?

MOST CONTROLLING AUTHORITY

FRCP 12(b)(6)

BRIEF IN OPPOSITION

The City of Bay City wants to have it both ways. It negotiated and signed a 75-year concession over a public bridge, granted a private partner the power to toll a public travel corridor, told its citizens the arrangement would protect their access, and now insists that those same citizens have no enforceable rights at all. In the City's telling, the bridge is "leased" municipal property, not a public trust resource; the Concession Agreement exists only for the City and BCBP; and motorists crossing the river every day are, at most, incidental bystanders to a purely bilateral deal. On that false foundation, the City moves to dismiss the two counts that seek to hold it accountable for its own role in this mess: the public-trust claim and the third-party beneficiary contract claim.

The City's view is not the law. A public bridge is not a private warehouse; it is part of the public highway system and is held in trust for the public. When a municipality contracts about the operation, tolling, and access conditions of that infrastructure, it does so as the public's agent, not as a private proprietor cutting a purely internal deal. The Concession Agreement is full of obligations that exist only because people use the Independence Bridge. Obligations include completion conditions, continuous-access requirements, tolling (payment demand) restrictions, and

public-protection mechanisms designed to ensure that motorists, residents, and commuters are not trapped by an unfinished bridge they are forced to pay for exaction. Those users are not incidental; they are the whole point.

At the Rule 12(b)(6) stage, the Court must accept the Complaint's well-pleaded allegations as true and draw reasonable inferences in Plaintiffs' favor. Those allegations plausibly state that: (1) the City holds the bridges and related travel corridors in trust for the public; (2) the City violated public-trust principles by authorizing and tolerating premature tolling and repeated closures inconsistent with that trust; and (3) the City made contractual undertakings for the benefit of a defined class of bridge users, of which Plaintiffs are members, making them intended third-party beneficiaries with rights under MCL 600.1405. The City's motion asks this Court to ignore both the public-trust doctrine and the third-party-beneficiary statute to erase those realities. Rule 12(b)(6) does not permit that result.

OBJECTION RE JURISDICTION

Before the Court reaches any merits question—including the City's motion—Plaintiffs renew and incorporate their objection that subject-matter jurisdiction under the Class Action Fairness Act remains unresolved. As set forth in Plaintiffs' motion for reconsideration of the Court's prior order (**ECF No. 33**) and Plaintiffs' request for jurisdictional discovery (**ECF No. 12**), this

case is in federal court solely because BCBP removed under the Class Action Fairness Act. CAFA, however, is tightly cabined by multiple mandatory and discretionary exceptions that withdraw federal jurisdiction when, as here, the dispute is overwhelmingly local: a local bridge, local tolling, injuries suffered entirely in Bay City, and a municipal defendant whose conduct lies at the heart of the controversy. There is also a question as to whether the CAFA amount-in-controversy has been met by BCBP to effectuate removal.

Whether those exceptions apply turns on facts uniquely in Defendants' possession: the citizenship and residence of putative class members, the relative proportion of Michigan versus non-Michigan toll users, the structure of the tolling accounts, and related data. Plaintiffs have sought targeted jurisdictional discovery on those issues. **ECF No. 12.** Until those facts are produced, Plaintiffs cannot meaningfully test CAFA's general coverage (including the home-state, local-controversy, and discretionary exceptions) and this Court cannot determine whether it has ***any*** power to adjudicate any merits issue at all.

The Sixth Circuit has made the sequencing obligation clear: a federal court must satisfy itself of jurisdiction ***before*** it rules on a Rule 12(b)(6) motion. When a district court proceeds to merits questions while leaving fact-

dependent CAFA issues unresolved, it abuses its discretion. See, e.g., *Cooper v Glen Oaks Healthcare, LLC*, 2023 WL 165961 (6th Cir. Jan. 12, 2023) (reversing where district court denied or ignored jurisdictional discovery needed to test CAFA exceptions and proceeded to the merits). Plaintiffs therefore object to any adjudication over Counts I and II against the City on the merits while jurisdiction remains an open and fact-dependent question. A judgment entered without subject-matter jurisdiction is void, no matter how efficient the sequencing might seem.

Subject to and without waiving that objection, Plaintiffs respond to the City's Rule 12(b)(6) arguments as follows.

FACTS

The Independence Bridge is not merely a steel structure. It is a part of the public arteries—critical, daily, unavoidable. For decades, Bay City residents crossed them freely as part of the public highway system the City holds in trust for the people it serves. In 2023, the City chose to fundamentally alter that relationship. It entered into a 75-year concession, granting Bay City Bridge Partners ("BCBP"), a private operator, extraordinary authority to control when and how users may cross their own bridge, including the power to impose tolls. In exchange, the City promised the public one foundational protection: tolls would not begin until the Independence

Bridge reached "Completion"—a defined condition requiring a continuous 30-day period of uninterrupted, 24-hour-a-day public access. Only then would the bridge be considered restored to the public's full use.

That is not what happened. The City functionally authorized tolling to begin despite BCBP's closures, lane restrictions, and repeated nighttime shutdowns that made "Completion" impossible under the Concession Agreement's own terms. The City publicly represented by the agreement itself and via public announcements that tolling would not begin until "Completion," and Plaintiffs purchased unlimited-use passes in reliance on that representation. In the six weeks following the start of tolling, the Independence Bridge was closed more than twenty times, including total nighttime closures that left residents unable to cross the river except by taking extended detours. Motorists who purchased unlimited-use passes based on the City-negotiated pricing structure found the bridge unavailable during the very hours they paid to use it. Yet the City, fully aware of these shutdowns, continued to functionally authorize toll collection by BCBP as if the bridge had been open continuously. The public, who had been promised a completed and reliable crossing before tolls began, bore the cost of a bridge that was not complete at all.

Throughout this period, the City treated the bridge not as a trust

resource devoted to public travel but as a revenue-driven asset administered through private delegation. The public protections negotiated into the Concession Agreement—completion before tolling, continuous access, fair pricing, and uniform treatment of regular users—were allowed to erode in practice even as the public was told they remained intact. The result was predictable: commuters were charged for a service they often could not use, the public's right of passage was repeatedly interrupted, and the City's assurances that tolling would begin only after full restoration of access proved untrue. Plaintiffs bring this action because public travel corridors cannot be quietly converted into private tolling opportunities without honoring the conditions that protect the traveling public.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pleaded factual allegations as true, draw all reasonable inferences in Plaintiffs' favor, and determine only whether the Complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible when the alleged facts, taken as true, allow the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 US at 678. A court reviewing a Rule 12(b)(6) motion may only dismiss when no set of facts

consistent with the pleadings could entitle the plaintiff to relief. *Taylor v. City of Saginaw*, 922 F.3d 328, 331 (6th Cir. 2019).

COUNTER ARGUMENT

I. PLAINTIFFS STATE A PLAUSIBLE PUBLIC-TRUST CLAIM AGAINST THE CITY

A. The City holds the bridges and travel corridors in trust for the public

The City's motion rests on a cramped account of the public-trust doctrine that does not match Michigan law. The City quotes *Glass v. Goeckel*, 473 Mich. 667 (2005) for the proposition that public-trust rights are limited to fishing, hunting, and navigation of Great Lakes waters, and asserts that "access to bridges or other infrastructure have never been the type of right protected by the public trust doctrine," so Count I must fail. It's position takes *Glass* out of context and ignores a century of Michigan authority treating public rights of passage—whether over water or across infrastructure spanning that water—as public-trust interests. From its earliest cases, the Michigan law has described and treated highways, streets, and similar public ways as being held in trust for the public.

A long history of Michigan law confirms this and was reconfirmed in the case of *2000 Baum Family Trust*. There, the Michigan Supreme Court explained that, when it comes to roadways and passages, the government

"does not receive title in the nature of a private ownership, it acquires no beneficial ownership of the land and has no voice concerning the use, it does not possess the usual rights of a proprietor, but rather takes title only to the extent that it could preclude questions which might arise respecting the public uses, other than those of mere passage." *2000 Baum Family Trust v. Babel*, 793 N.W.2d 633, 650 (Mich. 2010) (cleaned up and citations omitted). "Simply put, the law vests the governmental entity with *nominal* title" only. *Id.*; see also *Jonkers v. Summit Twp.,* 278 Mich. App. 263, 278 (2008) ("platted public roads convey either a mere public easement or, at most, a 'base fee' that amounts to little more than nominal title and no beneficial ownership whatsoever"). A governmental unit's interest in platted streets and rights-of-ways is a limited "base fee" or determinable fee held in trust for public travel, and that the municipality may not repurpose such corridors in ways that defeat the public's right of passage. *Village of Kalkaska v Shell Oil Co.*, 433 Mich. 348 (1989). The Independence Bridge is simply elevated segments of the same highway system: they carry the public's right of passage across navigable water. The City's interest in the bridges, like its interest in the adjoining streets, is held as a trustee for those public users, not as a private proprietary estate of the government.

Glass itself, when read carefully, is consistent with this structure. *Glass*

held that the public-trust doctrine protects the public's right to walk along the Great Lakes shoreline below the ordinary high-water mark, characterizing the doctrine as protecting "public rights" of passage and access. 473 Mich at 678-679. It did not freeze the doctrine in the nineteenth century. It affirmed that the State—and, by delegation, others—must protect public travel and access uses in trust-governed corridors, and that private or delegated actors may not unreasonably interfere with those uses. *Glass* speaks rightly and repeatedly of public-trust protection of "public rights" of access and passage—what Michigan's calls 'common highways.' Glass, 473 Mich. at 696 ("we must protect the Great Lakes *as common highways*"). This touches on the public's right of passage, not water use. A bridge carrying a public highway across a public river fits comfortably within the common-highway understanding. It is an instrumentality of public travel whose very reason for existence is to preserve the public's ability *to transverse*.

B. Private plaintiffs may enforce public-trust obligations; Count I states a cognizable claim

The City also argues that Plaintiffs improperly "put themselves in the shoes of the State of Michigan" and that only the sovereign may enforce public-trust obligations. But that is not what Michigan cases teach. *Obrecht v. National Gypsum Co*., 361 Mich. 399 (1960) involved a challenge by private parties to a State-approved conveyance of public submerged lands,

and the Supreme Court there described the courts as the "ultimate bulwark" against violations of the public trust. *Collins v. Gerhardt*, 237 Mich. 38 (1926) upheld the right of private individuals to sue to protect public navigation rights in rivers. *Bott v. Natural Resources Comm'n,* 415 Mich. 45 (1982) likewise recognized that members of the public may invoke the public trust to challenge governmental or delegated actions that impair public-trust uses.

These decisions share a common legal structure and understanding: the public-trust exists for the benefit of the public; governmental actors and their delegates are trustees of that interest; and when the trust is threatened—including by private actors or concessionaires acting under delegated authority—affected members of the public may seek judicial enforcement. Count I fits squarely. Plaintiffs do not "step into the shoes" of the State; they enforce the public rights they themselves hold as beneficiaries of the trust resource. Plaintiffs allege that the City, acting as trustee of the public's travel rights across the Indy, delegated operational authority to BCBP and then allowed tolling and repeated closures that impaired those travel rights in a manner inconsistent with the public-trust constraints on its authority. That theory is not a free-floating policy complaint; it is a classic trust-law claim: a trustee misusing a trust resource to the detriment of the beneficiaries.

The City's final move is to assert that "violation of trust principles" is not a cognizable cause of action. But courts look to substance, not labels. Count I alleges that the City owes fiduciary-like duties to the public in its control of essential travel infrastructure; that those duties arise from the public-trust doctrine as applied to public bridges and their travel corridors; and that the City breached those duties through the concession structure and its tolerance of premature tolling and repeated closures. Michigan courts have long entertained structurally similar actions—whether captioned as "public trust," "breach of fiduciary duty," or "ultra vires"—when a public trustee misuses trust resources. At a minimum, Plaintiffs have alleged facts that support a claim for relief grounded in well-recognized public-trust principles. That is enough to move past Rule 12(b)(6).

II. PLAINTIFFS PLAUSIBLY ALLEGE THAT THEY ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE CITY–BCBP LEASES

Count II asserts that Plaintiffs, as regular users of the Independence Bridge, are intended third-party beneficiaries of the Concession Agreement between the City and BCBP and may sue for breach under MCL 600.1405. The City's response is to treat the agreement as a purely bilateral commercial lease, to insist that no promises were made "directly to or for" bridge users, and to invoke *Koenig v. City of South Haven* as if it foreclosed beneficiary status whenever a municipality acts in the public interest. Under

the statute, *Koenig*'s own reasoning, and *Koenig*'s progeny, that is not correct.

A. The Concession Agreement contain promises for a defined class, i.e. bridge users

MCL 600.1405(1) provides that a person "for whose benefit a promise is made by way of contract" has the same right to enforce the promise as if it had been made directly. A promise is deemed made for a person's benefit when the promisor undertook to "give or to do or refrain from doing something directly to or for said person." *Id. Koenig* emphasized that the class of intended beneficiaries must be "sufficiently described"—something less than the entire universe, but not necessarily named individuals. See 460 Mich at 680-683.

Here, the Complaint alleges that the Concession Agreement is not generic leases of something like warehouse space, but a detailed infrastructure concession[1] that: define when tolling may begin; condition tolling on "Completion" and continuous 24/7 public access for 30 consecutive

[1]The law recognizes the differences of a private party lease from a "concession." A concession is generally understood to mean an arrangement whereby a private partner is granted the right to operate and usually collect associated revenues from a public activity without conveying an ownership or possessory interest. See U.S. Dep't of Transportation, *Public–Private Partnership Concessions for Highway Projects: A Primer*, available at https://www.fhwa.dot.gov/ipd/pdfs/p3/p3_concession_primer.pdf.

days; regulate the pricing structures available to regular users (including resident or unlimited-use plans); require that tolling and closures be managed in a manner that preserves the public's ability to cross; and include oversight mechanisms for changes that would materially affect those users. That is why it is labelled a *Concession* Agreement. The contractual undertakings exist only because a specific class of persons will cross the bridges: motorists, residents, commuters, and others who use the bridges as part of the public highway system. They are not incidental beneficiaries; they are the audience the obligations are written to protect.

At the pleading stage, Plaintiffs need not reproduce every clause; they must incorporate by attached and plausibly allege that the City undertook obligations under the Concession Agreement "to or for" a defined class of bridge users. The City's own description is framed has granting "exclusive right to … operate … and toll the [Bridges]" subject to terms and conditions—confirms that these contracts are not inward-facing arrangements. They are public-facing agreements governing how the bridges will be operated and tolled as concessions, vis-à-vis the people who use them, and not an easement or lease-like agreement.

B. *Koenig* does not insulate the City from contract claims where the contract itself protects a defined class of users

The City leans heavily on *Koenig*, but it is not the safe harbor the City imagines. In *Koenig*, the Court examined a memorandum of understanding concerning a privately owned pier and concluded that the MOU's "focus" was to allocate responsibilities between the city and the pier owner; it contained no promise to act "directly to or for" the pier users and did not describe any specific class of beneficiaries. See 460 Mich at 680-683. On that narrow record, the Court held that the child injured on the pier was not an intended beneficiary.

Two features distinguish our case. First, the Concession Agreement here is not merely internal allocations of responsibility between a municipality and a private party; they contain substantive conditions designed to safeguard a defined class of users—tolling commencement tied to completion, continuous-access requirements, structured pricing protections, and related provisions. Those are promises about how the bridges will be operated "for" *the people* who cross them, not for *the employees* of the City or about how the City and BCBP will divide tasks. Second, the class at issue here is not "the universe" that *Koenig* warned against; it is a specific, ascertainable set of persons: bridge users during the concession term until Completion is reached, and in particular those who pay tolls or purchase

passes under the City-approved framework. MCL 600.1405(2)(b) expressly contemplates third-party beneficiaries not yet in being at the time of contracting so long as they fall within a sufficiently described class. Bridge users who must pay (and did pay) tolls or purchased passes fall squarely within such a described class.

Michigan courts applying *Koenig* have repeatedly recognized in later decisions that when a contract describes performance in terms of protecting or serving a defined external group qualifies as intended third-party beneficiaries. *Shay v. Aldrich*, 487 Mich. 648 (2010); see also *Burkhart Associates, Inc. v. Nowakowski*, unpublished decision of the Court of Appeals, issued Sept 25, 2008 (Docket No. 277744 and 279402); *Clark v. Feinman*, unpublished decision of the Court of Appeals, issued Feb 16, 2016 (Docket No. 324258); *Johnson v. Farm Bureau Mut. Ins. Co*., unpublished decision of the Court of Appeals, issued Nov 15, 2018 (Docket No. 337199). Plaintiffs' allegations fit the model: the City approved, and entered into, a Concession Agreement whose performance terms are expressly keyed to the rights, protections, and expectations of third-party bridge users. Those users—including Plaintiffs—are the intended beneficiaries. And "a person who qualifies under the third-party-beneficiary statute gains the right to sue to enforce the contract." *Shay*, 487 Mich. at 640.

C. Plaintiffs may sue the City as well as BCBP

The City also suggests it cannot be sued because Plaintiffs "stand in the shoes" of the promisee and must therefore proceed only against the promisor. But nothing in MCL 600.1405 or Michigan law eliminates claims against a municipal promisee that itself undertook duties under the contract and allegedly breached them. The statute says that a beneficiary "has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. Count II alleges that the City breached those obligations by failing to require BCBP to adhere to the Concession Agreement's completion, access, and tolling terms and by acquiescing in unlawful tolling practices that violated those promised protections. At this stage, that is enough. The third-party beneficiary claim against the City is "plausible" under *Twombly* and the case should proceed.

CONCLUSION

Federal jurisdiction under CAFA remains unresolved and depends on facts in Defendant BCBP's possession. Plaintiffs do not waive and expressly preserve all objections to subject-matter jurisdiction. If, however, this Court ultimately concludes that CAFA's exceptions apply, remand—not merit decisions—is the appropriate next step.

If, however, the Court reaches the City's Rule 12(b)(6) motion, it should deny it. Plaintiffs plausibly allege that the City holds the bridges and their travel corridors in trust for the public and violated public-trust principles by delegating and tolerating premature tolling and repeated closures that impaired the users' right of passage. Plaintiffs likewise plausibly allege that they are intended third-party beneficiaries of the Concession Agreement, which contain promises made to and for the defined class of bridge users and those promises were breached by the City's failure to enforce those protections. At this stage, dismissal is inappropriate. The City's arguments depend on an improper narrowing of settled doctrines and ignoring public-facing contractual obligations that must be construed in Plaintiffs' favor. The City's motion to dismiss should be denied.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendant City of Bay City's motion to dismiss and order it to answer forthwith.

Date: December 4, 2025

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LOCAL RULE CERTIFICATION

I, Philip L. Ellison, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel or parties of record.

Date: December 4, 2025

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