

1 ALEXANDRA T. STEELE, SBN 291399  
2 **STEELE COOPER LAW**  
3 175 S. El Molino Ave., Suite 9  
4 Pasadena, California 91101  
5 Telephone: (626) 709-5501  
6 Email: alex@steelcooperlaw.com

7 THOMAS S. SLOVAK, SBN 62815  
8 STEPHEN J. SCHULTZ, SBN 90187  
9 **SLOVAK, BARON, EMPEY, MURPHY**  
10 **& PINKNEY, LLP**  
11 1800 E. Tahquitz Canyon Way  
12 Palm Springs, California 92262  
13 Phone: (760) 322-2275

14 Attorneys for Plaintiff Eileen Staats, on behalf of  
15 herself, and all others similarly situated (“the Class”)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

EILEEN A. STAATS, on behalf of herself and  
all others similarly situated,

Plaintiffs,

v.

CITY OF PALO ALTO; and DOES 1 through  
100, inclusive,

Defendant.

Case No. 115-CV-284956  
Assigned for all Purposes to Hon. Sunil R.  
Kulkarni

**PLAINTIFF’S NOTICE OF MOTION  
AND UNOPPOSED MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Action Filed: August 17, 2015

Hearing Date: September 2, 2021  
Time: 1:30 p.m.  
Department: 1

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 2, 2021 at 1:30 p.m. or as soon thereafter  
3 as the matter may be heard, in Department 1 of the Superior Court of California, County of Santa  
4 Clara, located at 191 North First Street, San Jose, California 95113, Plaintiff Eileen Staats  
5 (“Plaintiff”) on behalf of herself and all other members of the Class, will move without  
6 opposition for an order seeking:

- 7 1. Final approval of the proposed settlement of this action; and  
8 2. Dismissing the action in accordance with the terms of the settlement agreement.

9 This unopposed motion is made pursuant to California Code of Civil Procedure 382  
10 and California Rules of Court, rule 3.760 *et seq.* on the grounds that the settlement is fair,  
11 reasonable and adequate.

12 This motion is based upon the accompanying Memorandum of Points and Authorities,  
13 the Declarations of Alexandra T. Steele, Stephen Schultz, John A. Girardi, William  
14 Fitzsimmons, Plaintiff Eileen Staats, Jennifer Keough of JND Legal, the Settlement  
15 Agreement and exhibits, as well as the accompanying Motion for An Award of Attorneys’  
16 Fees, Reimbursement of Expenses and Payment of An Incentive Award for the Class  
17 representative, all files and, records in this action, and any argument and evidence which may  
18 be presented at the hearing on this motion.

19 **STEELE COOPER LAW**

20 Dated: August 11, 2021

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22 By:

  
\_\_\_\_\_  
ALEXANDRA T. STEELE

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Dated: August 11, 2021

**SLOVAK, BARON, EMPEY, MURPHY  
& PINKNEY, LLP**

By:   
STEPHEN J. SCHULTZ

Attorneys for Plaintiff and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This class action originated with an administrative claim filed in December 2014 by  
4 Plaintiff Eileen Staats on behalf of herself and all others similarly situated (“Plaintiffs”), seeking  
5 refunds of telephone utility users’ taxes (“UUT”) collected by the City of Palo Alto (the “City”).  
6 Plaintiff asserted that the City required telephone carriers to collect the UUT on services to which  
7 the City’s UUT ordinance did not actually apply. After more than five years of hard-fought  
8 litigation and extensive arm’s-length negotiations before the Honorable Bonnie Sabraw (ret.),  
9 Plaintiff and the City have finalized a Settlement Agreement (“SA”). (Declaration of Alexandra  
10 T. Steele [“Steele Decl.”], Ex. 1).

11 The Settlement is an outstanding result for the Settlement Class (defined in § E of SA) and  
12 easily meets the standards for final approval. The City has agreed to pay \$1,275,00.00  
13 (the “Settlement Fund”) to settle this litigation, representing approximately 29.5-44.3% of the  
14 UUT it unlawfully collected during the Class Period. Settlement Class members are able to  
15 submit claims for each telephone line they had during the Class Period, with graduated payments  
16 depending upon the number of qualifying phone lines held by each Claimant. The Settlement  
17 Fund will provide for UUT refunds to the Settlement Class and also cover payment of Plaintiff’s  
18 attorneys’ fees and costs, and payment of an incentive award to the named class representative,  
19 Plaintiff Eileen Staats. (*Id.*, Ex. 1 [§§ 3 & 4 of SA]). The Settlement was reached only after years  
20 of contentious litigation and is substantially similar to the settlement in *Ardon v. City of Los*  
21 *Angeles*, No. BC363959 (“*Ardon*”), which was approved by the Los Angeles Superior Court as  
22 “fair, adequate and reasonable.” (Steele Decl., Ex. 2).

23 Through this unopposed motion, Plaintiff seeks final approval of the class action  
24 settlement. On November 5, 2020, this Court preliminarily approved the Settlement as being fair,  
25 adequate and reasonable. After the Court preliminarily approved the Settlement, the parties  
26 notified the Class members through the Settlement Administrator, JND Legal, the Court approved  
27 settlement administrator. The Class members were given the deadline of August 30, 2021 to  
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1 submit objections to and and/or requests for exclusions from the settlement agreement and to  
2 submit claims. That process is nearing its conclusion.

3 This case was hard-fought, over the course of seven years, and the settlement process  
4 fastidious. By any measure, the Settlement is fair, adequate, and reasonable and  
5 warrants final approval. Accordingly, Plaintiff and Co-Class Counsel respectfully request that this  
6 Court grant final approval of the proposed Settlement and enter Final Judgment.

## 7 **II. SUMMARY OF THE LITIGATION**

### 8 **A. Nature of the Action**

9 During the Class Period, the City's UUT ordinance imposed a 5% tax on amounts paid  
10 for telephone services used by every person located within the City. Former City of Palo Alto  
11 Municipal Code ("PAMC"), § 2.35.090. (Plaintiff's Complaint ("Compl.") ¶¶8-27). However, the  
12 PAMC ordinance expressly excluded from taxation all amounts paid for telephone services not  
13 taxable under the Federal Excise Tax ("FET"), 26 U.S.C. § 4251. (*Id.*) Therefore, according to  
14 Plaintiff, telephone services not subject to the FET were not subject to the UUT. (*Id.*)

15 The FET was adopted in its current form in 1965 and defined the scope of taxable  
16 services in a manner that was tailored to the specific types of services offered in 1965, and no  
17 more. *See Am. Online, Inc. v. United States*, 64 Fed. Cl. 571., 578 (2005); *Amtrak v. United*  
18 *States*, 431 F.3d 374, 375 (D.C. Cir. 2005); *Fortis, Inc. v. United States*, 420 F. Supp. 2d 166, 175  
19 (S.D.N.Y. 2004). Those services were: (1) teletypewriter exchange service; (2) local telephone  
20 service; and (3) toll telephone service where calls are charged by both time and distance, and  
21 Wide Areal Telephone Service ("WATS"). 26 U.S.C. §§ 4251, 4252. Plaintiff alleges most  
22 modern telephone services do not fall under any of these three categories. For example, most  
23 modern long-distance telephone service is charged by a different fee structure where charges  
24 vary solely by elapsed time and not by distance or by a flat rate plan. (Compl. ¶¶8-27).

25 In the early 2000's, five United States Circuit Courts of Appeal, the Court of Federal  
26 Claims, and five United States District Courts all unanimously concluded that typical modern  
27 long-distance telephone service is not subject to the FET. (*Id.*) Following these holdings, in 2006  
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1 the IRS ceased collecting the FET on all telephone service except local-only telephone service  
2 and offered refunds to all taxpayers in the United States by way of a line item on their 2006  
3 federal tax return. The City, however, continued to require telephone companies to collect and  
4 remit taxes from telephone users on services to which Plaintiff alleges the FET, and therefore the  
5 UUT, did not apply. (*Id.*).

6 **B. Procedural History**

7 On December 24, 2014, Plaintiff submitted an administrative claim to the City for refund  
8 of the improperly collected UUT on behalf of herself and all other similarly situated taxpayers  
9 pursuant to Government Code sections 900, *et seq.* On August 17, 2015, Plaintiff filed this class  
10 action seeking refunds and to prevent further improper collection of the UUT. Plaintiff alleged the  
11 following causes of action against the City: (1) Declaratory and Injunctive Relief; (2) Money Had  
12 and Received; (3) Unjust Enrichment; (4) Writ of Mandamus; (5) Violation of Government Code  
13 § 53723; and (6) Violation of the California Constitution Article XIII, § C (Proposition 218). On  
14 December 2, 2015, the Court deemed the case complex, assigned it to Judge Peter Kirwan, and  
15 imposed a stay on discovery. On June 16, 2016, Defendant filed a Motion for Judgment on the  
16 Pleadings seeking to eliminate all of Plaintiff's claims going back in time beyond 2013,  
17 attempting to limit Plaintiff's recovery to taxes collect between December 24, 2013 and  
18 December 18, 2014. On November 1, 2016, the Court issued an order denying the requested  
19 relief. On December 14, 2016, the case was reassigned to the Honorable Thomas E. Kuhnle.

20 On May 5, 2017, Plaintiff filed her Motion for Class Certification. On June 14, 2017, the  
21 case was reassigned for a third time to the Honorable Brian C. Walsh. On November 28, 2017,  
22 the City filed a Motion for Leave to Amend its Answer which Plaintiff opposed. On December  
23 27, 2017, the Court granted the City's motion. On December 28, 2017, the City filed its amended  
24 Answer. On January 19, 2018, the City filed its Opposition to Plaintiff's Motion for Class  
25 Certification. On February 20, 2018, Plaintiff filed her Reply in support of her Motion for Class  
26 Certification. The matter was heard on April 6, 2018 wherein the Court ordered supplemental  
27 briefing to address some discrete legal issues. The Parties filed their supplemental briefing on  
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1 April 20, 2018 and their reply briefs thereto on April 27, 2020. The Court again heard the matter  
2 on June 8, 2018 and entered an Order granting Plaintiff's Motion for Class Certification on  
3 June 12, 2018. On November 29, 2018, Plaintiff filed her Statement Regarding Notice Plan which  
4 was approved by the Court on December 6, 2018. Plaintiff sent Notice to the Class on December  
5 12, 2018.

6 On January 22, 2019, the City filed a Motion for Summary Adjudication, challenging the  
7 time period under which Plaintiff and Class Members may be able to collect as limited by the  
8 Government Code. Plaintiff opposed the motion on April 4, 2019 the City filed its reply on  
9 April 22, 2019. The matter was heard on May 17, 2019 and the Court entered an Order granting  
10 the City's motion, limiting the refund period available to Plaintiff and Class Members to one year.  
11 A trial setting conference occurred on July 12, 2019 and the Court set Phase One of the trial for  
12 April 20, 2020.

13 On September 16, 2019, the Parties began the mediation process with the Honorable  
14 Bonnie Straw (ret.). This continued until October 23, 2019 when the Parties reached a settlement  
15 in principle as to the Settlement Fund. Thereafter, the Parties continued to negotiate the terms of  
16 the Settlement Agreement, the payment structure and the Notice Plan. On May 28, 2020 the  
17 Parties stipulated to continue the five-year dismissal deadline so the Parties could finalize the  
18 Settlement, which the Court entered. The Settlement Agreement was fully executed on  
19 August 11, 2020. The Court preliminarily approved the Settlement on November 5, 2020.

### 20 **III. SUMMARY OF THE PRELIMINARILY APPROVED SETTLEMENT**

#### 21 **A. Terms of the Settlement and Monetary Relief to Class Members**

22 The City agreed to a Settlement Fund of \$1,275,000 to settle the claims against it and to  
23 pay Class member claims, attorneys' fees and expenses, and Plaintiff's incentive award, with the  
24 remainder reverting to the City.<sup>1</sup> (Steele Decl., Ex. 1, [§§ 3&4]). Within 15 days of entry of  
25 judgment and an order of this Court granting final approval of the Settlement, the City will  
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27 <sup>1</sup> *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 159-60 (Reversion to a public entity  
28 exception pursuant to CCP § 384).

1 deposit the “Settlement Payment” of \$1,275,000.00 to the Administrator by certified check or  
2 wire transfer.

3           Upon timely submission of a Claim Form to the Administrator, Class members will be  
4 entitled to receive a payment disbursed by the Administrator from the Settlement Payment. The  
5 Class is defined as follows:

6           All persons, including individuals, non-corporate entities, and corporations,  
7 who have paid the City of Palo Alto Utility Users Tax (“UUT”) imposed by  
8 Palo Alto Municipal Code § 2.35.090 on the following services between August 1,  
9 2006 to December 18, 2014<sup>2</sup>: (1) “flat-rate” mobile telephone  
10 service that entitles the subscriber, upon payment of a periodic charge  
11 determined as a flat amount or upon the basis of total minutes, to an  
12 unlimited number of calls in an identified region; (2) “flat-rate,” separately  
13 billed long distance landline telephone service that entitles the subscriber,  
14 upon payment of a periodic charge determined as a flat amount or upon the  
15 basis of total minutes, to an unlimited number of calls in an identified region;  
16 (3) per-minute mobile telephone service; and/or (4) per-minute long  
17 distance landline telephone service. Not included in the class are persons  
18 who have paid the UUT only for separately billed local landline telephone  
19 services or local landline services “bundled” with mobile or long distance  
20 landline services in a plan that does not separately state the charge for the  
21 local service.

22           Class members can seek a refund for each phone line they had during the Claim Period,  
23 as follows:

24           **Five or Fewer Phone Lines.** Claimants with five or fewer phone lines can seek a refund  
25 of \$8.50 per phone line.

26           **Six to Ten Phone Lines.** Claimants with six to ten phone lines can seek a refund of \$8.50  
27 per phone line for the first five phone lines and \$7.50 per phone line for the remaining phone  
28 lines.

**More than Ten Phone Lines.** Claimants with more than ten phones lines can seek a  
refund of \$8.50 per phone line for the first five phone lines, \$7.50 per phone line for the next five  
phone lines, and \$6.50 per phone line for the remaining phone lines.

          Claimants must submit the following documentation to secure a refund:

<sup>2</sup> The eligible claim period is December 24, 2013 to December 14, 2014 per the Court’s order on  
the City’s Motion for Summary Adjudication reducing the recovery period available to Class  
members.

1           **One Phone Line.** If a Claimant is seeking a refund for one phone line, the Claimant must  
2 submit: (1) a Claim Form signed under penalty of perjury, indicating that the Claimant had a  
3 landline in the City or a wireless line with a place of primary use (as defined by the Mobile  
4 Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126) in the City during the Claim Period;  
5 and (2) evidence of a Palo Alto address, such as a current phone bill, utility bill, property tax bill,  
6 W- 2 form, paystub, or other similar document.

7           **Two to Ten Phone Lines.** If a Claimant is seeking a refund for two to ten phone lines, the  
8 Claimant must submit: (1) a Claim Form signed under penalty of perjury, identifying the number  
9 of landlines the Claimant had in the City or the number of wireless lines the Claimant had with a  
10 place of primary use in the City during the Claim Period; and (2) a phone bill or multiple phone  
11 bills, from any time period, sufficient to specifically identify each phone line. Each phone bill  
12 must show a Palo Alto address.

13           **More Than Ten Phone Lines.** If a Claimant is seeking a refund for more than ten phone  
14 lines, the Claimant must submit: (1) a Claim Form signed under penalty of perjury, identifying  
15 the number of landlines the Claimant had in the City or the number of wireless lines the Claimant  
16 had with a place of primary use in the City during the Claim Period; and (2) a phone bill or  
17 multiple phone bills, from the Claim Period, sufficient to specifically identify each phone line.  
18 Each phone bill must show a Palo Alto address. (Steele Decl., Ex. 1).

19           **B. Notice to the Settlement Class and Cost of Administration**

20           Notice was given as directed by the Court's Order to reach as many Class members as  
21 practicable. The Notice was extraordinarily robust, covering virtually every medium imaginable.  
22 Attached as Exhibits B and C to the Settlement Agreement, respectively, are the Short Form  
23 Notice (including Claim Form and return envelope) that were mailed to the Class and the Long  
24 Form Notice that was published on the Settlement Website, in the Daily Post and online via  
25 Google and Facebook. (Steele Decl. Ex. 1; JND Decl.). A shorter version of the Short Form  
26 Notice was disseminated by Press Release via Cision PR Newswire and distributed through  
27 11,000 media outlets to current and former Palo Alto UUT taxpayers. (*Id.*). The Claims  
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1 Administrator sent direct mail notice to 85,361 addresses. Total views of the Notice of final  
2 judgment entered in this case will be posted on the Settlement website. *See* Cal. Rules of Court  
3 (“CRC”), rule 3.771(b).

4 Consistent with the Claims Administrator’s estimate for administering the notice and  
5 handling the claims, to date the cost of administration is \$104,541.75, half of which is coming out  
6 of the \$425,000 and the other half to be borne independently by the City. It is estimated that the  
7 an additional approximately \$37,000 is necessary to complete the process. This is not an  
8 unreasonable amount for a settlement class of this size. The vast majority of the budget was spent  
9 on giving direct notice by mail to every resident in the City. (Keough Dec. ¶10).

10 **C. Requested Incentive Payment and Attorneys’ Fees**

11 Class Counsel, concurrently with the instant motion, filed a motion requesting an award of  
12 attorneys’ fees and expenses not to exceed \$425,000.00 in attorneys’ fees plus reimbursement of  
13 out-of-pocket expenses/costs. (Steele Decl., Ex. 1 [§ 4]). In support of Class Counsel’s request for  
14 attorneys’ fees, Counsel has also submitted lodestar information for the Court to compare to the  
15 amount requested per the Settlement Agreement. Counsel’s hours expended is far greater than the  
16 amount of fees requested here, which is only about 15.3% of the total settlement. Class Counsel  
17 believes the fees are well-deserved given their persistent prosecution of this case for more than  
18 seven years, including obtaining Class Certification.

19 As part of Class Counsel’s motion for attorneys’ fees, Class Counsel requests a Plaintiff’s  
20 Incentive Award to be paid to Plaintiff from the Settlement Fund in recognition of her  
21 contribution on behalf of the Class not to exceed \$10,000. In fulfilling her duties as class  
22 representative, Ms. Staats put many hours into consulting with Counsel, reviewing pleadings,  
23 responding to numerous discovery requests, sitting for deposition, and producing documents.  
24 (Declaration of Eileen Staats [“Staats Decl.”]).

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1 **IV. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL**

2 **A. The Proposed Settlement Meets the Standards for Final Approval**

3 To prevent fraud, collusion, or unfairness to the class, settlement of a class action requires  
4 court approval. *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1800-01, as modified  
5 (Sept. 30, 1996) (citations omitted); Cal. Rules of Court 3.769, 3.770(a.) A class action  
6 settlement should be approved where the court finds it is fair, adequate, and reasonable to the  
7 class members. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128, 133.  
8 Discussed in depth below, the Settlement meets all standards for final approval. “[A] presumption  
9 of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2)  
10 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)  
11 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Wershba*  
12 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 245 (2001) (citation omitted) (disapproved  
13 of on other grounds). In addition, “the trial court should consider relevant factors, such as the  
14 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,  
15 the risk of maintaining class action status through trial, the amount offered in settlement, the  
16 extent of discovery completed and the stage of the proceedings, the experience and views of  
17 counsel, the presence of a governmental participant, and the reaction of the class members to the  
18 proposed settlement.” *Wershba*, 91 Cal. App. 4th at 244-45 (internal quotations and citation  
19 omitted). As discussed below, the Settlement meets these standards.

20 **1. The Settlement is the Result of Arm’s-Length Negotiation**

21 Given the years of hard-fought litigation between the parties, the Court should have no  
22 doubt that the Settlement was the result of arm’s-length negotiations between experienced  
23 counsel. The parties engaged in mediation before Judge Bonnie Sabraw on September 16, 2019,  
24 at which point an agreement in principle on the Settlement Fund was reached, and thereafter  
25 engaged in further extensive negotiations concerning the details of the settlement, including the  
26 various forms of Class Notice and payment structures. Case law recognizes that a respected  
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1 mediator provides a high degree of assurance that the settlement is the result of arm’s-length  
2 bargaining. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 52-53.

3 **2. The Settlement Was Reached After Significant Investigation and**  
4 **Discovery Was Conducted**

5 The discovery taken in this case is more than adequate to allow the parties to make an  
6 informed settlement decision. *Chavez*, 162 Cal. App. 4th at 53 (characterizing “extensive”  
7 discovery as “written discovery, document production, and depositions of key [] employees.”).  
8 The instant Settlement came only after numerous rounds of discovery, extensive law and motion  
9 practice, third party discovery and multiple depositions. Further, prior to initiating the action,  
10 Plaintiff’s counsel made a Public Records Act Request pursuant to Gov. Code §§ 62501 *et seq.*  
11 and to which the City produced documents. After the action was filed, Plaintiff served Form  
12 Interrogatories, Request for Production of Documents (two sets), Special Interrogatories (two  
13 sets), and Requests for Admission (two sets). (Steele Decl. ¶¶ 5-8). The City responded to each of  
14 these sets of written discovery. The parties also engaged in lengthy meet and confers regarding  
15 the responses and the document productions. (*Id.*). Plaintiff took several depositions including a  
16 Person Most Qualified and three other City employee depositions. (*Id.*). Plaintiff engaged an  
17 expert to assist in Plaintiff’s investigation and analyses of the thousands of documents produced,  
18 prepare for class certification, evaluate liability, prepare a damages model and a trial plan.  
19 Likewise, the City propounded, and Plaintiff responded to, Requests for Production of Documents  
20 (two sets), Requests for Admission, and Special Interrogatories (two sets) and engaged and  
21 expert to assist in its analysis of liability and damages. Plaintiff and the City served subpoenas for  
22 the production of business records on numerous third-party telephone service providers. (*Id.*).  
23 Pursuant to these subpoenas, these non-parties produced documents and provided written  
24 declarations. (*Id.*). The city took the deposition of Plaintiff as well as the deposition of Plaintiff’s  
25 expert. (*Id.*).

26 The action settled only after thousands of pages of documents had been produced by  
27 Plaintiff, the City and third parties, written discovery had been taken, hours of testimony given,  
28

1 and multiple rounds of motion practice including a motion for judgment on the pleadings, class  
2 certification and motion for summary adjudication. After the Court granted Class Certification,  
3 Plaintiff sent Notice of the certification to Class and received only three opt-outs. Steele Decl.,  
4 Ex. 4. The investigation, analyses and legal work undertaken by counsel and counsel's experts  
5 was significant allowing for the parties and the Court to make an intelligent and educated  
6 determination regarding the Settlement.

### 7 **3. The Recommendation of Experienced Counsel Favors Approval**

8 In determining whether a proposed settlement is fair, reasonable, and adequate,  
9 California courts highly value the opinion of counsel that are experienced in the type of litigation  
10 being settled. *See, e.g., Chavez*, 162 Cal. App. 4th at 53. This Court recognized Class  
11 Counsel to have extensive experience, having represented millions of consumers in numerous  
12 class actions, included other related tax refund actions by naming them Class Counsel upon Class  
13 Certification. (Steele Decl., Girardi Decl; Schultz Decl.) Based upon Class Counsel's substantial  
14 experience<sup>3</sup>, their receipt and analysis of extensive discovery, motion practice and exhaustive  
15 negotiations directly with the City and under the guidance of a mediator, the Hon. Bonnie  
16 Sabraw, Class Counsel believes the Settlement is fair, reasonable, adequate and in the best  
17 interest of the Class Members. (*Id.*).

### 18 **4. Strength of Plaintiff's Case**

19 In determining whether the Settlement is fair and warrants final approval, the Court has  
20 to assess whether the relief offered by the Settlement is reasonable in light of the strength of  
21 Plaintiffs' case. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130. While  
22 Plaintiff is confident she could prove that the City collected UUT on telephone services that were  
23 not charged based upon both time and distance, the City on the other hand is equally confident in  
24

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25 <sup>3</sup> Upon filing of the Preliminary Approval Motion, Class Counsel was apprised of Girardi and  
26 Keese, Slovak, Baron, Empey, Murphy & Pinkney, LLP. The Court appointed Alexandra Steele  
27 of Steele Cooper Law as Class Counsel in its Order granting Preliminary Approval. Since that  
28 time, Girardi and Keese entered bankruptcy proceedings. However, Slovak, Baron, Empey,  
Murphy & Pinkney and Steele Cooper Law remain Class Counsel and their collective experience  
litigating class action matters is extensive. (Slovak Decl.; Schultz Decl.; Steele Decl.).



1 its argument that bundled services were taxable during the Class Period because of the Mobile  
2 Telephone Sourcing Act, among other arguments. Of other cases of this type, this is the only case  
3 that has gotten past Class Certification and this close to trial. Each of the other similar cases were  
4 settled in advance of reaching the legal issues that would have to be decided in this case. While  
5 Plaintiff has responsive arguments to the City’s defenses, the outcome is uncertain. If the City  
6 were to prevail on any of its arguments, the Settlement Class would obtain little or nothing from  
7 this litigation.

8 The Settlement provides an opportunity for Class members to receive refunds of the UUT  
9 Plaintiff alleges was wrongfully collected during the Class Period. Therefore, the relief offered by  
10 the Settlement is reasonable.

11 **5. Risk, Expense, Complexity and Likely Duration of Further Litigation**

12 The benefits of this Settlement must also be balanced against the risk, expense, and  
13 complexity of further litigation. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000)  
14 85 Cal. App. 4th 1135, 1152. An evaluation of the benefits of the Settlement must be  
15 tempered by the recognition that any compromise involves concessions on the part of the settling  
16 parties. Indeed, the very essence of a settlement agreement is compromise, “a yielding of  
17 absolutes and an abandoning of highest hopes.” *Officers for Justice v. Civil Serv. Comm’n*, 688  
18 F.2d 615, 624 (9th Cir. 1982) (citation omitted). While Plaintiff is prepared to proceed to trial  
19 should the Settlement not be approved, Plaintiff and the Settlement Class would still  
20 need to perfect its trial plan, retain additional experts and proceed through several stages of a  
21 phased trial. Further litigation would also produce additional time-consuming and expensive law  
22 and motion practice that accompanies trial, the trial itself, with the likelihood of appeals  
23 thereafter. Against these risks and the possibility of many more years of delay, the Settlement  
24 provides taxpayers with a more expeditious route to obtain refunds of the UUT unlawfully  
25 collected during the Class Period. Since this case is already seven years old, further delay is likely  
26 to further reduce the number of Class members filing claims because many Class members have  
27 moved and/or lost vital information regarding their accounts. Moreover, the uncertainty of the  
28

1 City’s liability could have a negative impact on the City’s ability to provide essential City  
2 services.

3 Despite these risks, the Settlement provides taxpayers with an opportunity to claim  
4 refunds of UUT unlawfully collected from them during the Class Period. Accordingly, on  
5 balance, the benefit to the Class and the Parties support approval.

### 6 **6. Risk of Maintaining Class Action Status Through Trial**

7 The City vigorously opposed Plaintiff’s Class Certification. Even though the Class has  
8 been certified, there is always a risk of decertification, a step the City threatened to take should  
9 the case proceed. *See Weinstat v. Dentsply Int’l, Inc.* (2010) 180 Cal. App. 4th 1213, 1226 (“our  
10 Supreme Court has recognized that trial courts should retain some flexibility in conducting class  
11 actions, which means, under suitable circumstances, entertaining successive motions on  
12 certification if the court subsequently discovers that a class action is not appropriate.”).

### 13 **7. The Amount Offered in Settlement**

14 The \$1,275,000.00 Settlement Fund represents a significant recovery for the Class. The  
15 \$1,275,000 million recovery is approximately 29.5-44.3% of the estimated \$2,878,671 in UUT  
16 the City unlawfully collected during the Class Period — an excellent result. (Declaration of  
17 William Fitzsimmons submitted in support of preliminary approval). “A settlement need not  
18 obtain 100 percent of the damages sought in order to be fair and reasonable.” *Wershba v. Apple*  
19 *Computer, Inc.* (2001) 91 Cal. App. 4th 224, 250. *See also, e.g., Rebney v. Wells Fargo Bank*  
20 (1990) 220 Cal. App. 3d 1117, 1139 (settlements found to be fair and reasonable even though  
21 monetary relief provided was “relatively paltry”).<sup>4</sup>

22  
23  
24 <sup>4</sup> *See also In re Celera Corp. Sec. Litig.*, No. 5:10-CV-02604-EJD, 2015 U.S. Dist. LEXIS 42228,  
25 at \*15-16 (N.D. Cal. Mar. 31, 2015) (granting final approval on a settlement fund which  
26 represented 17 percent of the plaintiff’s total estimated damages); *In re Omnivision Techs., Inc.*,  
27 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (granting final approval of a settlement fund where  
28 the gross class recovery was 9 percent of maximum potential recovery); *Destefano v. Zynga, Inc.*,  
No. 12-cv-04007-JSC, 2016 U.S. Dist. LEXIS 17196, at \*37-38 (N.D. Cal. Feb. 11, 2016)  
(finding “that the \$23 million offered in settlement is reasonable” where it represented  
“approximately 14 percent of likely recoverable aggregate damages at trial . . .”).

1                                   **8.      No Objections to Date**

2                   Notice was sent on April 30, 2021. The Claims Administrator sent direct mail notice to  
3 85,361 addresses.<sup>5</sup> The Settlement Website had 7,322 views as of July 30, 2021. By August 10,  
4 2021, 1,415 claims have been received.<sup>6</sup> The final date for the submission of claims and  
5 objections is August 30, 2021. To date, there have been three opt-outs and zero objections.  
6 (Keough Dec. ¶20). *Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.* 221 F.R.D. 523, 528–29  
7 (C.D.Cal.2004) (“It is established that the absence of a large number of objections to a proposed  
8 class action settlement raises a strong presumption that the terms of a proposed class settlement  
9 action are favorable to the class members.”).

10                                   **9.      Presence of a Governmental Participant**

11                   The defendant in this case is a governmental entity, which weighs in favor of approval.  
12 *See Touhey v. United States*, No. EDCV 08-01418-VAP (RCx), 2011 WL3179036, at  
13 \*20-21 (C.D. Cal. July 25, 2011) (fact that defendants “are the government” weighed “in favor  
14 of final approval.”) citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.  
15 1992) (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir.1982)); *In re*  
16 *Heritage Bond Litig.*, 546 F.3d 667, 674 (9th Cir.2008).

17                                   **B.      The Scope of the Release is Proper**

18                   The release must be broad enough to achieve its purpose — *i.e.*, releasing claims that the  
19 Parties are agreeing to settle, in order to prevent unfairly exposing a party to continuing litigation  
20 over the same subject matter. *Villacres v. ABM Industries, Inc.* (2010) 189 Cal. App. 4th 562,  
21 589. The release in the Settlement achieves a proper balance by releasing “the City from any and  
22 all claims, obligations, promises, demands, rights, actions, causes of action, costs, legal fees,  
23

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24 <sup>6</sup> Courts in the Ninth Circuit routinely approve settlements with claims rates well below 10% and  
25 in fact a claims rate of about 5% in the average. *See, e.g., Zepeda v. PayPal, Inc.*, No. C 10-2500  
26 SBA, 2017 U.S. Dist. LEXIS 43672, at 49-50 (N.D. Cal. Mar. 24, 2017) (approving settlement with  
27 2.8% claims rate); *Moore v. Verizon Commc’ns, Inc.*, No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS  
28 122901, at 8 (N.D. Cal. Aug. 28, 2013) (approving settlement with 3% claims rate); *Touhey v.*  
*United States*, No. EDCV 08-01418-VAP (RCx), 2011 U.S. Dist. LEXIS 81308, at 21-22 (C.D.  
Cal. July 25, 2011) (approving settlement with 2% claims rate).

1 expert fees, consultant fees, expenses, damages, and liability of any kind whatsoever, known or  
2 unknown, arising from, concerning, or relating to the Action” and includes a waiver of the  
3 protections afforded by California Civil Code section 1542, solely as they relate to the action.  
4 (Steele Decl., Ex. 1 [§§12&14]).

5 **V. NOTICE TO CLASS MEMBERS WAS ADEQUATE**

6 Due process requires that reasonable notice of the settlement be given to all potential class  
7 members. *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 177. Moreover, “notice of the  
8 final approval hearing must be given to the class members in the manner specified by the court.”  
9 California Rules of Court 3.769(f). Notice was conveyed through a broad, multi-layered,  
10 multimedia program and meets the requirements for due process. (Keough Decl. ¶¶4-15).  
11 Consequently, reasonable notice of the Settlement was given and is sufficient for final approval.

12 **VI. THE REQUESTED ATTORNEYS’ FEES AND PLAINTIFF’S INCENTIVE**  
13 **AWARD ARE FAIR**

14 The Settlement Agreement provides that Class Counsel will apply for attorneys’ fees and  
15 expenses not to exceed \$425,000 of the Settlement Fund. The Settlement Agreement also  
16 provides that Class Counsel will apply for a Plaintiff’s incentive award to be paid to Plaintiff  
17 from the Settlement Fund in recognition of her contribution on behalf of the Class. (*Id.*).

18 Courts in California routinely award fees calculated as a percentage of the class recovery  
19 made against public entities using percentages between 20 to 40%, which reflect the current  
20 marketplace in contingency fee cases. *See Chavez*, 75 Cal. App. 4th 43, 64-65. The requested fees  
21 and costs are well justified as a percentage of the recovery, given the contingent and risky nature  
22 of this case. *Id.* The \$425,000 accounts for 33% of the Settlement Fund. However, Plaintiff’s  
23 costs (including Plaintiff’s share of the administration costs) are to be taken out of this as well,  
24 which will leave a fee in the range of 15.3%. Class Counsel has invested significant time and  
25 expense in this case for the past seven years without having been paid anything or been  
26 reimbursed to date. Further, Class Counsel have invested this time and money on investigation,  
27 experts, sending Notice of Class Certification to Class members, and other costs related to this  
28

1 litigation with no assurance of repayment.<sup>7</sup> In light of the length of time that the litigation has  
2 been pending, the amount of work and out-of-pocket costs that Class Counsel have put into the  
3 case, as well as the successful result, the request is reasonable.

4 With respect to Plaintiff, “[i]ncentive awards are fairly typical in class action cases.”  
5 *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 WILLIAM B.  
6 RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS, § 11:38, p. 81 (4th ed. 2008)).  
7 Such awards “are intended to compensate class representatives for work done on behalf of the  
8 class, to make up for financial or reputational risk undertaken in bringing the action, and,  
9 sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez*, 563  
10 F.3d at 958-59.; *see also In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393  
11 (affirming incentive award of \$10,000 per representative); *Munoz v. BCI Coca-Cola Bottling Co.*  
12 *of Los Angeles* (2010) 186 Cal.App.4th 399. Here, Plaintiff made significant sacrifices over the  
13 course of seven years in order to serve the best interests of the Class, including incurring  
14 reputational risks, allowing inspections of her private telephone records, responding to written  
15 discovery, producing documents, reviewing filings and having her depositions taken. For these  
16 reasons, the compensation allocated for Plaintiff as Class Representative is a fair and reasonable  
17 aspect of the Settlement Agreement.

18  
19 **VII. CONCLUSION**

20 Because the Settlement is fair, reasonable and adequate, Plaintiff respectfully requests the  
21 Court grant the Settlement final approval.

22 Dated: August 11, 2021

**STEELE COOPER LAW**

23  
24 By: \_\_\_\_\_

  
**ALEXANDRA T. STEELE**

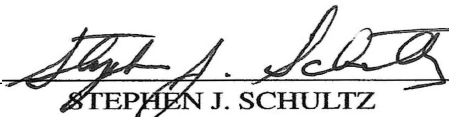
Attorney for Plaintiff and the Class

25  
26 \_\_\_\_\_  
27 <sup>7</sup> Former lead Class Counsel, Girardi Keese, put up the vast majority of the costs in this case.  
28 Accordingly, pursuant to a stipulation entered in the Bankruptcy Court, those costs will be paid to  
the Bankruptcy Trustee acting on behalf of Girardi Keese. (Steele Dec., Ex. 3.)

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Dated: August 11, 2021

**SLOVAK, BARON, EMPEY, MURPHY  
& PINKNEY, LLP**

By:   
STEPHEN J. SCHULTZ  
Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 At the time of service, I was over 18 years of age and not a party to this action. I am  
4 employed in the County of Los Angeles, State of California. My business address is 175 S. El  
Molino Ave., Suite 9, Pasadena, CA 91101.

5 On August 11, 2021, I served true copies of the following document(s) described as  
6 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF**  
7 **CLASS ACTION SETTLEMENT** on the interested parties in this action as follows:

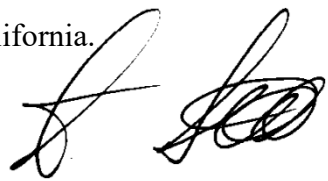
8 Benjamin P. Fay  
9 Gabriel McWhirter  
10 JARVIS, FAY, DOPORTO & GIBSON, LLP  
11 492 Ninth Street, Suite 310  
Oakland, CA 94607  
Telephone: (510) 238-1400  
Facsimile: (510) 238-1404  
[bfay@jarvisfay.com](mailto:bfay@jarvisfay.com)

12 Attorneys for Defendant CITY OF PALO ALTO

13 **XX BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the  
14 document(s) to be sent from e-mail address alex@steelecooperlaw.com to the persons at the e-  
15 mail addresses listed in the Service List. I did not receive, within a reasonable time after the  
16 transmission, any electronic message or other indication that the transmission was unsuccessful.

17 I declare under penalty of perjury under the laws of the State of California that the  
18 foregoing is true and correct.

19 Executed on August 11, 2021, at Pasadena, California.

20   
21 \_\_\_\_\_  
22 Alexandra T. Steele  
23  
24  
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27  
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