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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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11 EILEEN A. STAATS,
12 Plaintiff,
13 vs.
14 CITY OF PALO ALTO,
15 Defendant.
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Case No.: 2015-1-CV-284956

**ORDER CONCERNING
PLAINTIFF’S MOTIONS (1) FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND
(2) FOR AWARD OF ATTORNEYS’
FEES, REIMBURSEMENT OF
EXPENSES AND PAYMENT OF AN
INCENTIVE AWARD AND
JUDGMENT**

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19 This is a class action alleging that the City of Palo Alto unlawfully imposed a Utility
20 Users Tax (“UUT”) on customers of telephone service providers. The parties reached a
21 settlement, which the Court (Judge Walsh) preliminarily approved in an order filed on November
22 6, 2020. The factual and procedural background of the action and the Court’s analysis of the
23 settlement and settlement class are set forth in that order.

24 Before the Court are Plaintiff Eileen Staats’s motions for final approval of the settlement
25 and for approval of her attorney fees, costs, and service award. Plaintiff’s motions are
26 unopposed. The Court issued a tentative ruling on November 17, 2021, and no one appeared at
27 the November 18 hearing to challenge it. The Court now issues its final order, which GRANTS
28 both motions, but with a significant reduction in attorney fees.

1 **I. LEGAL STANDARD FOR SETTLEMENT APPROVAL**

2 Generally, “questions whether a [class action] settlement was fair and reasonable,
3 whether notice to the class was adequate, whether certification of the class was proper, and
4 whether the attorney fee award was proper are matters addressed to the trial court’s broad
5 discretion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*),
6 disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th
7 260.)

8 In determining whether a class settlement is fair, adequate and reasonable, the
9 trial court should consider relevant factors, such as the strength of plaintiffs’ case,
10 the risk, expense, complexity and likely duration of further litigation, the risk of
11 maintaining class action status through trial, the amount offered in settlement, the
12 extent of discovery completed and the stage of the proceedings, the experience
13 and views of counsel, the presence of a governmental participant, and the reaction
14 of the class members to the proposed settlement.

15 (*Wershba, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

16 In general, the most important factor is the strength of the plaintiffs’ case on the merits,
17 balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008)
18 168 Cal.App.4th 116, 130 (*Kullar*.) But the trial court is free to engage in a balancing and
19 weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91
20 Cal.App.4th at p. 245.) The trial court must examine the “proposed settlement agreement to the
21 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
22 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
23 whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, citation and internal quotation
24 marks omitted.)

25 The burden is on the proponent of the settlement to show that it is fair and
26 reasonable. However “a presumption of fairness exists where: (1) the settlement
27 is reached through arm’s-length bargaining; (2) investigation and discovery are
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1 sufficient to allow counsel and the court to act intelligently; (3) counsel is
2 experienced in similar litigation; and (4) the percentage of objectors is small.”
3 (*Wershba, supra*, 91 Cal.App.4th at p. 245, citation omitted.) The presumption does not permit
4 the Court to “give rubber-stamp approval” to a settlement; in all cases, it must “independently
5 and objectively analyze the evidence and circumstances before it in order to determine whether
6 the settlement is in the best interests of those whose claims will be extinguished,” based on a
7 sufficiently developed factual record. (*Kullar, supra*, 168 Cal.App.4th at p. 130.)

8 **II. TERMS AND ADMINISTRATION OF SETTLEMENT**

9 The gross maximum settlement amount is \$1,275,000. Attorney fees and costs of up to
10 \$425,000 (one-third of the maximum settlement) will be paid from the settlement fund. The
11 named plaintiff will also seek an enhancement award of \$10,000. The approximately \$145,535
12 in notice and administrative costs associated with the settlement will be borne half by Plaintiff’s
13 attorneys from their fee and cost award and half by the City.

14 The net settlement will be distributed to individual class members through a claims
15 process as follows:

- 16 • **Five or Fewer Phone Lines.** Claimants with five or fewer phone lines can seek a refund
17 of \$8.50 per phone line.
- 18 • **Six to Ten Phone Lines.** Claimants with six to ten phone lines can seek a refund of
19 \$8.50 per phone line for the first five phone lines and \$7.50 per phone line for the
20 remaining phone lines.
- 21 • **More than Ten Phone Lines.** Claimants with more than ten phones lines can seek a
22 refund of \$8.50 per phone line for the first five phone lines, \$7.50 per phone line for the
23 next five phone lines, and \$6.50 per phone line for the remaining phone lines.

24 Class members were given 120 days from the date of mailing to return their claim forms
25 with supporting documentation. In an order filed on October 20, 2021, the Court approved the
26 parties’ stipulation to an amended process concerning the treatment of untimely and deficient
27 claims. Funds that remain unclaimed following this process will revert to the City. (See Code
28 Civ. Proc., § 384, subd. (c).)

1 Class members will release the City from “any and all claims, obligations, promises,
2 demands, rights, actions, causes of action, costs, legal fees, expert fees, consultant fees,
3 expenses, damages, and liability of any kind whatsoever, known or unknown, arising from,
4 concerning, or relating to the Action....”

5 The notice process has now been completed. There was one objection to the settlement,
6 which the Court has received and considered.¹ Three individuals had previously opted out after
7 the Court granted class certification in 2018; additional opt-outs were not accepted in connection
8 with the settlement. Direct notice was mailed to 85,361 City residents potentially eligible for a
9 settlement payment.² As described in more detail in the administrator’s declaration, a digital
10 notice effort targeted class members who may have moved outside of Palo Alto, and short form
11 notices were distributed to media outlets as a press release and published in the *Palo Alto Daily*
12 *Post*.

13 Of the 85,361 notice packets, 7,330 were returned as undeliverable and 6 were re-mailed
14 to updated addresses. As of October 20, 2021, 1,559 claim forms were submitted, representing a
15 claims rate of about 1.8 percent.

16 This claims rate is extremely low. But consumer class actions often have a relatively low
17 claims rate. (See *Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 639, fn. 1
18 [noting that settlement claims rates are “notoriously low” and regularly amount to 10 percent or
19 less]; *Schneider v. Chipotle Mexican Grill, Inc.* (N.D.Cal. 2020) 336 F.R.D. 588, 599 [.83
20 percent claims rate “is on par with other consumer cases, and does not otherwise weigh against
21 approval”]; *In re Facebook Biometric Info. Privacy Litig.* (N.D.Cal. Feb. 26, 2021, No. 15-cv-
22 03747-JD) 2021 U.S.Dist.LEXIS 36801, at *10 [claims rate of 4 to 9 percent is typical for
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25 ¹ The October 20 stipulation addresses the first issue raised by the objector with respect to the
26 documentation required to support claims associated with a single telephone line, and the Court
27 finds that the documentation required to support claims associated with multiple telephone lines
is fair and reasonable.

28 ² The Court (Judge Kulkarni) notes that while it theoretically may be eligible to receive a
settlement payment, it did not submit a claim. Therefore, the Court believes it has no
disqualifying conflict, and therefore will rule on Plaintiff’s motions.

1 consumer class actions].) And the Court is persuaded that notice was the best practicable under
2 the circumstances in this case.

3 The Court continued the final approval hearing so that the administrator could submit a
4 fuller accounting of the claims process. As described in more detail in his declaration, the
5 administrator explains that 1,222 claims worth a total of \$19,277.50 will be allowed in full; 137
6 claims will be allowed in part, with a present total allowed value of \$1,359.00 and a potential
7 total value, if cured, of \$3,298.50; and 158 claims, with a potential total value of \$5,463.00, will
8 only be allowed if they are cured. 42 claims will be rejected, with a total value of \$981.50.
9 Thus, the allowable claims will total no more than \$28,039, a little over two percent of the gross
10 maximum settlement.

11 At preliminary approval, the Court found that the proposed settlement provides a fair and
12 reasonable compromise to Plaintiff's claims. It finds no reason to deviate from these findings
13 now, especially considering that there is only one objection. The Court accordingly finds that
14 the settlement is fair and reasonable for purposes of final approval, despite the disappointingly-
15 low claims rate. It accordingly GRANTS final approval.

16 **III. ATTORNEY FEES, COSTS, AND INCENTIVE AWARD**

17 Plaintiff seeks a combined fee and expense award of \$425,000, as stated in the class
18 notice. The request amounts to 33 percent of the maximum settlement fund. Subtracting the
19 requested \$10,000 incentive fee and \$219,155.92 in administrative and litigation costs leaves
20 \$195,844.08 to cover attorney fees, about half of the \$369,740 combined lodestar claimed by the
21 three firms that worked on the case and about 15.4 percent of the maximum settlement fund.

22 "Courts recognize two methods for calculating attorney fees in civil class actions: the
23 lodestar/multiplier method and the percentage of recovery method." (*Wershba, supra*, 91
24 Cal.App.4th at p. 254.) Plaintiff submits that the requested fee and cost award is reasonable
25 under either method. Citing *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19
26 (*Lealao*), she urges that the claims-made nature of the settlement "does not impact calculation of
27 the relevant common fund amount" for purposes of the percentage method. But *Lealao* looked
28 to the substantial value of the claims actually submitted in that case, not just the maximum

1 potential value of the settlement as Plaintiff urges here. (See *Lealao, supra*, 82 Cal.App.4th at
2 pp. 50–53 [discussing the \$14.7 million maximum value of the case as well as the \$7.35 million
3 in valid claims].)³ As explained in *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480
4 (*Laffitte*), the “constructive common fund” addressed by *Lealao*—like the fund in this case—was
5 not a “true common fund ... without any reversion to [the] defendant” (*Id.* at p. 503.)⁴
6 *Lealao* held “that *pure* percentage fees have been rejected by the California Supreme Court” for
7 funds like these. (*Lealao, supra*, 82 Cal.App.4th at p. 37, italics original.) In such cases, so long
8 as the value of the class recovery can be monetized with a reasonable degree of certainty, a trial
9 court can adjust or cross-check a lodestar award based on the percentage of the benefit method.
10 (*Id.* at pp. 49–53.) But the Court must start with the lodestar method.

11 Under *Lealao*, it would not be appropriate to award fees as a percentage of the maximum
12 settlement fund here, particularly without considering the value of the claims that were actually
13 submitted. Notably, the most recent declaration by the claims administrator confirms that the
14 value of the claims will be very low, consistent with the extremely low claims rate. The amount
15 paid to class members in this case will be far below counsel’s fee request, and even their costs.

16 Still, the Court finds that some fee and cost award based on an adjusted lodestar is
17 appropriate. Plaintiff’s counsel achieved class certification through time-consuming, hotly-
18 contested motion practice. The issues were complex and involved the evaluation of expert
19 testimony and an additional round of briefing directed by the Court. Plaintiff then defended, but
20 lost, a motion for summary adjudication of the claims accruing before December 23, 2013, based
21 on the claims presentation requirement prescribed by the Government Code. Following this loss
22 on the merits, Plaintiff continued to diligently pursue the remaining claims although their value

24 ³ In *Lealao*, “class counsel requested 24 percent of \$ 7.35 million, or \$ 1.76 million,” urging the
25 court “to reach this result by adjusting the lodestar figure (\$425,000) upward to \$ 1,487,500 by a
26 multiplier of 3.5 ‘based among other things on the result obtained by counsel as shown by actual
27 payments to be made to the class.’ ” (*Lealao, supra*, 82 Cal.App.4th at p. 25.)

28 ⁴ *Laffitte* declined to address “whether or how the use of a percentage method may be applied” to
such a fund. (*Laffitte, supra*, 1 Cal.5th at p. 503.)

1 was significantly diminished, and achieved a settlement representing 30–44 percent of the value
2 of those claims.⁵ As explained by Judge Walsh at preliminary approval, this is a good result for
3 those class members who continue to have viable claims, “considering the risks on the merits as
4 well as the challenges of proof addressed at class certification and the associated risk of
5 decertification.”

6 While the use of a claims process reduced class members’ actual recoveries, that process
7 was necessary in this case. As addressed at class certification, the UUT was billed and collected
8 by a number of different telephone service providers rather than the City, and it was expected
9 that class members would have to self-identify and provide documentation to participate in any
10 recovery.⁶ Ultimately, Plaintiff’s counsel did the best they could for class members who
11 continued to have potential claims following summary adjudication, even as their own financial
12 incentive was significantly reduced. The Court does not want to discourage such efforts by
13 failing to approve a reasonable award of fee and costs. It turns to that analysis now.

14 As an initial matter, the cost component of the award requested by Plaintiff is reasonable
15 and is approved. Notably, over \$100,000 in costs are for notice to the class, both post-
16 certification and in connection with the settlement. This notice was necessary to apprise class
17 members of their rights and should certainly be compensated. The other costs also appear
18 reasonably necessary to the litigation and are approved. Finally, Plaintiff requests a service
19 award of \$10,000. To support her request, she submits a declaration describing her efforts on
20 the case. Plaintiff estimates that she spent at least 100 hours on this matter, including over two
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23 ⁵ While not entirely clear from Plaintiff’s memorandum, her expert explains that “[d]uring the
24 [settlement] period, the City collected \$2,878,671 from its UUT. The Settlement Fund
25 represents 44 percent of the UUT collected. Less attorneys’ fees and costs, the remaining
26 portion of the Settlement Fund represents approximately 30 percent of the UUT collected during
that time period.”

27 ⁶ Notably, class certification was granted based on class members’ ability to self-identify and
28 prove their damages using their own billing records, since the evidence did not establish that
class members could be reasonably identified by the carriers themselves or that damages could
necessarily be calculated using carriers’ databases.

1 days in connection with her deposition. The Court finds that the class representative is entitled
2 to an enhancement award and the amount requested is reasonable.

3 Turning to the fee component of the award, Plaintiff claims a lodestar of \$369,740. The
4 lodestar is based on 738 hours billed by Girardi Keese and Steele Cooper Law at rates of \$125–
5 750 per hour (with only 80 hours billed at a rate above \$500), and 105 hours billed by Slovak,
6 Baron, Empey, Murphy & Pinkney, LLP at \$550 per hour. The Court finds the hours billed to
7 the case and the hourly rates to be reasonable. As previously stated, the fee component of the
8 award requested by Plaintiff is \$195,844.08, only about half of the claimed lodestar.

9 However, in light of Plaintiff's loss on the merits as to a large part of the class claims and
10 the extremely low participation rate by class members potentially eligible to receive a settlement
11 payment, the Court believes that the claimed fee component should be reduced by another 20%,
12 which means the fee component will be **\$156,675.26**. This reduced lodestar award strikes the
13 right balance between undercompensating counsel for their successful efforts on behalf of a
14 portion of the class, and over-incentivizing the prosecution of an action that ultimately did not
15 deliver significant money to the class as a whole. With this reduction, the Court GRANTS the
16 motion for fees and costs.

17 **IV. ORDER AND JUDGMENT**

18 In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND
19 DECREED THAT:

20 Plaintiff's motion for final approval is GRANTED. The previously certified class and
21 four subclasses are defined as:

22 All persons, including individuals, non-corporate entities, and corporations, who
23 have paid the City of Palo Alto Utility Users Tax ("UUT") imposed by Palo Alto
24 Municipal Code § 2.35.090 on the following services between August 1, 2006 to
25 December 18, 2014: (1) "flat-rate" mobile telephone service that entitles the
26 subscriber, upon payment of a periodic charge determined as a flat amount or
27 upon the basis of total minutes, to an unlimited number of calls in an identified
28 region; (2) "flat-rate," separately billed long distance landline telephone service

1 that entitles the subscriber, upon payment of a periodic charge determined as a flat
2 amount or upon the basis of total minutes, to an unlimited number of calls in an
3 identified region; (3) per-minute mobile telephone service; and/or (4) per-minute
4 long distance landline telephone service. Not included in the class are persons
5 who have paid the UUT only for separately billed local landline telephone
6 services or local landline services “bundled” with mobile or long distance landline
7 services in a plan that does not separately state the charge for the local service.

8 Excluded from the class are the three individuals who submitted valid requests for
9 exclusion.

10 Plaintiff’s motion for attorney fees and costs is GRANTED IN PART, with the attorney
11 fee component of the award reduced to **\$156,675.26**, for a total fee and cost award of
12 \$385,831.18.

13 Judgment shall be entered through the filing of this order and judgment. (Code Civ.
14 Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the
15 relief set forth in the settlement agreement and this order and judgment. Under Rule 3.769(h) of
16 the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms
17 of the settlement agreement and the final order and judgment.

18 The Court sets a compliance hearing for **May 5, 2022 at 2:30 P.M.** in Department 1. At
19 least ten court days before the hearing, class counsel and the settlement administrator shall
20 submit a summary accounting of the net settlement fund identifying distributions made as
21 ordered herein; the number and value of any uncashed checks; amounts remitted to the City; the
22 status of any unresolved issues; and any other matters appropriate to bring to the Court’s
23 attention. Counsel may appear at the compliance hearing remotely.

24 **IT IS SO ORDERED.**

25
26 Date: November 22, 2021

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28 _____
The Honorable Sunil R. Kulkarni
Judge of the Superior Court