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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.
16
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Case No.: 2015-1-CV-284956

**ORDER AFTER HEARING ON
NOVEMBER 5, 2020**

**Motion for Preliminary Approval of
Class Action Settlement**

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19 The above-entitled matter came on regularly for hearing on Thursday, November 5,
20 2020 at 1:30 p.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh
21 presiding. A tentative ruling was issued prior to the hearing, which no party challenged. The
22 appearances are as stated in the record. Having reviewed and considered the written
23 submissions of all parties and being fully advised, the Court adopts the tentative ruling as
24 follows:
25

26 This is a class action alleging that the City of Palo Alto unlawfully imposed a Utility
27 Users Tax (“UUT”) on customers of telephone service providers. Before the Court is plaintiff’s
28 motion for preliminary approval of a settlement, which is unopposed.

1 I. Factual and Procedural Background

2 According to the allegations of the Class Action Complaint (“Complaint”), in 1987, the
3 City adopted an ordinance establishing the UUT, which authorizes a local tax for telephone
4 services. (Compl., ¶¶ 8-9.) The UUT is automatically charged to City taxpayers each month by
5 telephone providers as part of their normal billing practice on behalf of the City. (*Id.* at ¶¶ 1, 9.)

6 For purposes of the UUT ordinance, the City adopted the definition of taxable telephone
7 services prescribed by federal statute in relation to excise taxes. (Compl., ¶ 10.) Beginning in
8 2005, five federal appellate courts held the federal excise tax statute did not permit the Internal
9 Revenue Service (“IRS”) to tax telephone services for which there is a toll charge that varies
10 with elapsed transmission time and not distance. (*Id.* at ¶ 12.) The IRS subsequently issued a
11 notice reflecting the same in May 2006, and announced it would cease collecting the federal
12 excise tax on amounts paid for time-only service after July 31, 2006. (*Id.* at ¶¶ 13, 72.)

13 Based on these authorities, Plaintiff’s telephone services are not taxable under federal
14 law. (Compl., ¶ 12.) And since the City adopted the definition of taxable telephone services
15 under the federal excise tax statute, after 2006, it could no longer apply the UUT to mobile
16 phone service among others. (*Id.* at ¶ 14.) Yet the UUT was still charged and collected
17 thereafter relative to exempt services. (*Id.* at ¶¶ 1, 16.) It was not until late 2014 that the UUT
18 ordinance was amended to remove any reference or connection to the federal excise tax. (*Id.* at
19 ¶ 26.)

20 Plaintiff claims she and other similarly situated persons have been unlawfully subject to
21 the UUT, such that they are entitled to a refund for taxes collected after at least August 1, 2006.
22 (Compl., ¶¶ 1, 27.) The Complaint, filed August 27, 2015, asserts the following causes of action:
23 (1) declaratory relief; (2) money had and received; (3) unjust enrichment; (4) writ of mandamus;
24 (5) invalidity of tax under Government Code section 53723; and (6) violation of California
25 Constitution Article XIII, C § 2 and invalidity of tax due to failure to obtain voter approval.

26 The City answered on December 18, 2015. The parties proceeded with discovery, and
27 plaintiff moved to certify the class on May 5, 2017. The hearing on the class certification motion
28 was rescheduled after the City amended its answer to assert an equitable setoff defense, and

1 again to permit the parties to submit supplemental briefing directed by the Court. In an order
2 filed on June 12, 2018, the Court granted plaintiff’s motion for class certification in part as to the
3 following class and four subclasses:

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

18 Notice issued to the class, with an opt-out deadline of January 14, 2019.¹ In an order
19 filed on May 20, 2019, the Court granted the City’s motion for summary adjudication “as to all
20 causes of action alleged in the complaint challenging the collection of telephone users tax that
21 accrued on or before December 23, 2013.” Thus, only the claims of class members who paid the
22 UUT between December 24, 2013 and December 18, 2014 remain at issue.

23 The parties have reached a settlement. Plaintiff now moves for an order preliminarily
24 approving the settlement, approving the form and method for providing notice to the class, and
25 scheduling a final fairness hearing.
26

27 II. Legal Standards for Approving a Class Action Settlement

28 Generally, “questions whether a settlement was fair and reasonable, whether notice to the
class was adequate, whether certification of the class was proper, and whether the attorney fee
award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple
Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48

¹ It appears that only three individuals opted out of the class.

1 Cal.App.4th 1794, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.*
2 (2018) 4 Cal.5th 260.)

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

10 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and
11 quotations omitted.)

12 In general, the most important factor is the strength of plaintiffs' case on the merits,
13 balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008)
14 168 Cal.App.4th 116, 130.) Still, the list of factors is not exclusive and the court is free to
15 engage in a balancing and weighing of factors depending on the circumstances of each case.

16 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine
17 the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the
18 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
19 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
20 concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal
21 quotation marks omitted.)

22 The burden is on the proponent of the settlement to show that it is fair and
23 reasonable. However "a presumption of fairness exists where: (1) the settlement
24 is reached through arm's-length bargaining; (2) investigation and discovery are
25 sufficient to allow counsel and the court to act intelligently; (3) counsel is
26 experienced in similar litigation; and (4) the percentage of objectors is small."

27 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor*
28 *Co., supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give
rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively
analyze the evidence and circumstances before it in order to determine whether the settlement is
in the best interests of those whose claims will be extinguished," based on a sufficiently
developed factual record. (*Kullar v. Foot Locker Retail, Inc., supra*, 168 Cal.App.4th at p. 130.)

1 III. Plaintiff's Investigation and Settlement Process

2 Before filing this action, plaintiff obtained relevant documents from the City pursuant to
3 a Public Records Act request. Plaintiff subsequently served and obtained responses to written
4 discovery requests, including two sets of requests for production of documents. The parties
5 engaged in lengthy meet and confer communications regarding the City's responses and
6 document productions. Plaintiff also took several depositions, including those of the City's
7 person most qualified designee and three other City employees. Meanwhile, the City deposed
8 plaintiff and her expert, obtained responses to written discovery requests including requests for
9 production of documents, and served subpoenas for the production of business records on
10 numerous third-party telephone service providers, who produced responsive documents and
11 declarations.

12 Following the Court's rulings on plaintiff's motion for class certification and the City's
13 motion for summary adjudication, the parties engaged in mediation with Hon. Bonnie Sabraw
14 (Ret.) between September 16 and October 23, 2019, reaching an agreement in principle. They
15 continued to negotiate the terms of the settlement agreement, the payment structure, and the
16 notice plan. On May 28, 2020, they stipulated to continue the five-year dismissal deadline so
17 they could finalize their settlement agreement, which was fully executed on August 11, 2020.

18 Plaintiff's counsel declares that her team has now reviewed many thousands of pages of
19 documents, including taxpayer telephone bills, investigation materials, technical data, and other
20 business records pertaining to their expert's analysis. They evaluated the merits of the action by
21 looking to other cases challenging utility users taxes, including *Ardon v. City of Los Angeles*
22 (Super. Ct. L.A. County, 2016, Case No. BC363959), which was also resolved through a
23 settlement. Ultimately, plaintiff agreed to settle the action for \$1,275,000, representing 44
24 percent of the \$2,878,671 in allegedly unlawful UUT the City collected during the relevant
25 period.

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1 IV. Provisions of the Settlement

2 Attorney fees and costs of up to \$425,000 (one-third of the gross settlement) will be paid
3 from the settlement fund. The named plaintiff will also seek an enhancement award of \$10,000.
4 The approximately \$115,535 in administration costs will be borne half by plaintiff's attorneys
5 from their fee and cost award and half by the City.

6 The net settlement, approximately \$840,000 by the Court's calculation, will be
7 distributed to individual class members through a claims process as follows:

- 8 • **Five or Fewer Phone Lines.** Claimants with five or fewer phone lines can seek a refund
9 of \$8.50 per phone line.
- 10 • **Six to Ten Phone Lines.** Claimants with six to ten phone lines can seek a refund of \$8.50
11 per phone line for the first five phone lines and \$7.50 per phone line for the remaining
12 phone lines.
- 13 • **More than Ten Phone Lines.** Claimants with more than ten phones lines can seek a
14 refund of \$8.50 per phone line for the first five phone lines, \$7.50 per phone line for the
15 next five phone lines, and \$6.50 per phone line for the remaining phone lines.

16 Claimants must submit the following documentation to secure a refund:

- 17 • **One Phone Line.** If a Claimant is seeking a refund for one phone line, the Claimant must
18 submit: (1) a Claim Form signed under penalty of perjury, indicating that the Claimant
19 had a landline in the City or a wireless line with a place of primary use (as defined by the
20 Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126) in the City during the
21 Claim Period; and (2) evidence of a Palo Alto address, such as a current phone bill, utility
22 bill, property tax bill, W-2 form, paystub, or other similar document.
- 23 • **Two to Ten Phone Lines.** If a Claimant is seeking a refund for two to ten phone lines,
24 the Claimant must submit: (1) a Claim Form signed under penalty of perjury, identifying
25 the number of landlines the Claimant had in the City or the number of wireless lines the
26 Claimant had with a place of primary use in the City during the Claim Period; and (2) a
27 phone bill or multiple phone bills, from any time period, sufficient to specifically identify
28 each phone line. Each phone bill must show a Palo Alto address.
- **More Than Ten Phone Lines.** If a Claimant is seeking a refund for more than ten phone
lines, the Claimant must submit: (1) a Claim Form signed under penalty of perjury,
identifying the number of landlines the Claimant had in the City or the number of
wireless lines the Claimant had with a place of primary use in the City during the Claim
Period; and (2) a phone bill or multiple phone bills, from the Claim Period, sufficient to
specifically identify each phone line. Each phone bill must show a Palo Alto address.

Class members will have 120 days from the date of mailing to return their claim forms
with supporting documentation. If a claim is rejected, the administrator will mail a notice to the

1 claimant, who will have 45 days to request reconsideration and remedy any unsubstantiated
2 portion of the claim. Unclaimed funds will revert to the City.

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

7 8 V. Fairness of the Settlement

9 Plaintiff submits that the \$1,275,000 settlement fund represents approximately 44 percent
10 of the estimated \$2,878,671 in allegedly unlawful UUT that the City collected during the claim
11 period. In light of the Court’s ruling on the City’s motion for summary adjudication, only the
12 subset of the class who paid the UUT between December 24, 2013 and December 18, 2014 will
13 be eligible to submit a claim, which is appropriate.² The Court agrees that the settlement
14 represents a good result for the class, considering the risks on the merits as well as the challenges
15 of proof addressed at class certification and the associated risk of decertification. Plaintiff
16 explains that a claims process is necessary because class members themselves rather than the
17 City possess the knowledge and proof as to whether they paid the UUT, presumably because the
18 UUT was billed and collected by telephone service providers rather than the City.

19 The Court retains an independent right and responsibility to review the requested attorney
20 fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles*
21 *Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Here, counsel submits that while
22 the \$425,000 combined fee and cost award represents 1/3 of the settlement fund, considering
23 their costs, the attorney fee portion of the award will constitute only about 21.5 percent of the
24 gross settlement. Still, counsel shall submit lodestar information prior to the final approval
25 hearing in this matter so the Court can compare the lodestar information with the requested fees.
26 (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to
27

28 ² Class members were permitted to opt-out of the class prior to summary adjudication, and will not be afforded a second opportunity to do so.

1 double-check the reasonableness of a percentage fee through a lodestar calculation].) Counsel
2 shall also submit an accounting of their costs.

3
4 VI. Notice

5 The content of a class notice is subject to court approval. (Cal. Rules of Court, rule
6 3.769(f).) “The notice must contain an explanation of the proposed settlement and procedures
7 for class members to follow in filing written objections to it and in arranging to appear at the
8 settlement hearing and state any objections to the proposed settlement.” (*Ibid.*) In determining
9 the manner of the notice, the court must consider: “(1) The interests of the class; (2) The type of
10 relief requested; (3) The stake of the individual class members; (4) The cost of notifying class
11 members; (5) The resources of the parties; (6) The possible prejudice to class members who do
12 not receive notice; and (7) The res judicata effect on class members.” (Cal. Rules of Court, rule
13 3.766(e).)

14 Here, the notices describe the lawsuit and the Court’s ruling on summary adjudication,
15 explain the settlement, and instruct class members that they may object or submit a claim. The
16 gross settlement and refund amounts are provided, along with the estimated fee and cost award
17 (on the full and publication notices only). Class members will be given 120 days to submit a
18 claim.

19 The short-form notice must be modified to state the amount of the fee and cost award that
20 will be requested. In addition, the notices must be modified to instruct class members that they
21 may appear at the final fairness hearing and make an oral objection even if they do not submit a
22 written objection. With regard to appearances at the final fairness hearing, the notices shall be
23 modified to instruct class members as follows:

24 Due to the COVID-19 pandemic, hearings before the judge overseeing this case
25 are currently being conducted remotely with the assistance of a third-party service
26 provider, CourtCall. If that remains the case at the time of the final fairness
27 hearing, class members who wish to appear at the final fairness hearing should
28 contact class counsel to arrange a remote appearance through CourtCall, at least
three days before the hearing if possible. Any CourtCall fees for an appearance
by an objecting class member shall be paid by class counsel.

1 Turning to the notice procedure, the parties have selected JND Legal Administration as
2 the settlement administrator. The administrator will mail the short-form notice and claim form
3 directly to City residents, based on its own search using skip trace databases and then the United
4 States Postal Service National Change of Address database to update addresses. JND staff will
5 track all notices returned as undeliverable and will promptly re-mail notices that are returned
6 with a forwarding address. To supplement direct notice, JND will cause over 103,000
7 impressions targeted to Adults 18+ in Palo Alto, CA to be delivered over 30 days via the largest
8 digital network (Google Display Network) and the top social media platform (Facebook). These
9 digital ads will contain an embedded hyperlink to the case website. Notice will also be published
10 in the *Palo Alto Daily Post* and be distributed as a press release to over 11,000 media outlets
11 nationwide. The long-form notice will be posted on a case website maintained by the
12 administrator, along with the claim form and other materials. These notice procedures are
13 appropriate and are approved.

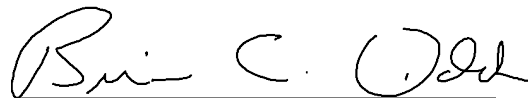
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15 VII. Conclusion and Order

16 Plaintiff's motion for preliminary approval is GRANTED, subject to the modifications to
17 the class notices directed above. The final approval hearing shall take place on **April 29, 2021**,
18 at 1:30 p.m. in Department 1.

19 The Court finds that Alexandra T. Steele, formerly of Girardi Keese and counsel of
20 record for plaintiff and the class at the time this Court granted class certification, naming Girardi
21 Keese class counsel, continues to be class counsel at her new firm, Steele Cooper Law.

22 IT IS SO ORDERED.

23
24 Dated: November 5, 2020



Honorable Brian C. Walsh
Judge of the Superior Court