SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ESTUADRO ARDON, on behalf of himself and all others similarly situated, Plaintiff, v. CITY OF LOS ANGELES, Defendants.	Case No.: BC363959 ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND DENYING MOTION TO INTERVENE Dept.: 307 Date: October 24, 2016 Time: 9:00 a.m.

I. BACKGROUND

Plaintiff Estuardo Ardon filed this class action lawsuit against Defendant City of Los Angeles on December 27, 2006. Plaintiff sues on behalf of himself and all similarly situated tax payers, based on the contention that Defendant has been improperly collecting a tax. Pursuant to the Los Angeles City Telephone Utility Users Tax (UUT), Defendant imposed a 10% tax on amounts paid for certain telephone services: interstate, intrastate, and international calls, teletypewriter exchange services, and cellular telephone services. (Complaint, ¶1.) Plaintiff alleges that, pursuant to the UUT's own terms, services not taxable under the Federal Excise Tax cannot be taxed by the City (Id. at ¶¶ 1, 8), and that the Federal Excise Tax does not apply to

"postalized" fees, that is, fees for telephone services that are not based on both distance between the callers and the duration of the transmission. (Id. at ¶¶ 2-4.) The complaint notes that, while at the time the Federal Excise Tax was first implemented, billing for telephone communication was based on both distance and duration, such is no longer the case. Following multiple successful challenges to the collection of the Federal Excise Tax in federal courts, the I.R.S. announced in May, 2006, that it would cease collecting the tax on amounts paid only for services not based on both distance and elapsed transmission time, and that it would refund taxes collected from February 28, 2003 through July 31, 2006. (Id. at ¶¶ 5, 6.) Plaintiff alleges that the City has not acted similarly by offering a way for taxpayers to seek refunds. (Id. at ¶12.)

Thus, the aim of this litigation has been to compel the City both to stop collecting taxes on telephone services to which the Federal Excise Tax does not apply, and to allow taxpayers to recover amounts that were allegedly improperly collected. The pleading alleges claims for Declaratory and Injunctive Relief, Money Had and Received, Unjust Enrichment, and Violation of Due Process. It prays for a declaratory judgment that the City has improperly collected the UUT on all phone service on which federal courts and the IRS have declared the Federal Excise Tax to be inapplicable, for an injunction against further improper collection, for a decree that the City has violated the 5th and 14th Amendments to the U.S. Constitution, for a writ of mandamus requiring the City to provide a constitutionally adequate legal remedy for taxpayers to challenge the future collection of the UUT, for the prompt return of all amounts of funds in the City's possession that were illegally collected, and for reimbursement.

After this litigation was filed, the City amended the UUT to eliminate reference to the Federal Excise Tax and Plaintiff amended his complaint to add a claim for declaratory relief,

alleging that this amendment was unconstitutional. In February, 2008, voters approved a measure that amended the UUT and removed all reference to the Federal Excise Tax. (Motion at 5:19-20.)

Defendant City successfully raised a challenge to the pleadings based upon the argument that Plaintiff was prohibited from pursuing these claims on a class wide basis, and that each member of the class must comply with the claims presentation requirement before proceeding with a lawsuit. The City argued that *Woosley v. State of California* (1992) 3 Cal.4th 758, 792, prohibits class claims for the refund of taxes. The Court of Appeal affirmed the trial court, but was reversed by the California Supreme Court. In so doing, the California Supreme Court applied the reasoning of *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457, which held that Government Code § 910 permits class claims against governmental entities because the word "claimant" refers to the class itself. Whereas *City of San Jose* (which involved nuisance claims concerning the San Jose Airport) stands for the general proposition that Government Code §910 permits class claims against governmental entities, *Woolsey* represents a specific prohibition against class claims for tax refunds where the tax statute at issue (there, the vehicle license fee) contains procedural requirements that are inconsistent with class claims. Finding that the taxing statute at issue (the UUT) does not contain any such procedural impediment, and that public policy does not prohibit this class action, the California Supreme Court held, "Class claims for tax refunds against a local governmental entity are permissible under section 910 in the absence of a specific tax refund procedure set forth in an applicable governing claims statute." (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 253.)

Following remittitur, the parties engaged in extensive discovery and mediation efforts, which ultimately resulted in settlement. Preliminary approval of the settlement was conditionally granted in August, 2015; an amended order granting preliminary approval was signed

September, 2015. (Joint Declaration of Francis M. Gregorek and Nicholas E. Chimicles (Joint Declaration), ¶30 and Exhibit E thereto.) The Court's August, 2015 order was conditioned in part upon presentation of a fully executed copy of the settlement agreement; at that time Plaintiff but not Defendant had signed it. The Second Amended Settlement Agreement has been signed by Defendant but not Plaintiff; accordingly, granting of this motion is conditioned upon presentation of a fully executed copy of the agreement, as the Court can only enforce agreements signed by parties.

II. MOTION FOR LEAVE TO INTERVENE

David Greenstein seeks leave to intervene in this action, citing CCP §387(a). This statute allows courts to permit a non-party to intervene where (1) proper procedures have been followed, (2) the nonparty has a direct and immediate interest in the litigation, (3) intervention will not enlarge the issues, and (4) the reasons for intervening outweigh opposition by the existing parties. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 51.) Here, while Greenstein says that he, "has an interest in the subject matter of the litigation as a class member," (Motion at 1:4-5) he presents no evidence of this, and Plaintiff presents evidence establishing that he does not. Even if he were a class member, the motion would be lacking in merit has Greenstein fails to demonstrate that his presence in this action is necessary. His only stated basis for intervening is to object to the requests for an incentive award to Plaintiff and a fee and cost award to Class Counsel both of which could be achieved by way of objection if Greenstein were a class member. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 253.)

Greenstein submitted a claim form on June 26, 2016. (Declaration of Rachelle Rickert, ¶6, and Exhibit E thereto.) On it, Greenstein states that he resides at 5160 Llano Dr., Woodland Hills, CA. (Exhibit E.) Plaintiff argues, however, that according to public records, Greenstein

transferred all interest in the real property located at 5160 Llano Drive to his ex-wife on March 29, 2004, prior to the start of the Class Period. (Rickert Declaration, ¶7, and Exhibit F thereto.) Plaintiff took Greenstein's deposition in order to probe this issue, questioning him not only about this document but other documents contained in other court files in which Greenstein stated under penalty of perjury that he resides in Mexico. (Rickert Declaration, ¶¶ 8-11 and Exhibits G, H, I, and J thereto.) The Court has read the excerpts of Greenstein's deposition concerning his contention to have resided at 5160 Llano Drive during the Class Period, including:

- He considered himself a full time resident of Mexico because he spent a lot more time in Mexico than out, and on his occasional trips to the United States he cannot say for sure where he stayed but he thinks it may have been at the house, with his ex-wife (pp. 51: 15-52:1; pp. 52:23 – 54:6; pp. 56:11- 57:19; pp. 62:21-64:4)
- He provided his ex-wife with money from time to time on a voluntary basis, which she may or may not have used to pay the phone bill (pp. 54:11-55:23; p. 71:3-6; p. 72:1-4).

Based upon the lack of evidence that Greenstein paid the telephone bill for the telephone at 5160 Llano Drive, as asserted in this claim form, the Court finds that Greenstein is not a class member. While this could potentially provide a basis for allowing him to intervene, Greenstein's motion lacks any argument or evidence to support the contention that he has an interest in this litigation. Perhaps because of these facts, at the hearing Greenstein orally withdrew his request to intervene

Greenstein's opposition to the motion for fees and incentive award is stricken and his objections are overruled. As he is not a class member and as his motion to intervene is denied, Greenstein lacks standing to oppose or object to anything in this litigation. On the same basis, Plaintiff's motion to quash deposition subpoena is granted.

III. MOTIONS FOR FINAL APPROVAL AND FOR FEES & COSTS AND INCENTIVE

A. SETTLEMENT CLASS DEFINITION

The Settlement Agreement defines the settlement class as follows: "[a]ll persons, including corporate and non-corporate entities wherever organized and existing, who paid telephone utility user taxes to the City of Los Angeles on the Kinds of Telephone Service utilized between October 19, 2005 and March 15, 2008, other than purely local service, teletypewriter exchange service, or long distance telephone service where the charges varied by both time and distance. The Settlement Class does not include prepaid mobile customers (which includes customers who purchased plans described as 'pay as you go,' 'pay as you talk,' pay and go wireless,' 'prepay or burner phone service' and 'no contract service') but does include prepaid mobile telephone service providers, *i.e.*, those that provide the above services to customers who prepay for wireless service. 'Purely local service' means local telephone service provided under a calling plan that does not include long distance telephone service, or that separately states the charge for local service on the bill to customers. The Settlement Class does not include any person, including any corporate and non-corporate entities wherever organized and existing, to whom the City has already paid a full refund of UUT paid for services utilized during the Class Period." (Second Amended Settlement Agreement, §I, p. 5-6.)

Kinds of Telephone Service means:

a. Residential landline service;

b. Business landline service; and

c. Mobile telephone service. (§I, ¶. 4.)

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B. TERMS OF SETTLEMENT AGREEMENT

The essential terms of the Settlement Agreement are as follows:

- Defendant agrees to a Settlement Fund in the amount of $92,500,000, to pay all claims, notice and claims administration expenses, an incentive award, and the fees and expenses of Class Counsel. (§III ¶A.1)
    - The Settlement Fund will be funded in installments. Within 30 days of entry of a final order and judgment, Defendant will provide an initial payment of $50,000,000, from which will be deducted the amount of any Advance Notice and Administration Expenses and a fee award to Class Counsel, which will be placed in a separate account. Thereafter, the Defendant will raise whatever funds are necessary to pay the difference between the Initial Payment and the amount required to pay all Class Member Payment Amounts, Notice and Claims Administration Expenses, Attorneys' Fees and Expenses, and Plaintiff's Incentive Award. (§III, ¶¶ A.2, A.3)
    - In the event the Settlement Fund is not entirely consumed, the balance, plus any interest that has accrued, will revert to Defendant. (§III, ¶A.4)
- To receive payment, class members must submit a completed claim form, provide certain information, and indicate which refund option they are selecting. (§III, ¶B.1)
    - Claim forms must submit claim forms within 120 days of notice. (§V ¶A)
    - Option 1 is called the Standard Refund Procedure. Class members who choose this option do not have to present evidence of UUT charges paid. Residential landline customers will receive $30. Business landline customers will receive $50. Mobile telephone customers will receive $50. (§III, ¶B.2)

- Option 2 is called Full Refund Procedure. Class members who select this option may claim a refund of the actual UUT paid during the Class Period, but must provide copies of bills showing such payments. For mobile telephone service customers, refunds will be in the amount shown on the bills, and for residential landline customers and business landline customers, refunds will be in the amount of 70% of the amount shown on the bills. (§III, ¶B.3)
- Class members may claim both Option 1 and Option 2 for different kinds of service, but regardless of the kind of refund selected, must submit a claim form signed under penalty of perjury. (§III, ¶¶ B.3, B.4)
- The claims administrator will decide if the claim forms are valid. (§III, ¶B.5)
- In lieu of receiving a payment, class members may donate their payment to one of four designated funds. (§III, ¶B.6)

- The cost of notice and administration will be the sole responsibility of the City and is capped at $288,000. (§IV. ¶L)
- Class Counsel will apply for an award of fees and costs not to exceed $18.5 million of the Settlement Fund, which will be paid from the Initial Payment, and the City reserves the right to object to any fee request in excess of $15 million. (§X, ¶A)
- Class Counsel will apply for a $10,000 incentive award for Plaintiff. (§X, ¶B)
- As of the Effective Date, Plaintiff and all class members (and their executors, estates, etc.) shall be deemed to have released the City and Related Parties from any and all Released Claims, whether known or unknown, and to have waived the protections afforded by CC§1542, solely as they relate to the allegations contained in Plaintiff's Complaint. (§VII, ¶A)

- Released Claims means, "any and all claims, demands, rights, damages, obligations, suits, and causes of action of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including both known and unknown claims of the Plaintiffs and all Class Members that were or could have been brought against the City and/or its Related Parties, or any of them, during the Class Period, arising from the facts alleged in the Complaint." (§I, p. 5)

C. ANALYSIS OF SETTLEMENT AGREEMENT

1. Standards for Final Fairness Determination

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." CRC 3.769(g). "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment." CRC 3.769(h).

"In a class action lawsuit, the court undertakes the responsibility to assess fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action. The purpose of the requirement [of court review] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); see also *Wershba, supra,* 91 Cal.App.4th at 245:Court needs to "scrutinize the proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or

overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned" ,(internal quotation marks omitted).)

"The burden is on the proponent of the settlement to show that it is fair and reasonable. However 'a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" (*Wershba, supra* 91 Cal.App.4th at 245, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) Notwithstanding an initial presumption of fairness, "the court should not give rubber-stamp approval." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.) "Rather, to protect the interests of absent class members, the court 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." (Ibid.) In that determination, the court should consider factors such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (Id. at 128.) "Th[is] list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra*, 91 Cal.App.4th at 245.)

Does a presumption of fairness exist?

a. Was the settlement reached through arm's-length bargaining? Yes. According to Class Counsel, the negotiations that eventually resulted in this settlement occurred

over the course of nearly 10 years, and included 5 formal mediation sessions before the Honorable Dickran Tevrizian (Ret.) Negotiations were at all times intense, challenging, and at arms'-length. In between sessions of mediation, when it was not at all clear that the case would ever settle, Class Counsel continued to aggressively litigate and filed a motion for class certification. (Joint Declaration, ¶¶ 27-30.)

b. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. The parties have diligently litigated this case and have expended significant energy on discovery. Plaintiff propounded numerous requests for production of documents from Defendant, and, with some, engaged in motion practice in order to compel compliance. Class Counsel also sought information from third party service providers, and engaged an expert to assist with data analysis. Defendant also propounded written discovery and took Plaintiff's deposition. The parties took the deposition of several service providers, and Defendant subpoenaed records from one. (Id. at ¶¶ 19-24.)

c. Is counsel experienced in similar litigation? Yes. At the time of preliminary approval, the attorneys representing Plaintiff and the class presented evidence of their substantial experience with class action litigation. (Declaration of Rachelle R. Rickert re: Preliminary Approval, ¶38, and Exhibits D, E, F, and G thereto.)

d. What percentage of the class has objected? Six objectors, out of a class of approximately 1.8 million, were received. (Declaration of Phil Cooper, ¶27 and Exhibit I thereto; Supplemental Declaration of Phil Cooper, ¶13 and Exhibit B

thereto; Second Supplemental Declaration of Phil Cooper, ¶14.) These six objections represent 0.00033% of the class.

CONCLUSION: The settlement is entitled to a presumption of fairness.

3. Is the settlement fair, adequate, and reasonable?

e. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar, supra,* 68 Cal.App.4th at 130.) The potential monetary value of the class claims was estimated by Defendant at $300 million. (Joint Declaration, ¶41, and Exhibit C thereto., "City of Los Angeles Continuing Disclosure Filing, Rule 15c2-12(b)(5) For the Period Ending June 20, 2013.") However, from the beginning, Defendant denied liability and has asserted defenses to this action. Thus, while Plaintiff continues to believe that his claims have merit and is prepared to proceed with litigation, Class Counsel has considered Defendant's positions and financial condition in coming to the conclusion that the proposed settlement is fair, reasonable, and adequate. For example, Defendant would contend that the UUT adopted the IRS's interpretation of the Federal Excise Tax at the time it was enacted in 1969, but the fact the IRS changed its position in 2006 does not require Defendant to change its interpretation of its ordinance. (Joint Declaration, ¶42.) Class Counsel also notes that Defendant would make an argument based upon the distinction between the federal authority Plaintiff relies on, which concern only long distance telephone service and not bundled service. (Ibid.) Given the uncertainty of establishing either class certification or liability, the $92,500,000 appears to be within the ballpark of reasonableness.

f. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

g. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (*Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226: "Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.")

h. Amount offered in settlement. Defendant has agreed to provide a Settlement Fund of $92,500,000. This amounts to approximately 31% of the estimated maximum potential value of the class claims. Taking into consideration the strengths and weakness of the case, as well as the prospect of a lengthy trial and the potential for an appeal thereafter, this settlement, which provides class members with the ability to submit a claim for a refund of the allegedly improper tax, represents a material benefit to class members. While the claims administrator, KCC Class Action Services, LLC, is still in the process of reviewing claim, it reports that it has received 312,116 of them. Although its review of claims is not yet complete, it has identified 285,010 claims for refunds in the standard amount, or approximately $19 million. It has also identified 12,869 in actual refund claims, many of which are from businesses such as

hospitals, banks, financial institutions, educational institutions, and others. (Supplemental Cooper Declaration, ¶¶4-7.)

i. Extent of discovery completed and stage of the proceedings. As discussed above, at the time of the settlement, the parties had conducted extensive discovery.

f. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including wage and hour cases.

g. Presence of a governmental participant. Defendant is a governmental entity.

h. Reaction of the class members to the proposed settlement.

KCC is providing notice and claims administration services. On October 14, 2015, KCC commenced notice via the Media Notice Plan. (Cooper Declaration, ¶12, and Exhibit D thereto.) Notice was published in four magazines (Parade, People, El Aviso, and Hoy Fin De Semana) and seven newspapers (Wall Street Journal, Los Angeles Times, Los Angeles Daily News, La Opinion, Contigo, Impacto USA, and Unidos). Notice was also provided on local televisions stations (KCBS, KTLA, KNBC, and KTTV), radio (KIIS, KYSR), via internet banners (Google, Xaxis, and Los Angeles Times), and by newswire. (Ibid.)

KCC established a website in English and Spanish (www.LATaxRefund.com), which provides information and from which class members may download claim forms and submit them, and an Interactive Voice Response system in English and Spanish (888-643-6490). (Cooper Declaration, ¶¶9, 10.) As of July 1, 2016, the website had been visited 305,802 times, and the IVR had received 40,525 calls. (Id. at ¶23.)

Additionally, KCC mailed notice to 1,871,761 commercial and residential customers, between October 20 and 23, 2015. (Id. at ¶¶4-8, 11, 13.) In the days following the mailing it was

discovered that some class members received multiple notice packets while others in the same apartment building did not receive any. KCC corrected this issue and sent replacement notice packets, assuming for itself the full cost of doing so. (Id. at ¶14.) KCC also forwarded mail returned with forwarding addresses, and conducted searches for mail that was not returned with forwarding addresses, and re-mailed notices when more current addresses were found. (Id. at ¶¶ 15, 16.)

Pursuant to this Court's order amending the Second Amended Settlement Agreement, Amending Claim Form, and Extending Claims Filing Deadline, KCC created an updated notice packet, Notice of Opportunity to Amend, and updated Claim Form and reminder postcard, and updated the website. (Id. at ¶17.) KCC mailed the Remail Notice Packets to 56,435 of the previously identified undeliverable addresses using a generic placename holder, mailed the Amended Notice Packet to 223,529 claimants with claims on file, advising them of new options, and sent 1,186,542 reminder postcards to addresses on the class member list, using generic placeholder name. (Id. at ¶¶ 18-20.)

Based upon the extensive and wide-ranging notice campaign outlined in the Cooper Declaration, it appears that the notice procedure was aimed at reaching as many class members as possible. The Court finds that the notice procedure satisfies due process requirements.

As of October 12, 2016, after mailing notice to over 1.8 million potential class members, KCC has received:

328,486 claims (a claims rate of approximately 18%),

25 requests for exclusion (an opt-out rate of 0.0013%), and

6 objections (an objection rate of 0.00033%).

(Second Supplemental Cooper Declaration, ¶4.)

Objections

Attached as Exhibit I to the Cooper Declaration are the four objections that were received prior to July 1, 2016, and attached as Exhibit B to the Supplemental Cooper Declaration are the two additional objections received prior to the July 12, 2016 cut-off.

Scott Aden and Nancy Aden object that they will recover only 70% of the UUT paid. However, based upon the City's contention that "bundled" landline service (local and long distance charged together) were properly taxes, 70% represents a compromise figure. All settlements, in fact, represent a compromise. The balance of the Aden objection appears to be a request to recover an additional amount, in other words, something other than what is offered under this settlement. If they wanted to seek such recovery, the Adens had the option of opting out of this settlement and pursuing an independent action against the City.

Joel Drum's objection seems to be based in part on the fact that class members are only entitled to receive $30 for each residential service and $50 for each mobile service, even if they have more than one line. While this is true (Defendant explains that this is because it does not have information about the number of lines on which claimant's paid UUT), it is also true that Drum had the option of pursuing a claim under Option 2. Drum also appears to believe that Defendant should be required to refund 100% to claimants. But again, settlements constitute a compromise position and rarely give rise to the recovery of 100% of the damages.

One anonymous objection, hand-written on the class notice, is difficult to decipher or to respond.

Finally, the objection submitted by Alfonso Calabrese asserts that the settlement is inadequate because Mr. Calabrese's settlement award "will decrease in direct proportion to the overall claims filed," that class members should not have to prove their claims, that no

reasonable person would retain the documentation required to obtain the Recognized Claim Amount, which is still only 70%, and that there is no way the attorneys should receive 20% of the settlement fund just because the class is so large. As to the first and second arguments, as already stated above, settlement awards represent a compromise of disputed claims and are not meant to constitute a complete recovery of all alleged damages. By agreeing to this settlement, each side has taken into account the risks of proceeding with the litigation; for Plaintiff, this includes the risk of failing to prevail on a motion for class certification and failing to establish liability. Defendant notes that the reason for the claim requirement is that Defendant does not in fact have the taxpayer information necessary for the kind of refund Calabrese would have preferred. The third objection fails to take into account the procedure negotiated with carriers for the provision of the necessary documents. As to the argument regarding fees, as discussed below, class action attorneys often recover a percentage of the settlement in the range of 33%, and here the actual percentage is more like 19%.

In addition to the January, 2016 objection submitted to the claims administrator, Alfonso Calabrese filed "Supplemental Authority" in support of his objection on August 10, 2016, and on September 19, 2016, file both "Motion" for leave to file a supplemental objection and a supplemental objection. In these filings, Calabrese is represented by attorney George W. Cochran.

On August 8, 2016, Mr. Cochran, an Ohio attorney, filed an application for *pro hac vice* admittance, which was conditionally granted at the hearing upon submission of proof of payment to the State Bar.

Calabrese's supplemental authority memo argues that fees should be awarded pursuant to the lodestar rather than percentage method, noting that the California Supreme Court was about

to issue a landmark decision in *Laffitte v. Robert Half International Inc.* In fact, it did so and the holding of that case supports using the percentage method; see additional discussion, below.

Calabrese's request for leave to submit a "supplemental" objection asserts that there is good cause to allow his late objection because the supplemental Cooper declaration demonstrates commercial customers with sizeable claims are the true winners. However, the larger refunds to commercial customers are based on what they paid. All class action members are treated the same, as all have the opportunity to submit claims backed up by records of payment. Calabrese's supplemental objection is overruled.

Finally, the objection by Yvonne Howell is based upon the argument that the standard refund is insufficient and the cost of obtaining records needed to submit a full refund is cost prohibitive. While the Court appreciates the frustration and expense involved in obtaining the records needed to support a full refund claim, as Plaintiff notes, this objection as submitted before the new procedure was put into place which provides for reimbursement of the cost to obtain records.

The Court has considered and now overrules each of the above objections. The Court can appreciate the frustration of some class members about the time and effort needed to comply with the claim requirement, but this is not a substantial reason for denying final approval of this settlement. Considerable and lengthy negotiations were required before this settlement was reached, and it should be recognized that this settlement represents a compromise of disputed claims. Tto the extent the objections are based on a belief that the class should recover some higher amount, it should be noted that settlements, "need not obtain 100 percent of the damages sought in order to be fair and reasonable," and that even if the relief is substantially less than what would be available after a successful outcome, "this is no bar to a class settlement because

'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'" (*Wershba, supra,* 91 Cal.App.4th at 250, citing *Air Line Stewards, etc., Loc. 550 v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109.) Finally, the Court notes that out of a class of potentially 1.8 million, the number of objections is miniscule, reflecting the class's overwhelmingly positive response.

CONCLUSION: The settlement can be deemed "fair, adequate, and reasonable."

D. ATTORNEY FEES AND COSTS

Class Counsel, Wolf Halderstein Adler Freemand & Herz, LLP, Chimicles & Tikellis, LLP, Cuneo Gilbert & Laduca, LLP, and Tostrud Law Group, PC, request an award of $18,500,000 for fees and costs. According to the Joint Declaration, Class Counsel have a combined lodestar of $11,813,095.75, and combined costs of $691,369.43. (Joint Declaration, ¶51.) (The lodestar and costs have increased since then; see below.) The lodestar excludes time attributable to opposing Defendant's appeal of this Court's order on Defendant's motion for return of privileged material and to disqualify counsel. (Id. at ¶52.)

The motion for fees argues that the fee and cost request is appropriate and should be approved under either the percentage of the common fund or the lodestar method. Defendant City opposes the motion for fees, arguing that the lodestar is the appropriate method of fee calculation, and asserting that the number of hours expended and the billing rates are unreasonably high. Plaintiff's Supplemental Brief argues again for fees pursuant to the percentage of the common fund method, based upon the recent California Supreme Court case *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480.

The Court requested that billing records or summaries be provided so that it could evaluate the reasonableness of the fee request, both as to hourly rates charged by the attorneys representing Plaintiff and the class, as well as the number of hours devoted to this litigation.

Based upon the supplemental declarations of Francis M. Gregork, Jon A. Tostrud, and Timothy N. Matthew, and the Declaration of Jonathan Cuneo, the lodestar calculation is as follows:

Law firm	Hours	Hourly Rate	Total Lodestar
Wolf Haldenstein Adler Freeman & Herz	12,791.4	$175-$800	$ 8,680,951.50
Tostrud Law Group, PC	1,270.9	$450-$600	$ 672,945.00
Chimicles & Tikellis, LLP	4,557.75	$60 - $950	$2,581,857.50
Cuneo Gilbert & Laduca, LLP	436.64	$150-$895	$ 319,127.50
TOTAL	**19,056.69**		**$12,254,881.50**

While the highest among the above hourly rates ($800-$900) are on the upper end of the prevailing rates in the community, they are not unreasonable. The City's expert, Gerald Knapton, says that if the rates were adjusted to the Third Quartile of prevailing rates for similar litigation in Los Angeles County (based in part on the 2015 Real Rate Report), the lodestar would be $8,287,728.23. (Knapton Declaration, ¶¶ 10-18.) In reply, Class Counsel notes that in another recent case, Mr. Knapton provided a declaration supporting the fee request by class counsel in *Skeen v. BMW of North America, LLC,* Civ. Case No. 2:13-cv-1531 WHW-CLW (D.N.J), in which he approved of rates up to $1,100 for partners working in the Los Angeles market. (Declaration of Rachelle Rickert, ¶2, and Exhibit A thereto.) Further, the Court notes that the bulk of the hours overall was by attorneys with billing rates in the $600-$700/hour range. Based on this Court's familiarity with the rates charged by attorneys in the Los Angeles area, the Court finds that the hourly rates charged by the attorneys are reasonable.

Defendant also argues that the number of hours expended on this litigation is unreasonable, noting as an example that often more than one attorney attended a deposition. This does not necessarily constitute a duplication of effort; given the hotly contested nature of this litigation and the complexity of the issues, Class Counsel could have reasonably deemed it necessary to have more than one attorney attend. Regarding the total number of hours expended, taking into consideration this case's nearly decade-long history and especially noting that Class Counsel deducted from these billing records the hours spent on appellate issues after the signing

of the Settlement Agreement, the Court finds the hours to be reasonable. Accordingly, $12,254,881.50 acts as the lodestar.

The $18,500,000 request, apart from costs, amounts to $17,784,850. [$18,500,000 - $715,150 cost request (see below) = $17,784,850] Given the $12,254,881 lodestar, to reach the $17,784,850 fee request requires application of a 1.45 multiplier. Here, given the quality of the representation, the novelty and difficulty of the issues presented and the skill displayed by the lawyers in presenting them, the results achieved on behalf of the class, and the contingent nature of the fee award, the Court has no trouble finding that this positive multiplier is warranted. Moreover, Defendant has agreed to a fee and cost award of $15,000,000. After deducting out $715,150 for costs, this would provide a fee award of $14,284,850. To achieve that amount would require application of a multiplier of 1.165. The difference between a multiplier of 1.45 and 1.165 is just .285.

Examining the fee request pursuant to the percentage method, the Court notes that it represents approximately 19% of the settlement. [$17,784,850 ÷ $92,500,000 = 0.1922] This is well below the average 33.33% generally awarded in class actions. (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558, FN13: "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") The recent *Laffitte* case provides support for the fee request under the percentage method as cross-checked by the lodestar, which in this case the Court has found to be reasonable.

As for costs, Class Counsel present evidence that as a group they have incurred $715,150. (Supplemental Gregork Declaration, ¶7, and Exhibit 3 thereto; Supplemental Tostrud Declaration, ¶7, and Exhibit 2 thereto; Supplemental Mathews Declaration, ¶7, and Exhibit 2

thereto; Cuneo Declaration, ¶7, and Exhibit 1 thereto.) These costs include filing fees, court fees, legal research, mediator fees, expert witnesses, photocopying, postage, court reporters and transcripts, travel (including meals and hotels), phone, fax, and other miscellaneous items. The costs appear to be reasonable and necessary to the litigation, are reasonable in amount, and were not objected to by the class.

Finally, as requested, copies of the *pro hac vice* orders were submitted, demonstrating that each of the out of state attorneys representing Plaintiff and the class may be awarded fees.

For all of the above reasons, the Court approves the $18,500,000 fee and cost request.

E. INCENTIVE AWARD TO CLASS REPRESENTATIVE

An incentive fee award to a named class representative must be supported by evidence that quantifies time and effort expended by the individual and a reasoned explanation of financial or other risks undertaken by the class representative. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806-807; see also *Cellphone Termination Cases* (2010) 186 Cal.App.4th 1380, 1394-1395: "[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. [Citations.]".)

Here, the named Plaintiff requests an incentive award of $10,000. Estuardo Ardon retained counsel to represent him in pursuing a claim over the UUT, and ultimately agreed to pursue not only his own claims but those of all other City UUT taxpayers. (Ardon Declaration, ¶3.) He has participated in this litigation from the beginning, devoting in total about 150 hours. (Id. at ¶¶ 5, 6.) Ardon has been in regular contact with his attorneys during the nearly 10 years since this case was filed, and has spent time responding to discovery requests, searching for

documents, preparing for and being deposed by the city, and working with his attorneys to prepare a declaration for presentation with the motion for class certification. (Id. at ¶¶ 5-7.) Ardon believes he has fairly represented the class and states that he has no conflicts with the class. (Id. at ¶8.) Additionally, Ardon has accepted the risks that are associated with acting as a class representative, including the publicity that comes along with taking a stand against a large governmental entity. (Id. at ¶11, and Exhibit B thereto: article portraying Ardon in a negative light.) As a result of Ardon's conduct, new law has been enacted that enables taxpayers to file claims seeking the refund of improperly collected taxes, and the class members in this action will receive settlement payments to compensate them for the illegally imposed tax. (Ibid.)

In light of the above, especially the positive result for the class, and taking into consideration the long duration of this litigation, $10,000 appears to be a reasonable inducement for her participation in this case. The requested incentive award is approved.

F. CLAIMS ADMINISTRATION COSTS

To date, claims administrator KCC has invoiced and been paid $2,114,359.91. (Cooper Declaration, ¶32.) KCC has not sent any additional invoices but expects to send an invoice for $1,299,516.47 based on current outstanding costs. (Second Supplemental Cooper Declaration, ¶20.)

IV. CONCLUSION AND ORDER

A. TENTATIVE RULING

Conditioned upon the filing of fully executed copy of the Second Amended Settlement Agreement:

(1) Grant class certification for purposes of settlement;

(2) Grant final approval of the settlement as fair, adequate, and reasonable;

(3) Award $18,500,000 in fees and costs to Class Counsel;

(4) Award $10,000 as an incentive award to Plaintiff Estuado Ardon;

(5) Claims administrator KCC has already received $2,114,359.91; another $1,299,516.47 is ordered to be paid to KCC at this time;

(6) Order class counsel to lodge a proposed Judgment, consistent with this ruling by October 31, 2016;

(7) Order class counsel to provide notice to the class members pursuant to California Rules of Court, rule 3.771(b); and

(8) A Non-Appearance Case Review re: Final Report re: Distribution of Settlement Funds is set for March 15, 2017, at 8:30 a.m. Final Report is to be filed by March 1, 2017.

Dated: October 25, 2016

Lisa Hart Cole
Judge of the Superior Court