RACHELE R. BYRD (190634)
MARISA C. LIVESAY (223247)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

DANIEL W. KRASNER (*pro hac vice*)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

NICHOLAS E. CHIMICLES (*pro hac vice*)
TIMOTHY N. MATHEWS (*pro hac vice*)
CHIMICLES & TIKELLIS LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, Pennsylvania 19041

JON TOSTRUD (199502)
TOSTRUD LAW GROUP, PC
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/278-2600
Facsimile: 310/278-2640

Attorneys for Plaintiff
[Additional Counsel Appear on Signature Page]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

JOHN W. MCWILLIAMS, on behalf of himself and all others similarly situated, Plaintiff, v. CITY OF LONG BEACH, Defendant.	Case No. BC361469 **PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** DATE: October 29, 2018 TIME: 9:00 a.m. DEPT: SS17 JUDGE: Hon. Maren E. Nelson

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 29, 2018 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department SS17 of the Superior Court of California, County of Los Angeles, located at 312 North Spring Street, Los Angeles, California, Plaintiff Joseph Henchman as Trustee of the John W. McWilliams Telephone Tax Claim Living Trust ("Plaintiff") will move this Court without opposition for a judgment and an order finally approving the settlement in this action, finally certifying the preliminarily approved Settlement Class, and dismissing this action according to the terms of the settlement.

This unopposed motion is made pursuant to California Code of Civil Procedure ("CCP") section 382 and California Rules of Court, rule 3.760, *et seq.* on the grounds that the proposed settlement is fair, reasonable, and adequate.

This motion is based upon the accompanying Memorandum of Points and Authorities, the Second Amended Settlement Agreement and the exhibits thereto, the Declaration of Joe Henchman, the Joint Declaration of Rachele R. Byrd and Timothy N. Mathews, the Declaration of Jennifer M. Keough Regarding Notice and Claims Administration, the Declaration of Hon. Dickran Tevrizian (Ret.), all files and records in this action, and any argument and evidence which may be presented at the hearing on this motion.

DATED: October 4, 2018

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
RACHELE R. BYRD
MARISA C. LIVESAY

By: Rachele R. Byrd
RACHELE R. BYRD

750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
DANIEL W. KRASNER
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

CHIMICLES & TIKELLIS LLP
NICHOLAS E. CHIMICLES

TIMOTHY N. MATHEWS
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
Telephone 610/642-8500
Facsimile: 610/649-3633

CUNEO GILBERT & LADUCA, LLP
JONATHAN W. CUNEO (*pro hac vice*)
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20013
Telephone: 202/789-3960
Facsimile: 202/789-1813

TOSTRUD LAW GROUP, PC
JON TOSTRUD
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/278-2600
Facsimile: 310/278-2640

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This class action against the City of Long Beach (the "City") arises from the City's collection of telephone utility users' taxes ("UUT") from August 11, 2005 through December 19, 2008 (the "Class Period") on telephone services allegedly not taxable under the City's UUT ordinance. After more than a decade of hard-fought litigation, including an appeal to the Court of Appeal and the California Supreme Court, and extensive arm's-length negotiations before the Honorable Dickran Tevrizian (Ret.), Plaintiff and the City seek final approval of their Second Amended Settlement Agreement ("SASA"). Joint Declaration of Rachele R. Byrd and Timothy N. Mathews in Support of Motion for Final Approval of Class Action Settlement, Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award (the "Joint Decl."), Exhibit ("Ex.") A.[1]

The City has agreed to pay up to $16,600,000 (the "Settlement Fund") to settle this litigation. Joint Decl., Ex. A, § III.A.1. The Settlement Fund[2] will provide UUT refunds to the Settlement Class and also payment of Settlement notice and administration costs, including certain telephone carriers' costs of retrieving and providing UUT data, Plaintiff's attorneys' fees and costs, and an incentive award to Plaintiff. *Id*., Ex. A, § III.A.1.

The Settlement is an outstanding result. Settlement Class Members[3] can receive up to a ***full recovery*** of the amount of the UUT that Plaintiff challenged as improperly collected by submitting documentary evidence of the amount of UUT paid, or by providing consent for certain of their telephone providers to provide that information to the Claims Administrator. *Id*., Ex. A, § III.B.3. Class Members can also receive refunds of $27.50 for landline, $46 for

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[1] This Court preliminarily approved the Settlement on March 28, 2018, and set a Final Fairness Hearing for October 29, 2108. *See* Joint Decl., Ex. B (Order Granting Motion for Preliminary Approval of Class Action Settlement, dated March 28, 2018 (hereafter referred to as the "Order."))

[2] Capitalized terms have the meaning ascribed in the SASA, unless otherwise noted. *See* Joint Decl., Ex. A.

[3] In its Order, this Court conditionally certified a Settlement Class (or the "Class") as also defined in the SASA. Joint Decl., Ex. A at 6 and Ex. B at 6, 28, 34.

business landline, and/or $46 for mobile service, without providing any documentation (*id*., Ex. A, § III.B.2), a significant achievement since taxpayers ordinarily bear the burden of producing evidence of any tax refund claimed due. *See, e.g., Dicon Fiberoptics, Inc. v. Franchise Tax Bd*., 53 Cal. 4th 1227, 1236 (2012).

The parties urge the Court to grant the Settlement final approval as fair, reasonable, and adequate. Class Members will receive immediate relief in the form of refunds rather than experience years of further delays as the litigation and inevitable appeals unfold. Plaintiff also respectfully requests that the Court finally certify the Settlement Class.

II. BACKGROUND

A comprehensive description of Plaintiff's claims and a procedural history of the case are contained in the Joint Declaration, filed concurrently herewith. In sum, the City's UUT ordinance collected a 5% tax on amounts paid for ***all*** telephone services used by every person located within the City. ¶¶ 1, 26.[4] However, the UUT expressly excluded from taxation amounts paid for telephone services not taxable under the Federal Excise Tax ("FET"), 26 U.S.C. § 4251. ¶ 28. Therefore, Plaintiff contends that telephone services not subject to the tax imposed by the FET were not subject to the UUT.

On August 11, 2006, Plaintiff submitted an administrative class claim with the City pursuant to Government Code § 900, *et seq*. for refund of the improperly collected taxes. ¶ 65; Joint Decl., ¶ 10. The City never responded to Plaintiff's claim. *Id*. Instead, by resolution approved on both September 5, 2006 and September 12, 2007, the City Council attempted to rewrite the UUT ordinance, without voter approval, to remove any reference to the FET and thereby apply the UUT to time-only telephone charges. *Id*., ¶ 14.

On November 6, 2006, Plaintiff filed this class action. On January 2, 2007, the City filed a demurrer claiming, among other things, that Plaintiff's class claim was invalid. *Id*., ¶¶ 11, 15. On April 13, 2007, this Court sustained the City's demurrer. The Court held, *inter alia*, that

[4] All paragraph references ("¶"), unless otherwise specified, are to Plaintiff's Class Action Complaint for Declaratory, Injunctive, Monetary and Other Relief, filed November 6, 2006 (the "Complaint").

Plaintiff could not assert a class claim for a tax refund. *Id*., ¶ 15.[5]

Plaintiff appealed on July 19, 2007. The briefing on appeal was completed on June 20, 2008, but the Court of Appeal stayed the appeal on August 20, 2008, pending a ruling by the Court of Appeal in a related case, *Ardon v. City of Los Angeles*, No. BC363959. In *Ardon*, this Court also sustained in part a demurrer by the defendant, City of Los Angeles, on the grounds that the plaintiff's class claim for tax refunds was invalid. *Id*. On May 28, 2009, the Court of Appeal affirmed this Court's decision in *Ardon*. *Ardon v. City of Los Angeles*, 174 Cal. App. 4th 369 (2009). However, on July 25, 2011, the California Supreme Court unanimously ruled in Plaintiff Ardon's favor, reversing the judgment of the Court of Appeal, and holding that "[c]lass claims for tax refunds against a local governmental entity are permissible under [Government Code] 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*, 52 Cal. 4th 241, 253 (2011). Then, on March 28, 2012, the Court of Appeal reversed in part this Court's granting of the City's demurrer in this case. *McWilliams v. City of Long Beach*, No. B200831, 2012 Cal. App. Unpub. LEXIS 2402 (2d App. Dist. Mar. 28, 2012).[6] The City filed a petition for rehearing, but the petition was denied.

The City then filed a Petition for Review with the California Supreme Court on April 30, 2012 (Case No. S202037), arguing that this case raised a pressing question expressly reserved in the Supreme Court's decision in *Ardon*, 52 Cal. 4th at 246, n.2, namely whether the Government Claims Act preempts local claiming requirements stated in city charters and county ordinances. The City contended that it had a claiming ordinance that qualified as a "statute" under Government Code section 905(a) and that the ordinance prohibited the filing of class claims.

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[5] Subsequent to the Court's ruling, voters approved an amendment to the City's UUT ordinance which removed any reference to the FET, effective December 19, 2008. This date marks the end of the Class Period. Joint Decl. at 5, n.7.

[6] The reversal was only in part because Plaintiff conceded that his fifth cause of action for violation of due process and sixth cause of action for writ of mandate were moot because he had an adequate "post-deprivation" remedy in light of *Ardon*, namely a class claim for a tax refund. "The trial court therefore correctly sustained the City's demurrer to these causes of action." *Id.* at *23.

The Supreme Court granted the City's petition on July 11, 2012. On April 25, 2013, the Supreme Court affirmed the judgment of the Court of Appeal in full, *McWilliams v. City of Long Beach*, 56 Cal. 4th 613 (2013), holding that "the applicable definition of 'statute' in section 905, subdivision (a) is that set forth in section 811.8, which excludes local charter provisions and ordinances." *Id.* at 626.

Class Counsel engaged in substantial party and third-party discovery. Joint Decl., ¶¶ 25-26. For example, Plaintiff propounded extensive third-party discovery, including sending document preservation demands to roughly 200 service providers and issuing subpoenas for production of documents to 20 major third-party telephone service providers (and their affiliates) that had remitted UUT to the City. Joint Decl., ¶ 26. Counsel also engaged in extensive meet-and-confer efforts with the service providers regarding the subpoenas. *Id*. In connection with Plaintiff's anticipated motion for class certification, Class Counsel obtained supporting declarations from multiple third-party telephone service providers regarding their policies and procedures, billing data, and UUT remittance practices. *Id*. Pursuant to these subpoenas, these non-parties produced thousands of pages of documents. *Id*. Plaintiff also responded to discovery propounded by defendant. *Id*., ¶ 27.

On April 1, 2015, the parties participated in a mediation session before Judge Tevrizian (Ret.) where they agreed to a settlement in principle. *Id*., ¶ 30. Resolving all material terms required lengthy additional negotiations, including a second mediation on December 17, 2015. *Id*. The parties subsequently exchanged multiple drafts of the Agreement via email and discussed some of the terms over the telephone on numerous occasions. The parties executed a Settlement Agreement on September 7, 2017. *Id*., ¶ 30. Plaintiff filed a motion for preliminary approval of the Settlement on September 8, 2017, and the parties executed a First Amended Settlement Agreement on January 16, 2018. Pursuant to various orders by this Court, Plaintiff submitted five supplemental submissions in support of his motion for preliminary approval, and the parties executed the SASA on March 20, 2018. On March 28, 2018, this Court granted preliminary approval to the Settlement. *Id*., ¶ 32.

III. SETTLEMENT TERMS

A. Monetary Relief to Settlement Class Members

The City has committed to pay up to $16.6 million into a Settlement Fund. Joint Decl., Ex. A, § III.A.1. This amount represents approximately 38-42% of the UUT it unlawfully collected during the Class Period. *Id*., § III.A.[7] Pursuant to the SASA, the City has advanced the funds necessary to pay the costs of notice and preliminary administration. *Id*., § IV.L.; Declaration of Jennifer M. Keough Regarding Notice and Claims Administration ("Keough Decl."), ¶ 30.

Within 30 days of entry of judgment and an order of this Court granting final approval of the Settlement, the City will deposit an initial payment equal to $11 million (the "Initial Payment"), minus the amount of any costs of notice and preliminary administration it has already paid, into a separate account. Joint Decl., Ex. A, § III.A.2.

Three types of telephone services are included in the Settlement: (1) residential landline services; (2) business landline services; and (3) mobile telephone services. For each type of service utilized during the Class Period, Class Members have the option of claiming: (1) a standard amount; or (2) with submission of telephone bills or other proof of payment of the UUT, a refund based on the total, actual UUT paid. *Id*., § III.B.[8]

Settlement Class Members have several options to submit claims. For each type of service utilized during the Class Period (mobile, residential landline, and/or business landline), Settlement Class Members have the option of claiming: (1) a standard refund amount, with no required documentation; (2) a refund based on the total, actual UUT paid during the Class Period, with submission of telephone bills or other proof of payment of the UUT, such as data

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[7] According to documents produced by the City in discovery, the City collected approximately $50.5 million in UUT during the 40-month Class Period. Accounting for the lawful taxation of local-only telephone services, Plaintiff estimates that approximately $40-44 million of the $50.5 million was unlawfully collected. Joint Decl., ¶ 33 n.9.

[8] Class Members do not have to elect the same claiming option for all types of telephone services. For example, if they paid for mobile telephone service and residential landline service during the Class Period, but do not have phone bills for their landline service, they can claim under the first option for landline service and the second option for mobile telephone service.

provided by their telephone service provider; or (3) a refund based on the UUT reflected in a sample of more recent telephone bills if the Class member is unable to locate Class Period bills.[9]

Under the first claiming option ("Option 1"), the standard Recognized Claim Amounts are $27.50 for residential landline telephone service, $46.00 for business landline service, and/or $46.00 for mobile telephone service. *Id.*, § III.B.2.

Under the second claiming option ("Option 2"), for mobile service, the Recognized Claim Amount will be based on 100% of the UUT shown on the documentation, and for landline telephone service the Recognized Claim Amount will be based on 70% of the sum of the UUT shown on the bills or other form of proof.[10] *Id.*, § III.B.4. Class Members using this Option can submit all of their Class Period bills, or they can submit a sample of bills from the Class Period, and their Recognized Claim Amount will be based on the average monthly UUT reflected, multiplied by the number of months in the Class Period. In order to claim a refund for the full Class Period using the sampling method, Settlement Class Members must submit at least three sample bills from each full calendar year in the Class Period (2006, 2007, and 2008), and at least one bill from the August 2005 to December 2005 time period, for a total of ten. *Id.*, § III.B.3.b.

Furthermore, the parties reached agreement with certain of the major carriers regarding a process by which Settlement Class members are able to request that the carriers search for their Class Period UUT payment data. Verizon[11] and Sprint will provide UUT data directly to the claims administrator for Settlement Class members who provide consent, and T-Mobile provided data directly to Settlement Class members who requested it via a dedicated email address or telephone number. *Id.*, § III.B.3.a.i.&ii. The parties have agreed that the costs of data retrieval

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[9] The amounts for all claims are subject to proration if claims exceed the settlement amount. Joint Decl., Ex. A, § V.B.1.

[10] Charges for purely local service were properly taxed under the UUT. Further, although Plaintiff disputes this, the City has argued that "bundled" landline service, where long distance and local service are charged together, was properly taxed. Accordingly, the parties negotiated that the recognized claim amount for Option 2 landline service would be 70% of the total UUT paid. Joint Decl., Ex. A, § III.B.4.

[11] Due to availability of data, the Verizon data searches will be limited to accounts with Verizon Wireless, MCI Communication Services, Inc., and MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services.

by Sprint, Verizon, and T-Mobile shall be paid as a cost of Notice and Administration, up to a total of $100,000. *Id*., § III.B.3.a.iii.

Finally, under the third claiming option ("Option 3"), Settlement Class members who are unable to submit bills from the Class Period can submit a sample of at least 10 more recent bills reflecting payment of the UUT. *Id*., § III.B.3.b. In order to submit a claim under this Option 3, Class Members must affirm on the Claim Form that they have made good faith efforts to locate copies of bills from the Class Period but have been unable to do so, and that, to the best of the Class Member's knowledge, his/her/its telephone usage during the Class Period was substantially similar to, or greater than, the telephone usage reflected in the copies of bills being submitted. *Id*. In order to utilize this sampling method, Class Members must submit at least ten bills from four different calendar years (*e.g.*, 3 bills from 2014, three bills from 2015, three bills from 2016, and one from 2017). *Id*.

Class Members had 120 days to submit their claims, or until September 15, 2018. SASA, § V.A; Joint Decl., Ex. B at 35. In addition to the robust notice program, Class Counsel sponsored an outreach program at their own cost to encourage the submission of claims, especially by potentially large UUT taxpayers that could be identified, such as businesses that would be expected to have high volume telephone usage. *Id*., § IV.K; Joint Decl., ¶ 43.

The Claims Administrator reports that as of October 2, 2018 the number of claims submitted is 32,139. Keough Decl., ¶ 20. Class Members were also provided with an opportunity to opt out of, or object to, the Settlement. In order to opt out of the Settlement, on or before October 15, 2018, Class Members needed only file with the Claims Administrator a signed, written request to opt out that included the Class Member's name, address and telephone number and address and telephone number(s) associated with the Class Period. Joint Decl., Ex. A, § VI.B. To date, the Claims Administrator has received only 9 requests for exclusion. Keough Decl., ¶ 28 & Ex. F thereto. Class Members who opt out may not file objections to the Settlement but, should they change their mind, do have the opportunity to rescind their opt-out during the claims period. Joint Decl., Ex. A, § VI.C. To date, the Claims Administrator has received no requests to rescind. Keough Decl., ¶ 29.

Class Members who wished to object to the Settlement, the payment of attorneys' fees and expenses or payment of the Plaintiff's incentive award were required to submit their objections and documentation showing their standing to object to the Claims Administrator by September 28, 2018. Joint Decl., Ex. B at 35. To date, the Claims Administrator reports that it has only received 2 objections. Keough Decl., ¶ 27 & Ex. E thereto. Plaintiff believes these objections are easily answered. Plaintiff will respond to the objections in a separate filing by the reply brief due date.

B. The Release is Narrowly Tailored to the Claims

The Court preliminarily found that "the form and scope of the release" is "appropriate and tethered to the pleadings." Joint Decl., Ex. B at 27. The Class Members will release claims — ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including both known and unknown claims — against the City "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." *Id.*, Ex. A, §§ I, VII.A.

C. Requested Attorneys' Fees and Costs and Incentive Award

As agreed to in the Second Amended Settlement Agreement, in Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award, filed concurrently herewith, Class Counsel have applied for attorneys' fees in the amount of $4,150,000, or 25% of the Settlement Fund, and expenses of $89,932.83. Joint Decl., Ex. A, § X.A. Also addressed in the motion filed concurrently herewith is Class Counsel's application for an Incentive Award of $6,000 to be paid to Plaintiff from the Settlement Fund in recognition of his/its contributions on behalf of the Class. The City has reserved the right to object to the amount of the incentive award. *Id.*, § X.B.

IV. METHODS AND REACH OF NOTICE AND ADMINISTRATION COSTS

Notice was given as directed in the Order to reach as many class members as possible and was extraordinarily robust, covering virtually every medium imaginable including, for example, 258,145 pieces of direct mail (Keough Decl., ¶¶ 6, 8), 4,154 television commercials on 21 different stations (*id.*, Ex. D), 492 radio commercials on 4 different stations (*id.*), publication in

13 major newspaper and magazine publications (*id*.), 12.5 million online impressions (*id*.), 265,272 reminder postcards (*id*., ¶ 19), roughly 700 direct telephone calls made to major businesses in the Long Beach area (Joint Decl., ¶ 44), postings on the Wolf Haldenstein and Chimicles websites (*id*.), and a joint press release by the parties in English and Spanish (Keough Decl., Ex. D; Joint Decl., ¶ 44). The Claims Administrator estimates that this notice campaign reached more than 90% of the Class Members. Keough Decl., ¶ 12. Notice of final judgment entered in this case will be posted on the Settlement website. *See* Cal. Rules of Court ("CRC"), rule 3.771(b).

The City has already paid notice and administration costs to the Claims Administrator of $867,551.39, and will incur addition costs in the future. Keough Decl., ¶ 30. Additionally, certain telephone service providers will be reimbursed for the costs of retrieving and providing Class Member UUT payment records to the Claims Administrator or to the Class Members directly (in the case of T-Mobile), which are anticipated not to exceed a total of $100,000. Joint Decl., Ex. A at § III.B.3.a.iii.

V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT

A. Standards for Final Approval of Settlement

A class action settlement should be approved where the court finds it is fair, adequate, and reasonable to the class members. *Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 128, 133 (2008). Moreover, a class action settlement is presumed to be fair if: (1) it 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.'" *Chavez v. Netflix*, 162 Cal. App. 4th 43, 52 (2008) (quoting *Dunk v. Ford Motor Co*., 48 Cal. App. 4th 1794, 1802 (1996)).

This Court has already found that the parties reached the Settlement through arm's-length bargaining including participation "in a mediation session before Judge Tevrizian (Ret.) where they agreed to a settlement in principle." Joint Decl., Ex. B, § D.1.a. Moreover, investigation and discovery were "sufficient to allow counsel and the court to act intelligently." *Id*., § D.1.b. Furthermore, this Court has recognized that "Class Counsel has experience litigating class

actions in state and federal courts." *Id*., § D.1.c. Finally, the percentage of objectors is extremely small. Only 2 objections have been received so far out of the more than 274,949 notices sent to potential Class Members. Keough Decl., ¶¶ 6, 27 & Ex. E. This amounts to only approximately 0.00073% of the Class. Further, only 9 Class Members timely filed exclusion requests following notice of this proposed Settlement. *Id*., ¶ 28 & Ex. F. Therefore, the Settlement is entitled to a presumption of fairness.

B. The Settlement is Fair, Adequate and Reasonable

1. The Strength of Plaintiffs' Case Balanced Against The Amount Offered in Settlement Favors Approval

The $16.6 million Settlement Fund represents a significant recovery for the Class and represents approximately 38-42% of the UUT the City unlawfully collected during the Class Period—an excellent result. Joint Decl., ¶ 32. "A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001). *See also, e.g., Rebney v. Wells Fargo Bank,* 220 Cal. App. 3d 1117, 1139 (1990) (settlements found to be fair and reasonable even though monetary relief provided was "relatively paltry").[12]

The Claims Administrator reports that it has received 32,139 claims to date. Keough Decl., ¶ 20. With approximately 274,949 members of the Class,[13] this equates to an approximate claims rate of 12%, which exceeds the number of claims the Claims Administrator expected to

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[12] *See also In re Celera Corp. Sec. Litig*., No. 5:10-CV-02604-EJD, 2015 U.S. Dist. LEXIS 157408, at *18-19 (N.D. Cal. Nov. 20, 2015) (granting final approval on a settlement fund which represented 17% of the plaintiff's total estimated damages); *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (granting final approval of a settlement fund where the gross class recovery was 9% 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 . . . .").

[13] In Plaintiff's motion for preliminary approval, he mistakenly estimated that there were 474,000 residential addresses in the City and 43,000 businesses registered with the City, most of which are likely members of the Class. Rather, 474,000 is the approximate population of the City of Long Beach. According to census materials, residential addresses number closer to 164,000. *See* https://www.census.gov/quickfacts/fact/table/longbeachcitycalifornia#viewtop.

receive, and is similar to the typical claims rates seen in these types of settlements. *Id*., ¶ 20. Of the 32,139 claims the Claims Administrator received, 20,626 were submitted online and 11,513 through the mail. *Id*. A preliminary review of the claims received has revealed 30,375 claims for standard amounts, and 10,529 actual refund claims. *Id*., ¶¶ 22-23. Many of the actual amount claims were submitted with substantial documentation. For example, 49 were submitted with over 100 pages of backup documentation, including a claim with more than 1,600 pages. *Id*. The Claims Administrator has also identified 7,781 claims that provide consent for carriers to search and provide UUT information to JND. *Id*., ¶ 24.

2. The Risk, Expense, Complexity and Likely Duration of the Litigation Would Be Considerable Were the Action to Proceed Against the City

The benefits of this Settlement must also be balanced against the risk, expense, and complexity of further litigation for both parties. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152 (2000). Although Plaintiff is prepared to proceed with a motion for class certification and to file a motion for summary adjudication should the Settlement not be approved, further litigation would produce additional time-consuming and expensive proceedings, as well as a potential trial. Moreover, given the past history of appellate proceedings in this action, including intervention by the California Supreme Court, there is also the likelihood that any decisions at class certification, summary judgment and/or trial would be appealed. Against these risks and the possibility of many more years of delay, the Settlement provides taxpayers with an opportunity to claim as expeditiously as possible refunds of all UUT unlawfully collected from them during the Class Period. Balancing these considerations supports approval of the Settlement because it reflects a well-reasoned resolution of this action, benefitting the Class and the administration of justice.

3. The Risk of Maintaining Class Action Status Through Trial Favors Final Approval

The City would no doubt vigorously oppose Plaintiff's attempts to have the class certified absent the Settlement. As this Court recognized in its Order, "Even if a class is certified, there is always a risk of decertification." Joint Decl., Ex. B, § D.2.c. (citing *Weinstat v. Dentsply Int'l,*

Inc., 180 Cal. App. 4th 1213, 1226 (2010)). As discussed above, it is also likely given the history of this action that any class certification decision would be appealed absent the Settlement.

4. The Recommendation of Experienced Counsel Favors Approval

In determining whether a proposed settlement is fair, reasonable, and adequate the California courts value highly the opinion of counsel that are experienced in the type of litigation being settled. *See, e.g., Chavez*, 162 Cal. App. 4th at 53. This Court has recognized that Class Counsel have extensive experience litigating class actions. Joint Decl., Ex. B, § D.2.f. Based upon Class Counsel's substantial experience and their review of substantial discovery, extensive litigation and exhaustive negotiations directly with the City and under the guidance of a mediator, the Hon. Dickran Tevrizian (Ret.), they believe the Settlement is fair, reasonable, and adequate and in the best interest of the Class Members. Joint Decl., ¶ 9.

5. Presence of a Governmental Participant Favors Approval

The fact that the defendant in this case is a governmental entity and endorses the settlement weighs in favor of approval. Joint Decl., Ex. B, § D.2.g; *see also Touhey v. United States*, No. EDCV 08-01418-VAP (RCx), 2011 U.S. Dist. LEXIS 81308, at *20-21 (C.D. Cal. July 25, 2011) (fact that defendants "are the government" weighed "in favor of final approval.").

VI. THE NOTICE TO CLASS MEMBERS WAS ADEQUATE

Due process requires that reasonable notice of the settlement be given to all potential class members. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Moreover, "notice of the final approval hearing must be given to the class members in the manner specified by the court." CRC, rule 3.769(f). The notice methods utilized here complied with the direction of the Order. Notice was conveyed through a broad, multi-layered, multimedia program. Keough Decl., ¶¶ 8-19. Consequently, the Settlement meets the requirements for reasonable notice in order to obtain final approval.

VII. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

This Court's Order conditionally certified the Settlement Class. The Court should now finally certify the Settlement Class for purposes of this Settlement.

There are two requirements to certify a class: (1) the class must be ascertainable; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704 (1967). California courts apply a "lesser standard of scrutiny" to certification of settlement classes. *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003). Each of the criteria for class certification is clearly satisfied in this case.

A. An Ascertainable Settlement Class Exists and Is Numerous

The Class is defined by objective characteristics and common transactional facts, *i.e.*, all persons who have paid the UUT on specific telephone services. Therefore, Class Members are readily ascertainable. *See Archer v. United Rentals, Inc.*, 195 Cal. App. 4th 807, 828 (2011). Moreover, certification of a class is appropriate when "the parties are numerous, and it is impracticable to bring them all before the court." CCP § 382; *see also Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981). Here, there are more than 274,000 households and businesses in the City, most of which are likely members of the Class as a result of their telephone usage, making it impracticable to bring them all before the Court.

B. There is a Community of Interest

"The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

The first factor means that it would be more efficient to jointly try the issues in the action, rather than requiring "each member . . . to individually litigate numerous and substantial questions to determine his or her right to recover following the class judgment . . . ." *Washington Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 913 (2001), *accord City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974). All Class Members were subject to the UUT pursuant to the Long Beach Municipal Code ("LBMC") during the Class Period. *See* former LBMC § 3.68.050(a). As a result, Plaintiff's allegations involve questions of law and fact common to the Class that predominate over any questions which may affect individual Class

Members.

The second factor, typicality, requires only that the named plaintiff's interests in the action be similar to those of other class members. *Richmond*, 29 Cal. 3d at 470, 478; *Vasquez v. Superior Court*, 4 Cal. 3d 800, 811 (1971). Plaintiff McWilliams was a resident of the City of Long Beach, was a customer of Verizon and Charter Communications during the Class Period, and, like the Class, paid the UUT imposed by the City on mobile and landline telephone services he purchased. Joint Decl., ¶ 56. Therefore, Plaintiff, like the Class, paid the UUT on services that were not taxable and is entitled to a refund.

With respect to the third factor, the representative plaintiff must adequately protect the interests of the class: (1) there must be no disabling conflict of interest between the class representative and the class; and (2) the class representative must be represented by counsel who are competent and experienced in the kind of litigation to be undertaken. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976); *See also Richmond*, 29 Cal. 3d at 478. During the more than ten years that this action has been pending, Mr. McWilliams, and subsequently the Trustee, have demonstrated their ability and willingness to vigorously prosecute this action. *See* Joint Decl., ¶ 56. Moreover, Plaintiff's claims present no conflict with the interests of other Class members.

Moreover, the Order finds that Class Counsel are adequate because they "have experience in class action litigation of this type." Joint Decl., Ex. B, § D.4.b.iv.; *see also, Richmond*, 29 Cal. 3d at 479 (counsel adequate where they had "substantial experience in class action litigation"). Class Counsel have diligently litigated this case throughout the nearly twelve years it has been pending and in the course of that effort secured reversal of this Court's order granting the City's demurrer in the Court of Appeal, and this decision was affirmed on appeal to the California Supreme Court. *McWilliams v. City of Long Beach*, 56 Cal. 4th 613 (2013). Furthermore, Class Counsel have successfully prosecuted numerous class actions across the country in both state and federal courts in recent years, recovering billions of dollars for injured class members. *See* Class Counsel Decls.

C. A Class Action is Superior

The California Supreme Court has consistently recognized that class actions provide accessible judicial review and deter unfair and illegal conduct and are therefore favored in California. *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004); *Richmond,* 29 Cal. 3d at 474; *Vasquez*, 4 Cal. 3d at 807-08; *Daar*, 67 Cal. 2d at 715. Here, "[g]iven the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members." Joint Decl., Ex. B, § D.4.b.v. No one could justify the effort and expense involved in trying to establish a practice of illegal taxation, nor would any attorney take such a case, when the amount at stake for any one individual, for example, is at the very most in the hundreds of dollars. Moreover, even if some of the business claims are large enough to justify individual litigation, an overwhelming majority of the class would have no realistic means of recovery absent a class action.

VIII. CONCLUSION

Because the Settlement is fair, reasonable, and adequate, the Court should grant the Settlement final approval.

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WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
RACHELE R. BYRD
MARISA C. LIVESAY

By: Rachele R Byrd
RACHELE R. BYRD

750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
DANIEL W. KRASNER
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

CHIMICLES & TIKELLIS LLP
NICHOLAS E. CHIMICLES
TIMOTHY N. MATHEWS
One Haverford Centre
361 West Lancaster Avenue

Haverford, PA 19041
Telephone 610/642-8500
Facsimile: 610/649-3633

CUNEO GILBERT & LADUCA, LLP
JONATHAN W. CUNEO (*pro hac vice*)
4725 Wisconsin Ave., NW
Suite 200
Washington, DC 20013
Telephone: 202/789-3960
Facsimile: 202/789-1813

TOSTRUD LAW GROUP, PC
JON TOSTRUD
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/278-2600
Facsimile: 310/278-2640

Attorneys for Plaintiff