

FILED
Superior Court of California
County of Los Angeles

MAR 28 2018

Sherri R. Carter, Executive Officer/Clerk

By *KJC*, Deputy
Kelly Jameson

**SUPERIOR COURT OF CALIFORNIA
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

ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

I. BACKGROUND

This class action originated with an administrative claim filed in August 2006 by Plaintiff John W. McWilliams on behalf of himself and all others similarly situated, seeking refunds of telephone utility users taxes ("UUT") collected by the City of Long Beach ("the City"). Plaintiff asserted that the City had required telephone carriers to collect the UUT on services to which the City's UUT ordinance did not actually apply. It is one of several similar cases.

1 On June 5, 2014, due to declining health concerns, Plaintiff McWilliams created the John
2 W. McWilliams Telephone Tax Claim Living Trust (the "Trust"), and transferred into the Trust
3 all of his rights, responsibilities, causes of action, and claims in the action. Mr. McWilliams
4 appointed Joseph Henchman, Executive Vice President of Tax Foundation, as Trustee of the
5 Trust to continue the litigation and ensure that the claims would survive in the event of Mr.
6 McWilliams' death. Mr. McWilliams passed away on December 30, 2015. The Parties agreed
7 that the Trustee on behalf of the Trust would be substituted as named Plaintiff and appointed as
8 Class Representative of the Settlement Class. Settlement Agreement, § II.B. A copy of the trust
9 agreement is attached as Exhibit A to the Declaration of Rachele Rickert. Thereafter the Court
10 made inquiry as to the propriety of this procedure and received briefing thereon. The Court is
11 satisfied based on the briefing and supplemental declarations received from Mr. Henchman on
12 January 11, 2018 that he was appropriately substituted and ordered same on March 6, 2018.

13
14 After a decade of litigation, including an appeal to the Court of Appeal and the California
15 Supreme Court, and negotiations before the Honorable Dickran Tevrizian (Ret.), in which both
16 Plaintiff and Mr. Henchman are represented to have participated, Plaintiff and the City finalized
17 a Settlement Agreement ("SA"), attached as Exhibit 1 to the Motion for Preliminary Approval.
18 Two amendments followed as did certain supplemental briefing.

19 A hearing was conducted on March 6, 2018. Further information was requested and
20 received March 20, 2018, including a Seconded Amended Settlement Agreement.

21 Having considered the proposed settlement and the argument of counsel the Court now
22 rules.

23 //

24 //

II. FACTS

1
2 The alleged facts concerning this matter are as follows: During the Class Period, the
3 City's UUT ordinance imposed a 5% tax on amounts paid for telephone services used by persons
4 located within the City. Former Long Beach Municipal Code ("LBMC"), § 3.68.050(a) (2006).
5 However, the UUT ordinance expressly excluded from taxation all amounts paid for telephone
6 services not taxable under the Federal Excise Tax ("FET"), 26 U.S.C. § 4251. (Plaintiff's Class
7 Action Complaint filed November 6, 2006 (the "Complaint"), ¶¶28,36.) Therefore, telephone
8 services not subject to the FET were not subject to the UUT.

9 The FET was adopted in its current form in 1965 and defined the scope of taxable
10 services in a manner that was tailored to the specific types of telephone services offered in 1965.
11 *See Am. Online, Inc. v. United States*, 64 Fed. Cl. 571, 578 (2005); *Amtrak v. United States*, 431
12 F.3d 374, 375 (D.C. Cir. 2005); *Fortis, Inc. v. United States*, 420 F. Supp. 2d 166, 175 (S.D.N.Y.
13 2004). Those services were: (1) teletypewriter exchange service; (2) local telephone service; and
14 (3) toll telephone service where calls are charged by *both time and distance*, and Wide Area
15 Telephone Service ("WATS"). 26 U.S.C. §§ 4251, 4252; Complaint, ¶¶3, 36.

17 Plaintiff alleges most modern telephone services do not fall under any of these three
18 categories. Instead, most modern long distance telephone service is charged via a "postalized"
19 fee structure, where charges vary solely by elapsed time and not by distance. (Complaint ¶¶4, 40-
20 41.)

21 In the early 2000's, five United States Circuit Courts of Appeal, the Court of Federal
22 Claims, and five United States District Courts concluded that typical modern long distance
23 telephone service is not subject to the FET. (Complaint, ¶¶ 5, 43.)
24
25

1 Following these holdings, in 2006 the IRS ceased collecting the FET on all telephone
2 service except local-only telephone service and offered refunds to taxpayers in the United States
3 by way of a line item on their 2006 federal tax return. (Complaint, ¶44.)

4 It is alleged that the City continued to require telephone companies to collect and remit
5 taxes from telephone users on services to which Plaintiff alleges the FET, and therefore the
6 UUT, did not apply.

7 On August 11, 2006, Plaintiff submitted an administrative claim with the City for refund
8 of the allegedly improperly collected UUT on behalf of himself and all other similarly situated
9 taxpayers pursuant to Government Code sections 900, *et seq.* (the "GCA"). (Complaint, ¶¶ 65-
10 67.) It is contended that the City ignored this demand and instead, in violation of Proposition
11 218, attempted to re-write the UUT to remove any reference to the FET without voter approval.
12 (Complaint, ¶¶ 16; 69-73.) On November 6, 2006, Plaintiff filed this class action seeking refunds
13 and to prevent further improper collection of the UUT. (Complaint, ¶¶ 82-107.)

14 On December 29, 2006, the City filed a demurrer asserting, among other things, that class
15 action claims for refunds of taxes are not permitted under the GCA or the City's local ordinances.
16 This Court sustained the demurrer and dismissed the action. Plaintiff appealed.

17 The Court of Appeal stayed the *McWilliams* appeal pending a decision by the Supreme
18 Court in *Ardon v. City of Los Angeles* (2011) 52 Cal. 4th 241, which involved the same issue. On
19 July 25, 2011, the California Supreme Court ruled in plaintiff Ardon's favor, holding that "[c]lass
20 claims for tax refunds against a local governmental entity are permissible under [Government
21 Code] section 910 in the absence of a specific tax refund procedure set forth in an applicable
22 governing claims statute." *Ardon v. City of Los Angeles*, 52 Cal. 4th 241, 253 (2011). Thereafter,
23 the Court of Appeal lifted the stay and reversed this Court's order granting the City's demurrer
24
25

1 and dismissing the case. *McWilliams v. City of Long Beach*, No. B200831, 2012 Cal. App.
2 Unpub. LEXIS 2402 (Mar. 28, 2012).

3 The City then filed a Petition for Review before the California Supreme Court. The City
4 argued that, notwithstanding the *Ardon* decision, the City's own municipal code prohibited the
5 filing of class claims. The California Supreme Court granted the petition and on April 25, 2013,
6 affirmed the judgment of the Court of Appeal, holding that the City's ordinance could not
7 supplant the procedures specified in the Government Code, which allowed class action refund
8 claims. *McWilliams v. City of Long Beach*, 56 Cal. 4th 613, 629 (2013).

9 Upon remand, the parties propounded discovery and Plaintiff prepared to file his motion
10 for class certification. Plaintiff obtained documents from the City and documents and supporting
11 declarations from several third-party telephone service providers.

12 On April 1, 2015, the parties participated in a mediation session before Judge Tevrizian
13 (Ret.) where they agreed to a settlement in principle. Resolving all material terms required
14 lengthy additional negotiations, including a second mediation on December 17, 2015. Plaintiff's
15 counsel, who were also counsel in *Ardon*, used knowledge they had gained through the *Ardon*
16 claims process to inform their negotiations.

17 The parties executed the settlement agreement on September 7, 2017. The parties filed
18 the *Second Amended Settlement Agreement* ("Settlement Agreement") on March 20, 2018.
19
20

21 **III. DISCUSSION**

22 **A. SETTLEMENT CLASS DEFINITION**

23 As defined in the SA the "Settlement Class" means "all persons, including corporate and
24 non-corporate entities wherever organized and existing, who paid telephone utility user taxes to
25

1 the City of Long Beach on the Kinds of Telephone Service utilized between August 11, 2005 and
2 December 19, 2008, other than purely local service, teletypewriter exchange service, or long
3 distance telephone service where the charge varied by both time and distance.” (Settlement
4 Agreement (“S.A.”), pg. 6, lines 10-14.)

- 5 ○ “Kinds of Telephone Service” means the three kinds of telephone service that
6 are the subject of this Action and for which UUT refunds are to be made
7 under this settlement: a) Residential landline service; b) Business landline
8 service; and c) Mobile telephone service. (S.A., pg. 4, lines 16-20.)
- 9 ○ “Purely local service” means local telephone service provided under a calling
10 plan that does not include long distance telephone service or local telephone
11 service where the charges for that service are separately stated on the bill to
12 customers. (S.A., pg. 6, lines 18-21.)
- 13 ○ The Settlement Class does not include prepaid mobile customers (which
14 includes customers who purchased plans described as "pay as you go," "pay
15 as you talk," "pay and go wireless," "prepay or burner phone service" and "no
16 contract service") but does include prepaid mobile telephone service
17 providers, i.e., those that provide the above services to customers who prepay
18 for wireless service. The Settlement Class does not include any person,
19 including corporate and non-corporate entities wherever organized and
20 existing, to whom the City has already paid a full refund of UUT paid for
21 services utilized during the Class Period. (S.A., pg. 6, lines 14-23.)
- 22 ● The “Class Period” is from August 11, 2005 to December 19, 2008. (S.A., pg. 3, line 20)
- 23
- 24
- 25

1 **B. TERMS OF SETTLEMENT AGREEMENT**

2 The essential terms are somewhat complex and are as follows:

- 3 • The Settlement Fund is **\$16,600,000**, reversionary. (Settlement Agreement, ¶III.A.1,
4 ¶III.A.4.)
- 5 • The Net Settlement Fund (**\$11,419,000**) is the Settlement Fund less:
- 6 ○ Up to \$4,150,000 (25%) for attorney fees (¶X.A.);
 - 7 ○ Up to \$125,000 for attorney costs (Ibid.);
 - 8 ○ Up to \$6,000 for a service award (¶X.B.);
 - 9 ○ Up to \$900,000 for Notice and Administration Expenses (¶IV.L.);
 - 10 ▪ All Notice and Administration Expenses remain the sole responsibility of
11 the City, regardless of whether the Settlement Agreement receives final
12 approval. (Ibid.)
 - 13 ○ Claim Form: To receive payment Class Members must submit a completed Claim Form.
14 The Claim Form must be submitted within 120 days of the mailing of the notices by
15 submitting it either electronically without signature to a website to be created by the
16 Claims Administrator, hand-delivery, fax, or mail. The written Claim Form will be in
17 English and Spanish. The website shall also have the electronic version of the Claim
18 Form in English and Spanish as formatted appropriately. When mailing the Claim Form
19 as described in Section IV.E of the settlement Agreement, the Claims Administrator shall
20 include with the Claim Form a self-addressed, pre-paid postage envelope in which the
21 Claim Form may be returned. Claimants who submit Option 1 claims (described below)
22 and also provide a copy of a telephone bill during the Class Period with their Claim Form
23
24
25

1 need not acknowledge the Claim under penalty of perjury. The Claim Form is attached as
2 Exhibit A to the Settlement Agreement. (§IV.A)

3 ○ The Claims Period (the period during which class members may timely submit
4 claims) shall span from the later of the date of completion of the mailing of the
5 Notice to Class Members or the date of publication following entry of the
6 Preliminary Approval Order, and end on the 120th day or such day as the Court
7 grants thereafter. (S.A., pg. 3, lines 9-12.)

8
9 ○ In order to receive a Class Member Payment Amount, Class Members must
10 submit a completed Claim Form for consideration and approval by the Claims
11 Administrator which includes the following required information: (a) Claimant's
12 name (as well as a contact name for business or entity Class Members); (b)
13 Claimant's current telephone number for contact purposes, if necessary, by the
14 Claims Administrator; (c) telephone number(s) for which the refund is claimed;
15 (d) for landline telephone service claims, the service address, located within the
16 City, for which a refund is claimed; (e) for mobile telephone service claims, the
17 billing address, located within the City, for which a refund is claimed; (f)
18 Claimant's current mailing address, if different from the billing/service address;
19 (g) Claimant's date of birth, unless Claimant is submitting one or more telephone
20 bills, and (h) the option of refund(s) requested. (§III.B.1)

21
22 ○ Payments may be received under three different options:

23
24 Option 1: Standard Refund Procedure: Class Members shall have the option of
25 returning the Claim Form with no additional documentation seeking flat

1 Recognized Claim Amounts of \$27.50 for residential landline telephone service,
2 \$46.00 for business landline service, and/or \$46.00 for mobile telephone service,
3 subject to the proration procedures referred to in section V.B.1., *infra*. For
4 business Claimants, only businesses that were registered with the City during the
5 Class Period shall be entitled to claim the business landline flat Recognized Claim
6 Amount. Class members may claim more than one flat Recognized Claim
7 Amount for different Kinds of Service (*e.g.*, one flat amount for landline and one
8 flat amount for mobile), but Class Members cannot claim more than one flat
9 Recognized Claim Amount for a single Kind of Telephone Service (*e.g.*, a Class
10 Member may not claim two flat amounts for mobile service). (§III.B.2)

- 11 ▪ Recognized Claim Amount means the dollar amount that has been
12 approved by the Claims Administrator for an Authorized Claimant's claim
13 pursuant to the terms and procedures specified in this Agreement. (S.A.,
14 pg. 5, lines 24-26.)

- 15
16 ○ Option 2: Full Refund Procedures: Class Members may claim a refund of the
17 actual UUT paid on long distance and bundled telephone services utilized during
18 the Class Period by submitting copies of telephone bills (or other service provider
19 documents) showing charges for the UUT from billing periods within the Class
20 Period. Class Members may submit a full set of bills (or other service provider
21 documents) reflecting the tax paid during the Class Period, or they may submit a
22 sample of: (1) at least one bill (or other service provider document) reflecting
23 UUT paid on a monthly basis from the period August 2005 through December
24 2005, *and* (ii) at least three bills (or other service provider documents) for each
25

1 calendar year of 2006, 2007, and 2008 reflecting UUT paid on a monthly basis
2 (*i.e.*, 3 bills for 2006, 3 bills for 2007, and 3 bills for 2008). (§III.B.3.a)

- 3 ○ If a Class Member submits a full set of bills (or other service provider
4 documentation) reflecting the tax paid during the Class Period, the Class
5 Member's Recognized Claim Amount shall be the total amount of UUT
6 reflected on such documentation as approved by the Claims Administrator.
7 (Ibid.)
- 8 ○ If a Class Member submits a sample of bills as provided above the Class
9 Member's Recognized Claim Amount shall be calculated as follows: (i)
10 the monthly UUT amount shown in the one document from the period
11 August 2005 through December 2005 shall be multiplied by five; and (ii)
12 the average monthly UUT reflected on the documentation for each other
13 calendar (2006, 2007, and 2008) year shall be multiplied by twelve. If a
14 Class member submits only a portion of the documentary evidence
15 required for each time period, the Recognized Claim Amount will be
16 calculated as the average for the time periods for which the requisite
17 documentation was provided, plus the UUT shown on the documentation
18 actually submitted for the other time periods. For example, if a Class
19 Member submits three bills from 2006 but only two bills from 2007, the
20 recognized Claim Amount will be calculated as the average of the UUT
21 shown on the three bills for 2006 multiplied by twelve, plus the total
22 amount of UUT shown on the two bills for 2007. (Ibid.)
23
24
25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- Class Members who submit a sample of bills must provide the requisite number of sample bills for each kind of service for which they seek a refund; for example, a Class member who seeks a refund for both landline and cellular service for the year 2007 must submit at least three landline bills from 2007 and at least three cellular bills from 2007. (Ibid.)
 - Class Members who incur out-of-pocket costs paid to their Class Period telephone carrier in order to obtain copies of bills may submit receipts from such Class Period telephone carrier of such costs for reimbursement, but such reimbursement not to exceed \$5 for each monthly bill submitted regardless of the actual cost and no more than \$50 total regardless of actual cost. (Ibid.)
 - Sprint and Verizon Customers: Subject to the Parties reaching an acceptable agreement with Sprint and Verizon, Class Members who were customers of Sprint and/or Verizon during the Class Period may provide consent for Sprint and/or Verizon to search for the Class Members' UUT payment data during the Class Period and provide that UUT data directly to the Claims Administrator. Class Members who select this option for a Kind of Service, but for whom Sprint and/or Verizon are unable to locate UUT payment records for that Kind of Service, shall be treated as if they made a claim under Option 1 for that Kind of Service, including being subject to the provisions relating to address audits as provided in section V.E.2. of the Settlement Agreement. (¶III.B.3.a.i)

- 1
- 2
- 3
- 4
- 5
- T-Mobile Customers: For Class Members who were customers of T-Mobile during the Class Period, subject to the Parties reaching an acceptable agreement with T-Mobile, the Notice will include a toll free number which Class Members may call to request a written statement of the UUT paid during the Class Period.

6 ¶III.B.3.a.ii)

- 7
- 8
- 9
- The costs of data retrieval by Sprint, Verizon, and T-Mobile shall be paid as a cost of Notice and Administrations, up to a total of \$100,000. (¶III.B.3.a.iii)

- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- The cost of this data retrieval is not included in the \$900,000 cap on notice costs discussed above and in the settlement agreement at ¶IV.L. The \$900,000 cap only pertains to the costs of providing notice to class members and does not include administration costs. ¶III.B.3.a.iii refers to a \$100,000 cap on the costs of data retrieval by the major telephone service providers, which is an administrative cost. (Second Supplemental Submission ISO Motion for Preliminary Approval, pg. 4.)

- 20
- 21
- 22
- 23
- 24
- 25
- Option 3: Submit Recent Phone Bills: Class Members who paid the City UUT during the Class Period, but who do not have copies of Class Period bills (and, as to Verizon and Sprint customers, who choose not to consent to a data search), may provide recent bills (or other service provider documents) reflecting payment of the UUT to the City. In order to claim a refund for the entire Class Period, such

1 Class Members must provide bills (or other service provider documents)
2 reflecting the UUT paid to the City in at least three months in three different
3 calendar years and at least one bill (or other service provider document) reflecting
4 the UUT paid a fourth calendar year for each Kind of Service for which they seek
5 a refund. For example, to claim a refund for residential service for the entire Class
6 Period, such Class Member could provide three bills from 2016, three bills from
7 2015, three bills from 2014, and one bill from 2013. A Class Member's
8 Recognized Claim Amount shall be calculated as the average monthly UUT
9 reflected in the documentation submitted for each calendar year multiplied by
10 twelve, plus the amount reflected in the documentation submitted from the fourth
11 calendar year multiplied by five. If a Class member submits only a portion of the
12 documentary evidence required for each time period, the Recognized Claim
13 Amount will be calculated as the average for the time periods for which the
14 requisite documentation was provided, plus the UUT shown on the documentation
15 actually submitted for the other time periods. In order to submit a claim under this
16 Option 4, Class Members must affirm on the Claim Form that they have made
17 good faith efforts to locate copies of bills from the Class Period but have been
18 unable to do so, and that, to the best of the Class Member's knowledge, his/her/its
19 telephone usage during the Class Period on which the Long Beach UUT was
20 collected was substantially similar to, or greater than, the telephone usage
21 reflected in the copies of bills being submitted. (§III.B.3.b.)

- 22
- 23 ○ Class Members who incur out-of-pocket costs paid to their current or
- 24 former carrier in order to obtain copies of bills under this Option 3 may
- 25

1 submit receipts from such carrier of such costs for reimbursement, but
2 such reimbursement not to exceed \$5 for each monthly bill submitted
3 regardless of the actual cost and no more than \$50 total regardless of
4 actual cost. (Ibid.)

- 5 ○ A Class Member may claim both Option 1 standard refund amounts and full
6 refund amounts under Options 2 or 3 for *different* Kinds of Telephone Service
7 (e.g., an Option 1 standard refund for mobile telephone service and an Option 2
8 full refund for landline telephone service), but a Class Member may not receive
9 both an Option 1 standard refund and an Option 2 full refund for the *same* Kind of
10 Telephone Service (e.g., both an Option 1 standard refund and an Option 2 full
11 refund for mobile telephone services). Further, a Class member may claim under
12 Options 2 and 3 for different telephone service accounts, but may not submit a
13 claim for the same account under both Option 2 and Option 3. Class Members'
14 claims are subject to offset for any UUT refunds previously paid by the City to
15 that Class Member so that the Class Member does not receive total refunds of
16 UUT that exceed the amount of UUT he, she or it paid for Kinds of Telephone
17 Service utilized during the Class Period. (§III.B.4.)

- 18
19 ■ Regardless of the refund option selected, each Claimant, by submitting a
20 Claim Form, must acknowledge under penalty of perjury (unless Claimant
21 is submitting at least one copy of her telephone bill reflecting payment of
22 the UUT during the Class Period) that the information set forth on the
23 Claim Form is accurate to the best of the Claimant's knowledge. The
24
25

claims administrator shall determine if each claim is valid. (§III.B.5,
§III.B.6)

○ Full Refund Recognized Claim Amount: The Recognized Claim Amount for full refund claims of mobile telephone service shall be the sum of the UUT shown on the bills or other evidence, or, if eligible sample bills are submitted, the average UUT shown on the bills as set forth above. The Recognized Claim Amount for full refund claims of residential landline telephone service and for business landline telephone service shall be 70% of the sum of the UUT shown on the bills or other evidence, or, if eligible sample bills are submitted, the average UUT shown on the bills as set forth above. If the bills include utility users' taxes collected from other cities, and the Long Beach UUT is not separately stated, the Claims Administrator shall have discretion to determine the appropriate estimate of the monthly Long Beach UUT. (§III.B.4.)

○ Class Member Payment Amounts

○ If the total of all recognized Claim Amounts is less than the Net Settlement Fund, then the Class Member Payment Amounts shall be each Authorized Claimant's Recognized Claim Amount.

○ If the total of all Recognized Claim Amounts is greater than the Net Settlement Fund, then the Claims Administrator shall make a pro rata adjustment based on each Authorized Claimant's Recognized Claim Amount, and shall issue refund checks in the pro rata amount, using the following formula: (§IV.B.2.)

$$\text{Pro Rata Adjustment} = \frac{\text{Net Settlement Fund}}{\text{Total Value of all Authorized Claimants' Recognized Claim Amounts}}$$

$$\text{Pro Rata Adjustment} = \text{Recognized Claim Amount} = \text{Class Member Payment Amount}$$

- 1 ○ Reversion: In the event that the total of all Class Member Payment Amounts, Notice and
2 Claims Administration Expenses, Attorneys' Fees and Expenses, and Plaintiffs Incentive
3 Award is less than the Settlement Fund, the difference, and any interest that may have
4 accrued, shall revert to the City. Such reversion, if any, shall occur within thirty (30) days
5 after issuance of the checks for the Class Member Payment Amounts, Notice and Claims
6 Administration Expenses, Attorneys' Fees and Expenses, and Plaintiff's Incentive Award.
7 To the extent any Class Member Payment Amounts go unclaimed (i.e., uncashed), those
8 additional amounts shall revert to the City under the terms of Section V.H. (§III.A.4.)
9
10 ○ Deceased Claimants: Claims may be filed by deceased Claimants through representatives
11 of their estate if appropriate documentation is provided. Any claims paid to a deceased
12 Claimant shall be made payable to the estate of the deceased Claimant or, in the absence
13 of an estate, to next of kin with documentation. (§V.C.)
14
15 ○ Rejected Claims: The telephone bills (or other service provider documents) provided by
16 the Class Members who submit Option 2 and 3 claims shall create a rebuttable
17 presumption that the Claimant paid the UUT in the amount set forth on the bills or
18 evidence. Any Party may seek to verify any Claim at such Party's discretion and expense.
19 Based on such verification or any other relevant circumstances, any Party may, upon
20 notice to counsel for the opposing Party, recommend to the Claims Administrator that the
21 claim should be approved or rejected. The Claims Administrator shall then make its own
22 independent determination at its sole discretion whether to approve or reject the claim.
23 (§V.E.2.)
24 ○ For Option 1 claims, the City may request that the Claims' Administrator conduct
25 an audit of any or all Option 1 claims, which audit shall be limited to confirming

1 through public records that the claimant's name is associated with the billing
2 and/or service address specified in the Claim Form. Such audit, if requested, shall
3 be conducted by the Claims Administrator through searches of public records
4 available via Accurint, and the cost of such searches shall be paid from the
5 Settlement Fund. If the search process locates a public record, indicating that the
6 claiming Class Member's name was associated with the relevant address at any
7 time during the Class Period, then the Claim shall be approved. If the search
8 process does not result in a match, the Class Member shall be entitled to provide
9 evidence of their service or billing address during the Class Period, which could
10 include, without limitation, a copy of a single bill or, account statement, a piece of
11 mail or a magazine mailing label from the Class Period, a driver's license from
12 the Class Period, or any other proof deemed sufficient by the Claims
13 Administrator to reflect the association between the Class Member and the
14 relevant service or billing address during the Class Period. As soon as practicable
15 a Claim Form is deemed to be deficient for any reason, the Claims Administrator
16 shall notify the Claimant (whose Claim Form has been deemed deficient) of the
17 deficiencies and request the Claimant correct them. Any Class Member whose
18 initial Claim Form is rejected or deemed, deficient by the Claims Administrator
19 shall have the right to cure the deficiency within 45 days of the date the notice of
20 deficiency is sent. (Ibid.)
21

- 22 ○ Initial Payment: Within 30 days of entry of the Final Order granting final approval to the
23 settlement, the City shall deposit the Settlement Fund in a separate escrow account at a
24 Financial Institution acceptable to all Parties, with the signatures of the Plaintiff's Co-
25

1 Escrow Agents as defined in paragraph "X.A." and counsel for the City of Long Beach as
2 co-signatories on the account, an initial payment equal to \$11,000,000 (the "Initial
3 Payment"), minus the amount of any Advanced Notice and Administration Expenses as
4 well as any attorneys' fees and expenses awarded and payable to Plaintiff's Counsel
5 pursuant to paragraph "X" below which shall be placed in a separate escrow account
6 within 5 days of entry of the order awarding attorneys' fees and expenses. (§III.A.2)

- 7 ○ Payment of the Balance of the Settlement Fund: The City shall pay the difference
8 between the Initial Payment and the total amount required to pay all Class Member
9 Payment Amounts, Notice and Claims Administration Expenses, Attorneys' Fees and
10 Expenses, and Plaintiff's Incentive Award, which total (including the Initial Payment)
11 shall not exceed the Settlement Fund amount. The City shall deposit the additional
12 necessary funds into the escrow account established pursuant to Section III.2, *supra*, no
13 later than 21 days after receiving notice from the Claims Administrator of the amount
14 due. The City shall not be required to pay interest on the Settlement Fund. (§III.A.3)
- 15 ● Checks must be cashed within 180 days of issuance. The Claims Administrator shall have
16 the discretion to reissue checks after the deadline to cash checks has passed if the original
17 check issued to the Claimant has not been cashed and, within 210 days after the original
18 check was issued, the Claimant certifies in writing that the original check did not reach
19 her within the 180 day time frame. The amount of any checks that become void may be
20 used, subject to the agreement of the Parties, to pay claims or any unanticipated Notice
21 and Administration Expenses, and thereafter shall revert back to the City. (§V.H, as
22 amended.)
23
24
25

- 1 • Objections: Objections by any class member shall be heard, and any papers submitted in
2 support of said objections shall be considered by the Court, at the Final Settlement
3 Hearing only if, at least thirty (30) calendar days prior to the Final Settlement Hearing,
4 such Class Member delivers to the Claims Administrator his/her/its objection. (§VI.A.)
 - 5 ○ Copies of at least one phone bill or other evidence of class membership must be
6 provided along with the objection to be considered valid. (Ibid.)
- 7 • Exclusions/Opt-outs: Any Class Member(s) who elect to exclude themselves or "opt out"
8 of the Class must file a written request to opt out with the Claims Administrator on or
9 before the date specified in the Preliminary Approval Order. (§VI.B.)
 - 10 ○ Rescission of Opt-Outs: The Parties recognize that some Class Members who
11 initially submit a request to opt out seeking exclusion may, upon further
12 reflection, wish to withdraw or rescind such opt-out requests. Class Members
13 shall be permitted to withdraw or rescind their opt-out requests by submitting a
14 "Rescission of Opt-Out" statement to the Claims Administrator that includes their
15 name, address, and telephone number and a statement indicating a desire to,
16 withdraw the previous request to opt out. Class Members may submit a Claim
17 Form along with their rescission of opt-out statement, provided the Claim Form is
18 submitted within the Claims Period. (§VI.C.)
 - 19 ○ Opt-outs must be submitted online or postmarked at least 10 business days prior
20 to the date of the Final Settlement Hearing. (Proposed Second Amended Order
21 Preliminarily Approving Class Action Settlement, ¶13.)
- 22 • Five Year Rule: The Parties agree that the Five Year Rule will be tolled from January 1,
23 2016 until either the Effective Date or until any order terminating the Settlement
24
25

1 Agreement is final (meaning the date upon which the order terminating the Settlement
2 Agreement is no longer subject to judicial review of any kind), such that in the event of
3 termination of the Agreement, the calculation of the five years provided for under the
4 Five Year Rule will not include the time period between October 23, 2014 and the date of
5 the finality of the order terminating the Settlement Agreement. (§IX.A.)

- 6 • The claims administrator is JND Legal Administration LLC. (Plaintiff's Supplemental
7 Submission ISO Motion for Preliminary Approval, pg. 1)
- 8 • Plaintiff anticipated the claims rate for individuals and small business will range
9 anywhere from 10% to 30%. (Declaration of Rachele Rickert, ¶28.)
- 10 • The Settlement Agreement does not contemplate any form of injunctive relief. (Plaintiff's
11 Supplemental Submission ISO Motion for Preliminary Approval, pg. 8)
- 12 • All class members who do not opt out will release certain claims against Defendant. (See
13 further discussion below)

14 **C. SETTLEMENT STANDARDS AND PROCEDURE**

15 California Rules of Court, rule 3.769(a) provides: "A settlement or compromise of an
16 entire class action, or of a cause of action in a class action, or as to a party, requires the approval
17 of the court after hearing." "Any party to a settlement agreement may serve and file a written
18 notice of motion for preliminary approval of the settlement. The settlement agreement and
19 proposed notice to class members must be filed with the motion, and the proposed order must be
20 lodged with the motion." (See Cal. Rules of Court, rule 3.769(c).)

21 "In a class action lawsuit, the court undertakes the responsibility to assess fairness in
22 order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
23 action. The purpose of the requirement [of court review] is the protection of those class
24 members, including the named plaintiffs, whose rights may not have been given due regard by
25

1 the negotiating parties.” (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America*
2 (2006) 141 Cal. App.4th 46, 60 [internal quotation marks omitted]; *Wershba v. Apple Computer,*
3 *Inc.* (2001) 91 Cal.App.4th 224, 245 (“*Wershba*”) [Court needs to “scrutinize the proposed
4 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
5 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
6 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”]
7 [internal quotation marks omitted].)

8 “The burden is on the proponent of the settlement to show that it is fair and reasonable.
9 However “a presumption of fairness exists where: (1) the settlement is reached through arm’s-
10 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court
11 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
12 objectors is small.” (*Wershba* at 245 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
13 1794, 1802 (“*Dunk*”)].) Notwithstanding an initial presumption of fairness, “the court should
14 not give rubber-stamp approval.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th
15 116, 130 (“*Kullar*”).) “Rather, to protect the interests of absent class members, the court must
16 independently and objectively analyze the evidence and circumstances before it in order to
17 determine whether the settlement is in the best interests of those whose claims will be
18 extinguished.” (*Ibid.*) In that determination, the court should consider factors such as “the
19 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,
20 the risk of maintaining class action status through trial, the amount offered in settlement, the
21 extent of discovery completed and stage of the proceedings, the experience and views of
22 counsel, the presence of a governmental participant, and the reaction of the class members to the
23 proposed settlement.” (*Id.* at 128.) “Th[is] list of factors is not exclusive and the court is free to
24 engage in a balancing and weighing of factors depending on the circumstances of each case.”
25 (*Wershba, supra* at 245.)

1 “A settlement need not obtain 100 percent of the damages sought in order to be fair and
2 reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if ‘the
3 relief afforded by the proposed settlement is substantially narrower than it would be if the suits
4 were to be successfully litigated,’ this is no bar to a class settlement because ‘the public interest
5 may indeed be served by a voluntary settlement in which each side gives ground in the interest
6 of avoiding litigation.’” (*Id.* at 250.)

7 **D. ANALYSIS OF SETTLEMENT AGREEMENT**

8 **1. Does a presumption of fairness exist?**

9 a. Was the settlement reached through arm’s-length bargaining? Yes. On April 1,
10 2015, the parties participated in a mediation session before Judge Tevrizian (Ret.)
11 where they agreed to a settlement in principle. Resolving all material terms
12 required lengthy additional negotiations, including a second mediation on
13 December 17, 2015. Plaintiff’s counsel represent they utilized the knowledge
14 they had gained through the *Ardon* claims process to inform their negotiations.
15 The parties executed the Settlement Agreement on September 7, 2017.

16 (Declaration of Rachele Rickert, ¶15.)

17 b. Were investigation and discovery sufficient to allow counsel and the court to act
18 intelligently? Yes. Prior to filing this action, Class Counsel represent they
19 investigated the facts and law underlying Plaintiff’s claims. Plaintiff also
20 propounded requests for production of documents, pursuant to which the City
21 produced 201 pages. Plaintiff also propounded on the City a set of requests for
22 admissions, a set of interrogatories and two sets of form interrogatories and
23 requested documents from the City pursuant to the California Public Records
24 Act, pursuant to which the City produced an additional 126 pages. (*Id.* at ¶¶17-
25 18.)

1 Plaintiff also undertook third-party discovery in connection with Plaintiff's
2 anticipated motion for class certification. Plaintiff sent document preservation
3 demands to roughly 200 service providers and issued subpoenas for production of
4 documents to major third party telephone service providers (and their affiliates)
5 that had remitted UUT to the City, including: AT&T Communications of CA,
6 Inc.; Broadwing Communications, LLC; Global Crossing Local Services, Inc.;
7 Charter Communications, Inc. d/b/a Charter Communications (CCI), Inc.; Level
8 3 Communications, LLC; MCI Communications Corporation; MPower
9 Communications Corp.; MetroPCS Wireless, Inc.; New Cingular Wireless PCS,
10 Inc.; Nextel of California, Inc.; Pacific Bell Telephone Company; Pac-West
11 Telecomm, Inc.; Sprint Communications Co., L.P.; Sprint Spectrum, L.P.;
12 Teleport Communications Group Inc.; U.S. Telepacific Corp.; Verizon California
13 Inc.; Verizon Wireless (VAE) LLC; XO Communications, LLC f/k/a Xo
14 California, Inc.; T-Mobile USA, Inc. Plaintiff also issued a subpoena for
15 production of documents to third party Veritex, Inc. Class Counsel engaged in
16 meet-and-confer efforts with the service providers regarding the subpoenas. In
17 connection with Plaintiff's anticipated motion for class certification, Class
18 Counsel obtained supporting declarations from multiple third-party telephone
19 service providers regarding their policies and procedures, billing data, and UUT
20 remittance. Pursuant to these subpoenas, these non-parties produced thousands of
21 pages of documents. Vertex, Inc., the company which provided tax billing and
22 calculation software to the service providers, also produced documents.

- 23 c. Is counsel experienced in similar litigation? Yes. Class Counsel has experience
24 litigating class actions in state and federal courts. True and correct copies of the
25

1 Class Counsel's resumes are attached as Exhibits D, E, F and G to the Declaration
2 of Rachele Rickert. (Id. at ¶35.)

- 3 d. What percentage of the class has objected? This cannot be determined until the
4 fairness hearing. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before
5 Trial (The Rutter Group 2014) ¶ 14:139.18 [“Should the court receive objections
6 to the proposed settlement, it will consider and either sustain or overrule them at
7 the fairness hearing.”].)

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

9 **2. Is the settlement fair, adequate, and reasonable?**

- 10 a. Strength of Plaintiff's case: “The most important factor is the strength of the
11 case for plaintiffs on the merits, balanced against the amount offered in settlement.”
12 (*Kullar, supra* at 130.) The \$16.6 million Settlement Fund is approximately 38-42% of the
13 estimated \$40-44 million in UUT the City collected during the Class Period. (Motion for
14 Preliminary Approval, pg. 13.)

15 While Plaintiff is confident he could prove at trial that the City collected UUT on
16 long distance telephone services that were not charged based upon both time and distance of
17 the call, the City would argue that bundled services were taxable during the Class Period
18 because the federal authorities Plaintiff relies upon address only long distance telephone
19 services and not bundled services. Further, the City would argue in its opposition to
20 Plaintiff's motion for class certification that individualized issues predominate because the
21 numerous telephone service providers used different methodologies for applying the tax and
22 offered thousands of different telephone plans. While Plaintiff has responsive arguments to
23 the City's defenses, the outcome is uncertain, and if the City were to prevail on any of its
24 arguments, the Settlement Class would obtain little or nothing from this litigation. The
25 Settlement provides an opportunity for Class members to obtain refunds of all UUT Plaintiff

1 alleges was wrongfully collected during the Class Period, subject only to potential proration,
2 depending upon the response rate.

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

7 c. Risk of maintaining class action status through trial. Even if a class is certified, there is
8 always a risk of decertification. (*Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th
9 1213, 1226 [“Our Supreme Court has recognized that trial courts should retain some
10 flexibility in conducting class actions, which means, under suitable circumstances,
11 entertaining successive motions on certification if the court subsequently discovers that the
12 propriety of a class action is not appropriate.”].)

13 d. Amount offered in settlement. As indicated above, Defendant has agreed to settle for
14 \$16,600,000. Assuming the Court approves all of the maximum requested deductions,
15 approximately **\$11,419,000** will be available for automatic distribution to class members
16 who submit claims.

17 e. Extent of discovery completed and stage of the proceedings. As discussed above, at the
18 time of the settlement, Class Counsel had conducted sufficient discovery to value the
19 claims.

20 f. Experience and views of counsel. The settlement was negotiated and endorsed by Class
21 Counsel who, as indicated above, are experienced in class action litigation, including
22 taxpayer cases of this type. Based upon their investigation and analysis, the attorneys
23 representing Plaintiffs and the class are of the opinion that this settlement is fair, reasonable,
24 and adequate. (Rickert Decl., ¶35.)

1 g. Presence of a governmental participant. Yes. The City of Long Beach is a governmental
2 participant and endorses the settlement.

3 h. Reaction of the class members to the proposed settlement. The class members' reactions
4 will not be known until they receive notice and are afforded an opportunity to opt out or
5 object. This factor becomes relevant during the fairness hearing.

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

8 **3. Scope of release**

9 The settlement contemplates that upon the Effective Date, "Plaintiff and all Class Members
10 and their executors, estates, predecessors, successors, assigns, agents and representatives, shall
11 be deemed to have jointly and severally released and forever discharged the City and the
12 Related Parties from any and all Released Claims, whether known or unknown, arising from the
13 facts alleged in the Complaint. Class Members provide this release conditioned upon the City's
14 compliance with all provisions of this Agreement. The Court shall retain Jurisdiction to enforce
15 the terms of this Agreement by any and all means available. All Class Members shall be fully
16 and forever barred from instituting or prosecuting in any court or tribunal, either directly or
17 indirectly, individually or representatively, any and all Released Claims against the City or any
18 of the Related Parties." (§VII.A.)

19 "Released Claims" means and includes any and all claims, demands, rights, damages,
20 obligations, suits, and causes of action of every nature and description whatsoever, ascertained
21 or unascertained, suspected or unsuspected, existing or claimed to exist, including both known
22 and unknown claims of McWilliams and all Class Members, that were or could have been
23 brought against the City and/or its Related Parties, or any of them, during the Class Period,
24 arising from the facts alleged in the Complaint. (S.A., pg. 6, lines 2-79.)

1 Plaintiff and all class members will provide a general release as well as a CC§1542
2 waiver, solely as they relate to the allegations contained in Plaintiff's Complaint. (¶VII.A.)

3 The Court preliminarily finds the form and scope of the release to be appropriate and
4 tethered to the pleadings.

5 **4. May conditional class certification be granted?**

6 a. Standards

7 A detailed analysis of the elements required for class certification is not required, but it
8 is advisable to review each element when a class is being conditionally certified. (*Amchem*
9 *Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627.) The trial court can appropriately
10 utilize a different standard to determine the propriety of a settlement class as opposed to a
11 litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
12 cases. (*Dunk, supra* at 1807, fn. 19.) Finally, the Court is under no "ironclad requirement" to
13 conduct an evidentiary hearing to consider whether the prerequisites for class certification have
14 been satisfied. (*Wershba, supra* at 240.)

15 b. Analysis

- 16 i. Numerosity. There are approximately 474,000 residential addresses in
17 the City and 43,000 businesses registered with the City, most of which
18 are likely members of the Class. (Motion, pg. 15.) Thus, numerosity has
19 been established. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926,
20 934 [stating that "[n]o set number is required as a matter of law for the
21 maintenance of a class action" and citing examples wherein classes of as
22 little as 10 [*Bowles v. Superior Court* (1955) 44 Cal.2d 574] and 28
23 [*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017] were upheld].)
- 24 ii. Ascertainability. The class is defined above. The class definition is
25 "precise, objective and presently ascertainable." (*Sevidal v. Target Corp.*

1 (2010) 189 Cal.App.4th 905, 919.) Class members are identifiable from
2 Defendant's records and those of third party service providers. The City
3 will provide the Claims Administrator with a list or lists of all addresses
4 (including names, where available) within the City of Long Beach
5 contained in its utility billing system (CC&B) and from its GIS provider,
6 as well as a list of the addresses and contact information for all businesses
7 registered with the City during the Class Period (§IV.E.)

8
9 iii. Community of interest. "The community of interest requirement involves
10 three factors: '(1) predominant common questions of law or fact; (2) class
11 representatives with claims or defenses typical of the class; and (3) class
12 representatives who can adequately represent the class.'" (*Linder v.*
13 *Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Here, each member of the
14 proposed Class is the victim of a common course of conduct undertaken
15 by the City. That is, all Class Members were subject to the UUT pursuant
16 to the LBMC, the remittance of which was based on the imposition of a
17 5% tax rate during the Class Period. (Motion, pgs. 15-16.)

18 iv. Adequacy of class counsel. As indicated above, Class Counsel have
19 experience in class action litigation of this type.

20
21 v. Superiority. Given the relatively small size of the individual claims, a
22 class action appears to be superior to separate actions by the class
23 members.

24 CONCLUSION: The class may be conditionally certified since the prerequisites of class
25 certification have been satisfied.

1 **5. Is the notice proper?**

2 a. Method of class notice.

3 Notice is proposed to be given in a variety of forms.

4 Individual Notice

5 Within thirty (30) days of entry of the Preliminary Approval Order, the City shall
6 provide the Claims Administrator with a list or lists of all addresses (including names, where
7 available) within the City of Long Beach contained in its utility billing system (CC&B) and
8 from the City’s Geographic Information System (“GIS”) provider, as well as a list of the
9 addresses and contact information for all businesses registered with the City during the Class
10 Period. Within fifty-one (51) days of entry of the Preliminary Approval Order, the Claims
11 Administrator shall mail the Notice and the Claim Form to the addresses on the CC&B, GIS and
12 businesses lists, and also the Letter to Businesses and Entities (Exhibit D to the Settlement
13 Agreement) of Class Settlement to the businesses on the list provided by the City. (¶IV.E.)

- 14 ○ **Reminder Notice:** At Class Counsel’s discretion, Class Counsel may request that,
15 four weeks before the end of the Claims Period, the Claims Administrator mail a
16 one-time Reminder Notice postcard. The Reminder Notice shall include, among
17 other things, information concerning the lawsuit, the deadline for submission of
18 claims, and instructions on how a Claimant may make a claim. (¶IV.F)

19 Notification on Websites

20 The City, Wolf Haldenstein Adler Freeman & Herz LLP and Chemicles & Tikellis LLP
21 will provide notice of this Agreement on their respective websites, including a link to the
22 website established by the Claims Administrator for the submission of claims. (¶IV.G.)
23

24 Publication Notice

1 Upon issuance of the Preliminary Approval Order, the Claims Administrator shall cause
2 to be published the Publication Notice attached to the Settlement Agreement in one or more
3 editions of the *Long Beach Press-Telegram*, *Los Angeles Times*, *Los Angeles Daily News*, *LA*
4 *Opinion*, *Impacto USA*, *Unidos*, *Hoy Fin de Semana*, *El Aviso*, *Orange County Register*, the
5 Western U.S. edition of *People in Espanol*, the California state editions of *Parade and People*,
6 and the *Wall Street Journal*. The publication of the Publication Notice will commence no later
7 than 20 days after entry of the Preliminary Approval Order so as to provide the best practical
8 notice to the Settlement Class. (¶IV.D).

9 Internet Advertising

10 The Claims Administrator shall also place banner advertisements and/or sponsored links,
11 geo targeted to the City of Long Beach area, and to a lesser extent California and other U.S. IP
12 addresses, via websites and networks such as Yahoo/Bing, Google, Xaxis, the Long Beach
13 Press-Telegram Website, Facebook and mobile advertising. (¶IV.H)

14 Joint Press Release

15 The Parties shall agree to a joint press release in English and Spanish over Businesswire
16 and/or PR News Wire's US1 and National Hispanic Newswire and to major local television and
17 newspaper outlets in the City of Long Beach and/or Los Angeles County. The cost and
18 administration of issuing this press release shall be borne by the Settlement Fund. The joint
19 press release shall constitute substantially the same form attached as Exhibit H to the Settlement
20 Agreement. (¶IV.I)

21 Television and Radio

22 The claims administrator shall also place advertisements on television and radio stations
23 directed towards the Long Beach region. No ad shall be placed that has not been approved by
24
25

1 the Court. (¶IV.J). The parties shall submit the radio and TV ads to the Court for approval prior
2 to their publication. (Proposed Second Amended Order Preliminarily Approving Class Action
3 Settlement, ¶11.f.) The ads shall be provided to the Court in electronically viewable format
4 (thumb drive or disc) within forty five (45) days of preliminary approval of the settlement

5 Outreach Program

6 Class Counsel may sponsor an outreach program at their own cost to encourage the
7 submission of claims. Subject to the protective order in place in the case, the City shall provide
8 Class Counsel access to the list of businesses and entities registered with the City during the
9 Class Period, as described in section IV.E. of the Settlement Agreement. (¶IV.K)

10 Live Call Center Support

11 The Claims Administrator shall provide live call center support to Class Members for
12 any questions that may arise regarding the claims administration process including, but not
13 limited to, how to fill out and return the Claim Form, what to do in the event the Claim Form is
14 lost, and general questions about the settlement. (¶V.G.)

15
16 b. Content of class notice.

17 The proposed class notice and publication notice are attached to the Settlement
18 Agreement as Exhibits E and G. The notice appears to be acceptable except that it fails to advise
19 that objections to the settlement shall be lodged thirty (30) days before the Final fairness
20 Hearing. It includes information such as: a summary of the litigation; the nature of the
21 settlement; the terms of the settlement agreement; the maximum deductions to be made from the
22 gross settlement amount (i.e., attorney fees and costs, the enhancement award, and claims
23 administration costs); the procedures and deadlines for participating in (do nothing), opting out
24 of, or objecting to, the settlement; the consequences of participating in, opting out of, or
25 objecting to, the settlement; and the date, time, and place of the final approval hearing.

1 Cost of class notice.

2 As indicated above, Notice and Administration Expenses are estimated not to exceed
3 \$900,000. (Settlement Agreement, ¶IV.L.) Prior to the time of the final fairness hearing, the
4 settlement administrator must submit a declaration attesting to the total costs incurred and
5 anticipated to be incurred to finalize the settlement for approval by the Court.

6 **6. Attorney fees and costs**

7 California Rule of Court, rule 3.769(b) states: “Any agreement, express or implied, that
8 has been entered into with respect to the payment of attorney fees or the submission of an
9 application for the approval of attorney fees must be set forth in full in any application for
10 approval of the dismissal or settlement of an action that has been certified as a class action.”

11 Ultimately, the award of attorney fees is made by the court at the fairness hearing, using
12 the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22
13 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615,
14 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) In common fund cases, the
15 court may use the percentage method, as cross-checked against the lodestar if appropriate.
16 (*Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503.) Despite any agreement by
17 the parties to the contrary, “the court ha[s] an independent right and responsibility to review the
18 attorney fee provision of the settlement agreement and award only so much as it determined
19 reasonable.” (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th
20 123, 128.)

21 The question of class counsel’s entitlement to \$4,150,000 in attorney fees will be
22 addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.
23 Class counsel must provide the court with billing information so that it can properly apply the
24 lodestar method, and must indicate what multiplier (if applicable) is being sought.
25

1 Counsel are advised that to the extent they seek fees on a percentage basis based on the
2 amount of potential recovery of the class rather than the amount actually recovered they shall
3 brief the propriety of that request and shall show what efforts they undertook to encourage
4 putative class members to participate in the settlement.

5 Class counsel should also be prepared to justify the costs sought by detailing how they
6 were incurred.

7
8 **7. Enhancement Award to Class Representatives**

9 The Settlement Agreement provides for an enhancement award of up to \$6,000 to the
10 class representative. Plaintiff may submit evidence in support of an enhancement award at the
11 time of final approval if he so chooses to. Trial courts should not sanction enhancement awards
12 of thousands of dollars with “nothing more than *pro forma* claims as to ‘countless’ hours
13 expended, ‘potential stigma’ and ‘potential risk.’ Significantly more specificity, in the form of
14 quantification of time and effort expended on the litigation, and in the form of reasoned
15 explanation of financial or other risks incurred by the named plaintiffs, is required in order for
16 the trial court to conclude that an enhancement was ‘necessary to induce [the named plaintiff] to
17 participate in the suit’” (*Clark v. American Residential Services LLC* (2009) 175
18 Cal.App.4th 785, 806 [italics and ellipsis in original].)

19 The Court will decide the issue of enhancement awards at the time of final approval.

20
21 **8. Form of Final Approval Order and Judgement**

22 Counsel are advised that the Court will prepare its own final approval order. The
23 proposed form of Judgment must include the names of all class members not bound by the
24 settlement and the terms of the release. (See CRC 3.771(a)).
25

1 Pursuant to California Rule of Court 3.771(b), a copy of this Judgment shall be posted
2 on the Settlement website within 5 business days of the service of the Judgment and remain
3 posted there for a period of at least 180 days after the date of final approval. (Proposed
4 Judgment, ¶10.) Notice of entry of the Judgment shall be posted on the Settlement Website
5 along with copy of the Judgment, and a statement shall accompany each refund check that is
6 sent to Class members notifying them of such posting. (Amended Proposed Order Preliminarily
7 Approving Class Action Settlement, ¶12.)

8
9 **III. CONCLUSION AND ORDER**

10
11 Conditioned on the parties (1) amending the Notice to advise that objections must be
12 received thirty (30) days before the final fairness hearing; (2) providing the Court in electronic
13 form (disc or thumb drive) copies of all advertising for approval within twenty days of this
14 Order; and (3) assuring that newspaper publications run at least once per week for four weeks,

15 The Court hereby:

- 16 (1) Grants preliminary approval of the settlement as fair, adequate, and reasonable;
17 (2) Grants conditional class certification;
18 (3) Appoints Joseph Henschman (Trustee of the John W. McWilliams Telephone Tax
19 Claim Living Trust) as Class Representative;
20 (4) Appoints Wolf Haldenstein Adler Freeman & Herz LLP, Chimicles & Tikellis LLP,
21 Cuneo Gilbert & Laduca, LLP and Tostrud Law Group, PC as Class Counsel;
22 (5) Appoints JND Legal Administration LLC as Settlement Administrator;
23 (6) Approves the proposed notice plan; and
24 (7) Approves the proposed schedule of settlement proceedings, as set forth below:

25 //

1 **PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

- 2 • Order preliminarily approving hearing: March 20, 2018.
- 3 • Deadline for Defendant to provide class list to settlement administrator: April 27, 2018
- 4 • Deadline for settlement administrator to mail notices: May 18, 2018
- 5 • Deadline for class members to submit a claim form: September 15, 2018 if 120 days
- 6 after the later of the date of completion of the mailing of the Notice to Class Members
- 7 (120 days after the later of the date of completion of the mailing of the Notice to Class
- 8 Members or the date of publication following entry of the Preliminary Approval Order)
- 9 • Deadline for class members to opt out: October 15, 2018
- 10 • Deadline for class members to object: September 28, 2018
- 11 • Deadline for class counsel to file motion for final approval: October 4, 2018
- 12 • Final fairness hearing: October 29, 2018, at 9:00 a.m.

13
14 Dated: 3/28/18



15 MAREN E. NELSON

16 Judge of the Superior Court

17

18

19

20

21

22

23

24

25