RACHELE R. BYRD (190634)
MARISA C. LIVESAY (223247)
BRITTANY N. DEJONG (258766)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
Symphony Towers
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
Telephone: 610/642-8500
Facsimile: 610/649-3633

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]

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 MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARD

Date Action Filed: November 6, 2006
Trial Date: None Set

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, the Court-appointed Class Counsel and Class Representative, Joseph Henchman, Trustee of the John W. McWilliams Telephone Tax Claim Living Trust (hereinafter, "Plaintiff" or "Class Representative"), will move for an order:

1. Awarding Class Counsel $4,150,000 in attorneys' fees and reimbursement of expenses of $89,932.83; and

2. Approving the payment of an incentive award to Plaintiff in the amount of $6,000.

This motion is based upon:

a. the accompanying Memorandum of Points and Authorities; the Second Amended Settlement Agreement;

b. the Joint Declaration of Rachele R. Byrd and Timothy N. Mathews in Support of: (1) Unopposed Motion for Final Approval of Class Action Settlement; and (2) Motion for Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award (the "Joint Declaration" or "Joint Decl.");

c. the Declaration of Jennifer M. Keough Regarding Notice and Claims Administration;

d. the December 31, 2017 Declaration of Joseph Henchman (also submitted with Plaintiff's Motion for Preliminary Approval);

e. the Declaration of Rachele R. Byrd in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award;

f. the Declaration of Timothy N. Mathews in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award;

g. the Declaration of Jon Tostrud in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award;

h. the Declaration of Jon Cuneo in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Payment of an Incentive Award;[1]

i. all files and records in this action; and

j. 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
BRITTANY N. DEJONG

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 Ave.
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
4725 Wisconsin Ave, NW, Suite 200
Washington, DC 20016
Telephone: 202/789-3960
Facsimile: 202/789-1813

[1] The individual declarations of Rachele R. Byrd, Timothy N. Mathews, Jon Tostrud and Jon Cuneo on behalf of their respective firms are collectively referred to herein and in the following Memorandum of Points and Authorities as the "Class Counsel Declarations" or "Class Counsel Decls."

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

A. Background

Approximately twelve years ago, Class Counsel undertook three unprecedented cases seeking refunds of telephone taxes on behalf of the residents of the City of Los Angeles, the City of Long Beach, and the unincorporated areas of the County of Los Angeles. These were risky and hard-fought cases, requiring Plaintiffs to win two separate appeals in the Supreme Court of California establishing the rights of taxpayers to bring the claims on a class-wide basis. *Ardon v. City of Los Angeles*, 52 Cal. 4th 241 (2011); *McWilliams v. City of Long Beach*, 56 Cal. 4th 613 (2013). In October 2016, the Court granted final approval to a settlement in one of the three cases, *Ardon v. City of Los Angeles.* Now, the parties to the remaining two cases—*McWilliams v. City of Long Beach*, and *Granados v. County of Los Angeles*—seek final approval of settlements, and Class Counsel seek an award of fees and expenses for their work in achieving those settlements, as well as incentive awards for the plaintiffs.

While the three cases were related, each one was litigated separately, entailed unique risks, and was hard-fought by the separate defendants. Class Counsel recorded their time separately in all three cases and allocated their time among the cases where the work performed benefitted more than one case. *See* Class Counsel Decls., ¶ 4. This Motion seeks an award of attorneys' fees and expenses solely for the work performed and results achieved in the *McWilliams v. City of Long Beach* case.

B. Statement of Facts

Class Counsel[2] diligently and skillfully prosecuted this extremely risky case over the course of roughly twelve years, without compensation or reimbursement of costs. By any measure, the Settlement is exemplary. The City has agreed to pay $16,600,000 (the "Settlement Fund") to settle this litigation, representing approximately 38-42% of the telephone utility users' taxes ("UUT") that Plaintiff alleges the City unlawfully collected during the Class Period. The

[2] Capitalized terms have the meaning ascribed in the Second Amended Settlement Agreement ("SASA"), unless otherwise noted. *See* Joint Declaration, Exhibit ("Ex.") A.

Settlement entitles Class members to receive up to a *full refund* of the UUT that Plaintiff alleges were improperly collected on telephone service during a 40 month period, from August 11, 2005 to December 19, 2008 (the "Class Period"). Class members who file claims can receive up to a 100% refund of the UUT they paid on mobile phone service during the Class Period, plus a 70% refund of the UUT they paid on landline service during the Class Period. This is, in essence, a full recovery of the damages they would have received if Plaintiff had succeeded in certifying a class and prevailed on all of the liability issues at summary judgment or trial.[3]

Class Counsel also negotiated an extraordinarily robust notice program. A complete notice packet -- including a notice, claim form and a prepaid return envelope -- written in both English and Spanish, was mailed to every address in the City of Long Beach. Keough Decl. at ¶¶ 5-8. A few months later, a reminder postcard was mailed to every potential Class Member who had not yet submitted a claim. *Id*., ¶ 19. In addition, notice was provided in 13 print publications, 4,154 television commercials, 492 radio commercials, over 12 million digital impressions, a press release, and on the websites of the Claims Administrator and certain Class Counsel. *Id.*, Ex. D; Joint Decl., ¶ 44. Thus, the negotiated notice program included virtually every conceivable form of notice. Then, Class Counsel also independently mailed over 200 customized letters to area accounting firms, notifying them that their clients may be entitled to refunds and encouraging the firms to assist their clients with filing claims. Joint Decl., ¶ 44. In addition, Class Counsel conducted a direct telephone outreach program to over 700 area businesses. *Id*. Specifically, a team of paralegals and contractors called these businesses, requested to speak with accounting or legal departments, and encouraged the businesses to file refund claims. *Id*.

Class Counsel also negotiated a simple and fair claims process, which provides Class members several options. Every Class member can claim standard refund amounts of $46 for

[3] Plaintiff did not challenge application of the UUT to charges for purely local telephone service, which applies solely to landline service. In administering a refund of the Federal Excise Tax ("FET"), which was coextensive with the UUT, the Internal Revenue Service determined that approximately 32% of the total FET was attributable to local service and, therefore, properly collected. *See* Joint Decl., Ex. D. Thus, the Settlement provides for a 70% refund of the total UUT collected on landline service.

mobile service, $27.50 for landline service, and/or $46 for business landline service, with no documentary evidence required, simply by completing the claim form with basic information.[4]

Alternatively, Class members can claim greater amounts – up to a 100% refund of the UUT actually paid – with evidence of the amount of UUT paid. Class Counsel negotiated several means for Class members to provide such evidence. First, Class members can submit a full set of bills or other Carrier-provided documentation of the UUT paid during the Class Period, or a sample of 10 bills from which an average monthly UUT payment will be calculated. Second, Class members can provide consent for Verizon and/or Sprint to search their records for UUT payment data, and T-Mobile customers can contact T-Mobile directly to obtain their UUT payment data. The costs of these data searches will be borne by the Settlement Fund. Finally, Class members who are unable to obtain Class Period records may submit a sample of ten recent phone bills reflecting UUT paid to the City, and the claims administrator will calculate their refund using the average monthly UUT amount shown. This latter option is a significant enhancement over the options provided in the settlement in the *Ardon* case.

Although it will take months for the Claims Administrator to process all the claims and calculate refunds due, and for the telephone carriers to provide UUT data where requested, by any measure this Settlement is a success. As of October 2, 2018, 32,139 claims have been filed by Class Members. Keough Decl., ¶ 20. This represents approximately 12% of the addresses in the City of Long Beach to which notices were sent. *Id*.

Achieving this exemplary Settlement was far from certain. Class Counsel faced a significant risk, *perhaps a likelihood*, that their investment of substantial resources over the course of more than a decade would be entirely for naught. Indeed, at the time this case was filed, the generally accepted understanding was that class claims for tax refunds were not permitted, and this Court ruled against Plaintiff on that threshold legal issue. Plaintiff appealed, and the Court of Appeal stayed the appeal pending a decision by the Court of Appeal (and then

[4] Ordinarily, taxpayers bear the burden of producing evidence of any tax refund they are due (*see, e.g., Dicon Fiberoptics, Inc. v. Franchise Tax Bd.*, 53 Cal. 4th 1227, 1236 (2012)), so the fact that taxpayers are receiving refunds without a documentation requirement is a significant achievement.

the California Supreme Court) in the related *Ardon* case. On July 25, 2011, the Supreme Court of California 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*, 52 Cal. 4th at 253. Thereafter, the Court of Appeal lifted the stay in *McWilliams* and reversed this Court's order granting the City's demurrer and dismissing the case. *McWilliams v. City of Long Beach*, No. B200831, 2012 Cal. App. Unpub. LEXIS 2402 (2d App. Dist. Mar. 28, 2012).

The City of Long Beach, however, filed a Petition for Review before the Supreme Court of California on an issue that had not been decided in *Ardon*. The City argued that, while the *Ardon* decision held that class claims are permitted under the Government Code, the City's own municipal code prohibited the filing of class claims. The Court granted the petition. *McWilliams v. City of Long Beach*, No. S202037, 2012 Cal. LEXIS 6604 (July 11, 2012). Thus, the victory achieved in *Ardon* was at risk of being nullified in *McWilliams*. On April 25, 2013, however, the Supreme Court once again ruled in favor of the taxpayers, holding that local ordinances cannot supplant the procedures specified by the Government Claims Act, which allow class claims. *McWilliams*, 56 Cal. 4th at 629.[5]

Even then, however, the City did not capitulate. Upon remand, the parties propounded discovery and Plaintiff prepared to file his motion for class certification. Among other things, Plaintiff obtained documents from the City and documents and supporting declarations from several third-party telephone service providers. Joint Decl., ¶ 23.

On April 1, 2015, the parties participated in a mediation session before Judge Tevrizian (Ret.) where they agreed to a settlement in principle. Resolving all material terms required lengthy additional negotiations, including a second mediation on December 17, 2015.

Even then, there was also a risk that the entire case could have been derailed upon the

[5] Even this decision was at risk. In 2014, a bill was proposed in the California legislature to legislatively overrule the *McWilliams* decision (Assembly Bill 59 (2014)), which could have served as precedent for the City to enact retroactive legislation prohibiting the class tax refund claims brought by Plaintiff here.

death of the named plaintiff, John McWilliams, which was averted solely by the foresight and careful planning of Class Counsel. In 2014, after the case had been pending for eight years, the health of the named plaintiff, Mr. John McWilliams, began to decline. Joint Decl., ¶ 57. In order to ensure that the claims on behalf of himself and others similarly situated would survive his death, Mr. McWilliams created the John W. McWilliams Telephone Tax Claim Living Trust (the "Trust") in June 2014, and transferred into the Trust all of his rights, responsibilities, causes of action, and claims in the action. Mr. McWilliams appointed Joseph Henchman, Executive Vice President of Tax Foundation, a non-profit tax policy research organization based in Washington, D.C., as Trustee of the Trust to continue the litigation. Mr. McWilliams passed away on December 30, 2015. *Id.* Absent the Trust, the entire case could have been derailed upon his death because McWilliams was the only claimant who submitted an administrative claim to the City for a tax refund on behalf of himself and others similarly situated.

Class Counsel seek an award of $4,150,000 for attorneys' fees, or 25% of the $16,600,000 Settlement Fund, plus reimbursement of out-of-pocket expenses of $89,932.83, as compensation for their considerable investment of time and effort and their success in achieving the Settlement. Class Counsel have invested a collective lodestar of $3,246,866.00 over the nearly 12-year course of this litigation. Joint Decl., ¶ 47; Class Counsel Decls. Thus, the requested fee represents a modest multiple of 1.28 of their lodestar. All of the relevant factors demonstrate that an award of $4.15 million for fees, plus expenses, is warranted here. Plaintiff also requests an incentive award of $6,000 in recognition of his service on behalf of the Class.

II. LEGAL ARGUMENT

There are two generally accepted methods for determining an award of attorneys' fees under California law: (1) the percentage-of-the-recovery method, and (2) the lodestar method. Typically the percentage method is selected when a settlement results in a common fund, and the lodestar method is selected when a settlement does not result in a common fund. In either case, courts will typically refer to the other method as a cross-check to ensure that the fee award is fair. *Roos v. Honeywell Int'l, Inc.*, 241 Cal. App. 4th 1472, 1493 (2015). "The trial court is the best judge of the value of professional services rendered in its court, and while its judgment is

subject to our review, [the Court of Appeal] will not disturb that determination unless . . . convinced that it is clearly wrong." *Id.* at 1482 (internal quotations omitted). Class Counsel's request for $4,150,000 for attorneys' fees is appropriate under either the lodestar or percentage-of-recovery standard.

A. The Requested Fees Should Be Approved Under the Percentage of the Common Fund Method

The common fund doctrine is generally held applicable "where plaintiffs' efforts have effected the creation or preservation of an identifiable fund of money out of which the fees will be paid." *Jordan v. Dep't of Motor Vehicles*, 100 Cal. App. 4th 431, 446-47 (2002) (citing *Serrano v. Priest*, 20 Cal. 3d 25, 37-38 (1997)). Here, the Settlement resulted in creation of an identifiable $16.6 million fund from which tax refunds, notice and administration costs, attorneys' fees and expenses and any incentive award will be paid. In *Laffitte v. Robert Half Int'l, Inc*., 1 Cal. 5th 480, 503 (2016), the Supreme Court held that where, as here, "class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created" and that "the percentage method is a valuable tool."

Although it is possible that the entire $16.6 million Settlement Fund will not be exhausted, and therefore some amount could revert to the City, in applying the common fund method under California law, attorneys' fees are "calculated on the basis of the ***total fund made available*** rather than the actual payments made to the class." *Lealao v. Beneficial Cal., Inc*., 82 Cal. App. 4th 19, 51 (2000) (emphasis added) (citing *Williams v. MGM-Pathe Commc'ns Co*., 129 F.3d 1026 (9th Cir. 1997).[6] So, for example, in *Collins v. City of Los Angeles*, 205 Cal. App.

[6] *See also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990 ("attorneys' fees sought under a common fund theory should be assessed against every class members' share, not just the claiming members.") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980)); *Estrada v. iYogi, Inc*., No. 2:13-cv-01989 WBS CKD, 2016 U.S. Dist. LEXIS 8947, at *18 (E.D. Cal. Jan. 26, 2016) ("Where there is a claims-made settlement . . . the percentage of the fund approach . . . is based on the total money available to class members, not just the money actually claimed."); *Glass v. UBS Fin. Servs., Inc*., No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *50 (N.D. Cal. Jan 26, 2007) (the court "must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount

4th 140, 147-48, 158 (2012), the Court included in its common fund valuation for purposes of determining appropriate attorneys' fees the entire value of the judgment, even though a portion of that amount was payable to class members who could not be located and would revert to the City.[7]

In *Ardon*, the Court noted that fees awarded in class actions average around 33% of the recovery. *See* Joint Decl., Ex. E at 21 (citing *Consumer Privacy Cases* 175 Cal. App. 4th 545, 558, n.13 (2009): "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") In *Laffitte*, for example, the Supreme Court of California affirmed a fee award representing 33.33% of a $19 million common fund, plus expenses. *Laffitte*, 1 Cal. 5th 480; *Laffitte v. Robert Half Int'l Inc.*, 231 Cal. App. 4th 860, 869 (2014).

Here, the 25% fee sought falls comfortably below the 33% average, and easily within the range commonly approved. *See, e.g., Chavez v. Netflix, Inc*., 162 Cal. App. 4th 43, 66 n.11 (2008) (27.9 percent of the class benefit awarded and noting "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) ("25 percent of the total damages fund recovered for the class"); *In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *8-9 (Alameda Cnty. Super. Ct. Oct. 22, 1998) (awarding 30% of fund and citing eleven other awards ranging from 30%-45%).[8]

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of the fund actually claimed by the class"); *Fernandez v. Victoria Secret Stores, LLC*, No. C-06-04149 MMM (SHx), 2008 U.S. Dist. LEXIS 123546, at *36 n.39 (C.D. Cal. July 21, 2008) ("Use of the 'common fund' concept in a case such as this, where each class member can recover only a finite amount, does not affect the calculation of attorneys' fees even if a portion of the fund is not claimed.").

[7] Moreover, any reversion here is tantamount to a *cy pres* distribution. The goal of the Settlement is to pay UUT refunds to Class members, most of whom are still residents of Long Beach. Thus, a reversion to the City ensures that the Settlement Fund will be used for the benefit of the majority of Class members. Further, Code of Civil Procedure section 384(c) recognizes that, in cases against public entities, a reversion to the public entity satisfies a public purpose.

[8] *See also In re Natural Gas Trust Cases Price Indexing*, JCCP No. 4221/4224/4226/4428, 2006 Cal. Super. LEXIS 1302, at *7 (San Diego Cnty. Super. Ct. Dec. 11, 2006) (fee awards of

The percentage method is appropriate here as it "provides a credible measure of the market value of the legal services provided" in contingency litigation (which almost always involves percentage fee agreements). *Lealao*, 82 Cal. App. 4th at 49. As explained in *Laffitte*:

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation . . . —convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal. 5th at 503. The percentage method also encourages the successful attorney to accept the contingency risk and delay in payment, the importance of which California decisions have repeatedly emphasized. *See, e.g.*, *Ketchum v. Moses*, 24 Cal. 4th 1122, 1136 (2001) ("lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk") (internal quotations omitted); *Lealao*, 82 Cal. App. 4th at 47 ("attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private . . . legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior"); *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 273 (1975) ("There must always be a flavor of generosity in the awards . . . in order that an appetite for efforts may be stimulated.").

B. The Requested Fees Should Be Approved Under the Lodestar Method

California courts typically apply the lodestar plus multiplier method as a cross-check on fees calculated under the percent-of-recovery method, or when there is not a common fund capable of valuation with reasonable certainty. *Lealao*, 87 Cal. App. 4th at 37-39, 45-46. The Court is not required to perform an exhaustive cataloging and review of counsel's hours. *See In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check

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25%-30% are "customary" in common-fund cases; awarding $26,699,828.00 of the $92.1 million settlement fund, or 29%); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811, 833 (Dec. 2010) (analyzing 444 cases between 2006 and 2007 and concluding that "[m]ost fee awards were between 25 percent and 35 percent . . . ."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements:* 1993-2008, 7 J. EMPIRICAL LEG. STUD. 248, 262 (June 2010).

calculation need entail neither mathematical precision nor bean-counting."). *See also Destefano v. Zynga, Inc*., No. 12-cv-04007-JSC, 2016 U.S. Dist. LEXIS 17196, at *66-68 n.11 (N.D. Cal. Feb. 11, 2016) (noting that "the Court may rely on . . . summaries [of hours worked], as actual billing records are unnecessary in the context of assessing the lodestar cross-check.")

1. Class Counsel's Lodestar is Reasonable and Supports the Requested Award

Class Counsel's lodestar of $3,246,866.00 over the course of this twelve year litigation is reasonable. The starting point in the lodestar analysis is to discern the prevailing hourly rate for similar work in the pertinent geographic region. *Chodos v. Borman*, 227 Cal. App. 4th 76, 93 (2014) ("'hourly amount to which attorneys of like skill in the area would typically be entitled'") (citing *Serrano v. Unruh*, 32 Cal. 3d 621, 640 n.31 (1982)).

In *Ardon*, the Court previously approved the hourly rates of Class Counsel here over the objection of the defendant, and after considering expert evidence. Joint Decl., Ex. E at 20 ("Based on this Court's familiarity with the rates charged by attorneys in the Los Angeles area, the Court finds that the hourly rates charged by the attorneys are reasonable.") Class Counsel's rates should be approved again here. Class Counsel are highly-regarded members of the bar, have extensive experience in class actions and complex litigation, and their rates are squarely in line with prevailing rates in this jurisdiction, are paid by hourly paying clients of their firms, and/or have been approved by numerous other courts. *See* Class Counsel Decls.

Class Counsel's rates of $625 to $965 for partners and $445 to $530 for associates are within the prevailing market rates in the Los Angeles area for attorneys of comparable skill, experience, and reputation.[9] *See, e.g., Bergstein v. Stroock & Stroock & Lavan*, No. BC483164, 2013 Cal. Super. LEXIS 593, at *12 (L.A. Cnty. Super. Ct. Feb. 14, 2013) (approving rates up to $920 per hour and noting that "in the Los Angeles legal community, attorney billing rates of

[9] The Supreme Court has held that the use of current rates is proper since such rates compensate for inflation and loss of use of funds. *Mo. v. Jenkins*, 491 U.S. 274, 283-84 (1989). That is particularly apt here, in a case that has lasted more than a decade. *See also Mackinnon v. Imvu, Inc.*, No. 111-cv-193767, 2016 Cal. Super. LEXIS 175, at *2-3 & n.1 (Santa Clara Cnty. Super. Ct. Feb. 22, 2016) ("current rates, rather than historical rates, should be applied in order to compensate for the delay in payment") (citing *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998)).

$1000 per hour and above are no longer unheard of"); *Rodriguez v. Cnty. of Los Angeles*, 96 F. Supp. 3d 1012, 1022-23 (C.D. Cal. 2014) (approving attorney rates from $500 to $975 in a case against County of Los Angeles); *Blacksher v. United States Sec. Assocs., Inc.*, No. BC348103, 2008 Cal. Super. LEXIS 1464, at *6-7 (L.A. Cnty. Super. Ct. Mar. 7, 2008) (noting that partner billing rates for Southern California ranged as high as $825.00 in 2008). Likewise, Class Counsel's rates for paralegals, legal assistants, and law clerks, which range from $60 to $320, are reasonable. *See Goldman v. Lifelock, Inc.*, No 115CV276235, 2016 Cal. Super. LEXIS 82, at *6 (Santa Clara Cnty. Super. Ct. Feb. 5, 2016) (approving paralegal rates up to $320 per hour); *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2015 U.S. Dist. LEXIS 54063, at *65 (C.D. Cal. Mar. 24, 2015) (approving paralegal rates of $240 to $345).

Further, Class Counsel's total hours are reasonable. The extensive work performed by Class Counsel, from initial investigation through the appeal in the Supreme Court of California, discovery, and the years-long exhaustive settlement negotiation process, is set forth more fully in the accompanying Joint Declaration. On average, Class Counsel invested approximately 397 hours per year in this roughly 12-year litigation. Courts routinely find comparable expenditures of time reasonable in similarly complex litigation. *See, e.g., Skold v. Intel Corp.*, No. 1-05-CV-039231, 2015 Cal. Super. LEXIS 122, at *14-15 (Santa Clara Cnty. Super. Ct. Jan. 28, 2015) (finding that 17,651.2 hours was reasonable for ten years of litigation, especially, "[r]ecognizing the length and complexity of this lawsuit and the amount of work involved over an extended period of time as well as the risks associated with the outcome"); *Duran v. United States Bank Nat'l Ass'n*, No. 2001-035537, 2010 Cal. Super. LEXIS 1058, at *54 (Alameda Cnty. Super. Ct. Dec. 16, 2010) (holding that 14,500 "hours are fully justified by the tremendous burdens of over eight years of intense, bitterly-contested litigation."); *Chemical Bank v. City of Seattle*, 19 F.3d 1291, 1298 (9th Cir. 1994) (affirming 137,000 billable hours was reasonable for a seven-year case).

Each firm here has also submitted a declaration summarizing the work they performed by category, attesting that their reported hours are accurate and were reasonably incurred in connection with the prosecution of the case, and that their firms maintain daily,

contemporaneous time records. *See, e.g.*, *Concepcion v. Amscan Holdings, Inc*., 223 Cal. App. 4th 1309, 1324 (2014) ("It is not necessary to provide detailed billing timesheets to support an award of attorney fees under the lodestar method . . . . Declarations of counsel setting forth the reasonable hourly rate, the number of hours worked and the tasks performed are sufficient.") (citing *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 254-55 (2001)); *see also Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1081 (N.D. Cal. 2010) ("An attorney's sworn testimony that, in fact, it took the time claimed '. . . is evidence of considerable weight on the issue of the time required . . .'") (alterations in original). Further, each firm kept time separately for the three related cases, and allocated their time among the three cases for work that benefitted more than one case—there was no double billing. *See* Class Counsel Decls., ¶ 4.

Class Counsel also expects to incur significant additional lodestar going forward. In the *Ardon* case, as an example, Class Counsel have incurred $400,657.00 in additional lodestar since the Court's Final Approval Order, in large part due to time spent overseeing the claims administration process and communicating with class members. *See* Class Counsel Declarations, ¶ 11. Here as well, Class Counsel has closely monitored the claims process and has been proactive in addressing issues and advising and assisting claimants. The process of analyzing claims and the carrier search procedure is anticipated to take at least several months, during which time Class Counsel expects to continue a high level of oversight and involvement.

2. The Requested 1.28 Multiplier is Well-Earned

In *Ardon*, the Court "[had] no trouble finding that [a 1.45] positive multiplier [wa]s warranted," based on the "quality of the representation, the novelty and difficulty of the issues presented and the skill displayed by the lawyers in presenting them, the results achieved on behalf of the class, and the contingent nature of the fee award . . . ." Joint Decl., Ex. E at 21. Here, the Court should likewise have no trouble approving the requested 1.28 multiple.

Class Counsel's "unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider . . . ." *Ketchum*, 24 Cal. 4th at 1138. Here, Class Counsel requests a total award of $4.15 million in fees, which equates to a multiple of 1.28 on

their lodestar of $3,246,866.00. This multiple is very reasonable.

To "approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees" (*id.*), courts employ fee enhancements, adjusting the fee "based on consideration of factors specific to the case," *PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). Those factors include: (1) the results achieved on behalf of the Class; (2) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (3) the response of the Class to the settlement, including a lack of objections to the settlement terms, and particularly to the fee award; (4) counsel's experience, reputation, and ability; (5) counsel's preclusion from other work; and (6) the contingent nature of the fee award. *See Ketchum*, 24 Cal. 4th at 1132; *Cundiff v. Verizon Cal., Inc*., 167 Cal. App. 4th 718, 724 n.3 (2008); *Consumer Privacy Cases*, 175 Cal. App. 4th at 556. All of these factors weigh in favor of enhancement.

One of the primary fee enhancement factors is contingency risk. In *Ketchum*, the Supreme Court explained that its purpose "is to bring the financial incentives for attorneys enforcing important . . . rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." *Ketchum*, 24 Cal. 4th at 1132 (citing *Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962)). To achieve this purpose, the "'contingent fee ***must be*** higher than a fee for the same legal services paid as they are performed.'" *Ketchum*, 24 Cal. 4th at 1132 (emphasis added). The enhancement is "intended to approximate market-level compensation for [the attorney's] services, which [in contingency-fee cases] typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." *Id.* at 1138. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579 (2004) ("One of the most common fee enhancers . . . is for contingency risk."). Here, Class Counsel litigated for nearly ***12 years*** and incurred over $3.2 million in lodestar and over $89,000 in out-of-pocket costs, while facing a serious risk that they would never be compensated ***at all***. Indeed, the trial court ruled against Plaintiff on the threshold legal issue, and Plaintiff had to win an appeal in the Supreme Court.[10]

[10] Plaintiff's success in the appeal in the Supreme Court of California established the rights of *all* California taxpayers to pursue class refund claims under the Government Code. Courts recognize that "the public interest is served by rewarding attorneys who assume representation

There were, of course, numerous other possible pitfalls, including class certification and proving claims based on highly technical application of tax law to modern telephone service.

There is also no question that the threshold issues were both novel and difficult, and Class Counsel demonstrated utmost skill in persuading the Supreme Court to rule in Plaintiff's favor. Class Counsel's experience, reputation, and ability to achieve extraordinary results in class action and complex litigation is second to none (*see* Class Counsel Decls.), and was put to the test in this case by a sophisticated defendant with ample resources. Further, Class Counsel were precluded from other work while they fought for the rights of Long Beach taxpayers.

The result achieved here also weighs heavily in favor of enhancement. The $16.6 million Settlement Fund represents approximately 38-42% of the UUT unlawfully collected by the City during the Class Period. *See* Joint Decl., ¶ 33, n.9. The claims process is simple and fair, and the notice program was extraordinarily robust, and included Class Counsel's direct outreach efforts to hundreds of businesses. *Id.*, ¶ 44. The response of the Class members has also been overwhelmingly positive. To date, 32,139 claims have been filed, and Class Counsel and the Claims Administrator have received only 2 objections. However, neither of those objections concerns attorneys' fees, expenses or the requested incentive award.

Finally, the requested multiple of 1.28 is below multiples commonly awarded in class action litigation. *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (affirming 2.52 multiplier); *Chavez*, 162 Cal. App. 4th at 66 (affirming 2.5 multiplier); *Wershba, Inc.*, 91 Cal. App. 4th at 255 ("Multipliers can range from 2 to 4 or even higher."); *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for lodestar enhancement of "two, three, four or otherwise"); *In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.*, 1998 WL 1031494, at *10 ("Cases from California and other jurisdictions reflect that multipliers of two or

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on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work." *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW, 2010 U.S. Dist. LEXIS 49482, at *5 (N.D. Cal. Apr. 22, 2010) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)). Such a practice "encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *In re Nuvelo Sec. Litig.*, No. C 07-04056 CRB, 2011 U.S. Dist. LEXIS 72260, at *9 (N.D. Cal. July 6, 2011).

more are commonplace in class actions.").[11]

The fact that the defendant here is a public entity does not militate against the modest multiplier Class Counsel request. *See Rogel v. Lynwood Redevelopment Agency*, 194 Cal. App. 4th 1319, 1332 (2011) ("In our view, *Serrano III*, *Horsford* and *Schmid* preclude a rule which awards less than the fair market value of attorneys' fees merely because the case was filed against a government agency. We also see a strong public policy against such a rule."); *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal. App. 4th 359, 400 (2005) (holding it was an abuse of discretion to deny a positive multiplier based on the public entity status of the defendant where the public entity chooses to defend its conduct through lengthy and complex litigation); *Schmid v. Lovette*, 154 Cal. App. 3d 466, 476 (1984) ("The fact that the fee award must be paid from the limited budget of the district and that the financial burden will therefore fall upon the taxpayers also does not constitute a special circumstance rendering the fee unjust"). There is ample support for awarding a multiplier in a class action brought against a public defendant. *See Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1123-27 (C.D. Cal. 2008) (a $6.375 million fee, 25% of a $25.5 million fund, was awarded; 5.2 multiplier); *Crommie v. State of Cal., Public Utilities Comm'n*, 840 F. Supp. 719, 725-26 (N.D. Cal. 1994) (multiplier of 2.0); *Coalition for Los Angeles Cnty. Planning in the Public Interest v. Bd. of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (multiplier of 2.0).[12]

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[11] *See also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("'[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied'") (quoting 3 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS, § 14.03 at 14–5 (3d ed. 1992)); *Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 U.S. Dist. LEXIS 115151, at *30 (E.D. Okla. Aug. 16, 2011) (citing a study "reporting average multiplier of 3.89 in survey of 1,120 class action cases"); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."); *Vizcaino*, 290 F.3d at 1051 n.6 (noting that in most cases where the common fund is $50-200 million the multiplier is in the 1.5-3.0 range); *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (indicating that lodestar multiplier of 1.35 to 2.99 common in megafunds over $100 million).

[12] As set forth in the SASA, the "Attorneys' Fees and Expense award will be allocated among Class Counsel with the approval of the Class Counsel." Joint Decl., Ex. A, § X.A. Class Counsel have reached agreement among themselves as to the allocation of fees based on their relative contributions to the litigation. Plaintiff has been informed and consented to the

C. Class Counsel's Expenses Are Reasonable

Class Counsel also seek $89,932.83 in unreimbursed expenses, which include, *inter alia*, expert witness and consultant fees, transcript fees, necessary travel, and other reasonable expenses. *See* Class Counsel Decls. Class Counsel also anticipate incurring additional expenses through the end of the claims process, for which they will not seek additional reimbursement.

D. The Requested Incentive Award to Plaintiff Is Reasonable

Class Counsel requests a $6,000 incentive award for the Class Representative, an amount which is less than the amounts often awarded, including the $10,000 incentive award granted in *Ardon*. *See* Joint Decl., Ex. E at 23; *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393-95 (2010) (affirming $10,000 incentive awards); *Blacksher*, 2008 Cal. Super. LEXIS 1464, at *10-11 ($10,000 award); *Antelope Valley Groundwater Cases v. Diamond Farming Co.*, JCCP No. 4408, Cal. Super. LEXIS 739, at *17 (L.A. Cnty. Super. Ct. Mar. 4, 2011) (same); *Eates v. KB Home*, No. RG-08-384954, 2011 Cal. Super. LEXIS 810, at *6-7 (Alameda Cnty. Super. Ct. June 16, 2011) (same). The efforts of the Class Representative are described in the Declaration of Joseph Henchman in Support of Motion for Preliminary Approval of Class Action Settlement, filed again herewith (Joint Decl. Ex. C) as well as in the Joint Declaration (*id.*, ¶ 57).

III. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request an award of $4.15 million, reimbursement of $89,932.83 in expenses, and an incentive award of $6,000 to the Class Representative, to be paid from the Settlement Fund.

DATED: October 4, 2018

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

By: Rachele R. Byrd
RACHELE R. BYRD

agreement in writing, consistent with California Rules of Professional Conduct, rule 2-200 and California Rules of Court, rule 3.769. *See* Henchman Decl., ¶ 12.

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 Ave.
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, Pennsylvania 19041
Telephone: 610/642-8500
Facsimile: 610/649-3633

CUNEO GILBERT & LADUCA, LLP
JONATHAN W. CUNEO
4725 Wisconsin Ave, NW, Suite 200
Washington, DC 20016
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

25032