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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

CHRISTINA LOPEZ-BURTON, an individual, on behalf of herself and all others similarly situated,

Petitioner and Plaintiff,

v.

TOWN OF APPLE VALLEY, a general law city; and DOES 1-10,

Respondents and Defendants.

Case No.: CIVDS1725027

Assigned for all purposes to Hon. David S. Cohn

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Petition/Complaint Filed: December 20, 2017

DATE: July 23, 2019
TIME: 8:30 a.m.
DEPT: 26

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

///

CALIFORNIA CONSTITUTION

STATUTES

California Code of Civil Procedure

Government Code

RULES

Federal Rules of Civil Procedure

California Rules of Court

OTHER AUTHORITIES

INTRODUCTION

On December 20, 2017, Plaintiff Christina Lopez-Burton ("Burton") filed this class action ("Lawsuit" or "Action") against the Town of Apple Valley ("Town") on behalf of herself and all others similarly situated. The Action alleges that the Town's solid waste[1] (trash) collection fees and charges[2] violate Proposition 218 because they exceed the cost of providing solid waste services and a portion of fees were transferred to the Town's General Fund and used for general governmental purposes. (See Cal. Const., art. XIII D, § 6, subd. (b)(1)(2) and (5).) Central to the dispute was the Town's embedding of an 18% "franchise fee" in the rates.

The Action, filed as a Petition for Writ of Mandate, was bifurcated into a liability phase and damage phase. The Court scheduled the liability phase for April 18, 2019. On February 17, 2019, Burton filed an Opening Brief and supporting evidence. On March 20, 2019, the Town filed its Opposition Brief and supporting evidence. In the meantime, the parties participated in two mediation sessions with the Hon. Jeffrey King (Ret.) At the second mediation on March 22, 2019, the parties reached a settlement in principle. The parties stipulated to vacating the writ petition hearing so that they could formalize and seek Court approval of the settlement.

On June 27, 2019, the parties executed a Class Action Settlement Agreement ("SA" or "Settlement" or "Agreement"), filed herewith. The Settlement requires the Town to create a Common Fund in the amount of $3,150,000 which will be used to provide automatic monthly credits to current solid waste customers for approximately 20 months and to provide refunds to former solid waste customers who submit a valid and timely Claim Form. The amount of the credits and refunds will be pro-rata based on the ratepayers' rate schedules, which vary depending on the type and level of service. The Town has also agreed to freeze the solid waste rates at issue herein until July 1, 2021. Attorneys' fees and expenses and administration costs will be paid from the Common Fund. No portion of the fixed Common Fund reverts to the Town; all $3,150,000 will be distributed to class members and there is no *cy pres* distribution.

[1] At issue are both solid waste and *recycling* fees and charges, but for brevity's sake, only the term "solid waste" is used herein.

[2] "Fees" and "charges" are used interchangeably herein.

As further explained below, the Settlement is fair, reasonable, and adequate to the Class. Accordingly, Burton respectfully requests that the Court preliminarily approve it; appoint Burton as the Class Representative and Eric J. Benink and Prescott Littlefield as Class Counsel; provisionally certify a Settlement Class; direct the parties to provide notice to the Class; and set a Fairness Hearing on October 3, 2019 or on the first date available on the Court's calendar thereafter.

SUMMARY OF THE ALLEGATIONS AND DEFENSES

A robust recitation of Burton's allegations is set forth in her February 17, 2019 Opening Brief. In sum, Burton contends that the Town has overcharged solid waste customers in order to generate a profit for its General Fund. Proposition 218 (Cal. Const. art. XIII D, § 6, subd. (b)(1)(2) and (5)) prohibits local governments from charging more than the cost of providing a property-related service, such as solid waste collection service. In order to generate a profit, the Town embeds in its rates (adopted on August 12, 2014 through Rate Resolution No. 2014-33) an 18% franchise fee. According to the Town, the franchise fee is effectively paid by its third-party waste hauler Burrtec Industries ("Burrtec") for the exclusive franchise rights to provide trash service in the Town which is set forth in an Exclusive Franchise Agreement between the Town and Burrtec. However, Burton contends that Burrtec does not pay, and has no economic interest in, the franchise fee because the Town imposes the fees and charges directly on the solid waste customers and Burrtec never transmits the fees to the Town.

The Town also charges customers amounts to cover reimbursements from its Solid Waste Fund (where solid waste fees and expenses are accounted for) to its General Fund for alleged shared administrative overhead. The Town claims that certain overhead costs are incurred in the General Fund for the benefit of the Solid Waste enterprise and thus, should be reimbursed by solid waste customers. In some years, the Town has created one-page annual Cost Allocation Plans to justify these reimbursements. In other years, there was no Cost Allocation Plan at all. Burton contends that the Town cannot justify how it determined these allocations and cannot carry its burden of demonstrating that transfer are legitimate expenses.[3] The Town contends that its methods for

[3] Under Proposition 218, in any legal action contesting the validity of a fee or charge, the government agency, not the challenger, bears the burden of proving compliance with Proposition 218's requirements. (Cal. Const., art. XIII D, § 6, subd. (b)(5).)

determining shared costs may be imperfect and informal, but Proposition 218 does not require perfection and its methods were reasonable and justifiable.

In the context of non-property related fees (fees not subject to section 6 of article XIII D), the California Supreme Court has held that a franchise to use public streets or rights-of-way is a form of property that a local agency may sell and a franchise fee is the purchase price of the franchise. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 (*Jacks*).) The Town contends that under *Jacks*, the amount of the franchise fee is justifiable because it represents the value of the franchise rights and the amount of Burrtec's annual pro-rata share of deferred maintenance impact to the Town's rights-of-way. Burton disputes that *Jacks* is applicable in the context of a property-related fee imposed directly by a local agency because *Jacks* involved the question whether an electric fee (which, is not a property-related fee subject to section 6) is a *tax*. Furthermore, Burton contends that the Town's expert's methodologies for calculating the value of the franchise fee are erroneous.

DISCOVERY

Burton has conducted extensive formal discovery, including: propounding Requests for Production of Documents (two sets), Special Interrogatories (two sets), Requests for Admission, and Form Interrogatories; reviewing 8,000+ pages of documents produced by the Town; subpoenaing and reviewing documents from third-party Burrtec (1,600+ pages); deposing third party witness Richard Nino from Burrtec, third party witness Marc Puckett (former Town Finance Director) and a PMQ for the Town, Kofi Antobam, on 18 separate topics; reviewing and analyzing the Town's expert report and declaration regarding the value of the "franchise fee;." and obtaining information directly from the Town's counsel. (See Declaration of Eric Benink In Support of Plaintiff's Motion for Preliminary Approval ("Benink Decl."), filed herewith, ¶ 2.) One of Burton's counsel, Eric Benink, had also obtained documents from the Town previously in connection with a Public Records Act lawsuit pertaining to, *inter alia*, the franchise fee. (*Id*.)

SETTLEMENT NEGOTIATIONS

The parties participated in two separate mediations with the Hon. Jeffrey King (Ret.) on February 28, 2019 and March 22, 2019. The settlement negotiations during each mediation session were adversarial and at arm's length. Participating on Plaintiff's side were attorneys Eric Benink and

Prescott Littlefield. Burton participated in the first mediation session by telephone as she was recovering from pneumonia and in the second mediation session in person. On the Town's side, the Town's outside counsel Richard Egger and Town Manager Doug Robertson participated in both sessions. The settlement reached in principle during the March 22, 2019 session required subsequent Town Council approval, which was given on March 26, 2019. (Benink Decl., ¶ 3.) The parties thereafter negotiated and exchanged drafts of the Settlement and the exhibits thereto and the final Settlement Agreement was executed on June 27, 2019. (*Id*.)

PROPOSED SETTLEMENT

A. SETTLEMENT CLASS

The proposed Settlement Class is as follows:

> All persons (which includes entities such as firms, companies, corporations, associations, and public entities) who, between July 24, 2016 and the date Preliminary Approval Order is entered, were Account Holders, but excluding (a) any officer or council member of the Town; (b) any judge assigned to hear this case; and (c) persons who timely and properly exclude themselves from the Class as provided in this Agreement.
>
> An "Account Holder" means those persons and entities who hold a solid waste / recycling account in the Town of Apple Valley.

The class period begins on July 24, 2016 because it marks the one-year date prior to the date Burton submitted a government claim on behalf of herself and all others similarly situated seeking a refund under the Government Claims Act. (Gov't Code § 911.2 [requiring claims for damages to be presented within one year].) Thus, claims for charges imposed prior to July 24, 2016 are barred. There are approximately 22,400 Account Holders. (Benink Decl., ¶ 4.)

B. SETTLEMENT BENEFITS

In exchange for a release of claims, the Town has agreed to create a Common Fund in the amount of $3,150,000. (SA, ¶ 6.1.1.) After deducting attorneys' fees and expenses, a service award for Burton, publication and administration costs, the Common Fund will be used to (a) provide refunds to former customers (persons who are no longer solid waste customers as of the exclusion deadline) who submit claims to a Claims Administrator and (b) provide automatic monthly credits to current customers beginning the second billing cycle after the Effective Date of the Agreement (30 days after

Final Judgment is entered) through June 30, 2021. (SA, ¶¶ 6.1.1 - 6.1.3.)

There are many different customer rates, depending on the type and level of solid waste and recycling service. The amount of the monthly credit will be based on each customer's pro rata payment in the month of May 2019 relative to all customers' payments in the month of May 2019; accordingly, all customers subject to the same rate code will receive the same monthly credit. (SA, ¶ 6.1.3.) For former customers, a lump sum payment will be made which will be calculated by multiplying what a current customer in the same rate code would receive as a monthly credit by the number of months that the former customer held an account during the Class Period, up to a maximum of eighteen months. (SA, ¶ 6.1.2.) The entire Common Fund will be distributed by June 30, 2021. (SA, ¶ 6.1.3.2.) In other words, no portion of the Common Fund will revert to the Town. There is no *cy pres* distribution. An estimate of the monthly credits and refund amounts are set forth in the Long Form Notice. (SA, Ex. C, ¶ 7.)

In addition to these direct monetary benefits, the Town has agreed to not raise rates until July 1, 2021. (SA, ¶ 6.1.4.) The Town has asserted that it would seek to raise rates by 4%-5% in in the following few years. (Benink Decl., ¶ 5.) An increase of 5% in each of the next two years would result in additional charges of $567,750 in year 1 and$1,135,000 in year two. (The projected solid waste fees in Fiscal Year 2018-2019 was budgeted to be $11,355,000).

C. RELEASE

In exchange for the settlement benefits, the Class Members will release all rights, claims, and actions they have or may have in the future arising out of, or relating to, the facts and circumstances giving rise to the Lawsuit or Claim (i.e. Government Claim), or arising out of, or relating to, claims that the rates, fees and charges adopted through Resolution No. 2014-33 violate Proposition 218 and/or Proposition 26. (See SA, ¶ 10.2 for full release.) The release does not extend to solid waste rates, fees, and charges that the Town adopts in the future. (*Ibid*.)

ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARD

Class Counsel will request attorneys' fees in the amount of 33% of the Common Fund, ($1,050,000), and reimbursement of expenses in the amount of approximately $12,994. (See Benink Decl.. ¶ 12, Ex. B [itemized detail]; Declaration of Prescott W. Littlefield ("Littlefield Decl."), filed

herewith, ¶ 6, Ex. A [itemized detail].) Representative Plaintiff Burton will seek a $5,000 service award to be paid from the Common Fund for her diligent participation and efforts. (See Declaration of Christina Lopez-Burton, filed herewith [explaining her participation].) The Motion for Attorneys' Fees and Service Award Request will be posted on the settlement website fourteen days prior to the exclusion and objection deadline.

NOTICE PROCEDURES

The parties have agreed to the form and manner of Class Notice. (See SA, ¶ 7, Exs. B, C, and D.) The Town will mail a Summary Notice to its current customers. The Summary Notice will direct customers to a settlement website at www.AVTrashSettlement.com that will post the Long Form Notice. The Town will also cause to be published in the *San Bernardino Sun*, a Publication Notice two times one week apart, that will likewise direct readers to the website. In addition to the Long Form Notice, the website will make available an Opt-Out Form, Objection Form, Claim Form, the Petition and Complaint, the Settlement Agreement, the Court's Preliminary Approval Order, Class Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses, the Motion for Final Approval and supporting papers, and the Final Approval Order and Judgment.

Class Members will have 45 days from the date the Summary Notice is mailed to postmark requests for exclusion, objections, and claim forms. (SA, ¶¶ 2.1.16, 2.1.22, 6.1.2.2, 8, 9.) Class members will mail requests for exclusion to Class Counsel. Class members will mail objections to the Court, to Class Counsel, and to the Town's Counsel. Former customers will submit claim forms to the Claims Administrator.

CLAIMS ADMINISTRATOR

The parties have selected Phoenix Settlement Administrators ("Phoenix") to perform the administration duties, including: creating and hosting a website (and posting relevant documents); receiving Claim Forms of former customers; establishing a Qualified Settlement Fund ("QSF"); verifying claims with Town; sending refunds to former customers; providing a telephone number and P.O. Box whereby Class Members can request further information and copies of Notices and forms; and filing tax returns for the QSF. Phoenix has substantial experience in class administration. (See Declaration of Michael E. Moore, filed herewith, ¶¶ 2-9, Ex. A.) Phoenix estimates its fees to provide

these services at $7,873 (*Id*. at ¶ 10, Ex. B.) These administration costs will be deducted from the Common Fund. (See SA, ¶ 6.1.1.1.)

ADDITIONAL INFORMATION REQUESTED BY COURT

Other than the duty of former customers to submit claim forms in order to participate in the settlement benefits, there are no affirmative duties or obligations that the Settlement places upon Class Members. There are no tax consequences to Class Members or the Town. There are no related cases. The language of the class notice has been agreed to by counsel for the parties. A class list has not been provided to Class Counsel nor the Claims Administrator; as stated *supra*, the Town will be mailing notice directly to its current customers.

ARGUMENT

A. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

1. The Standards for Preliminary Approval

California Rules of Court ("CRC"), Rule 3.769(a) provides: "A settlement or compromise of an entire class action, or of a cause of action in a class action, or as a party, requires the approval of the court after hearing." "The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion." (CRC 3.769(c).) In determining whether to approve or reject a proposed settlement, the Court has broad discretion. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-35 (*Wershba*) disapproved on other grounds in *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260; *Mallick v. Superior Ct*. (1989) 89 Cal.App.3d 434, 438; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, n. 19.)

California has a well-established and strong public policy favoring compromises of litigation. (*Hamilton v. Oakland School Dist.* (1933) 219 Cal. 322, 329 ["it is the policy of the law to discourage litigation and favor compromises"]; see also *Central & West Basin Water Replenishment Dist. v. Southern California Water Co.* (2003) 109 Cal. App. 4th 891, 912.) This policy is particularly compelling in class actions. (*See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1152.)

At the preliminary approval, the Court need only decide whether the proposed settlement falls

within a range of possible final approval. (*In re Tableware Antitrust Litig*. (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1079-80.) The ultimate question of whether the Settlement is fair, reasonable, and adequate will be made after notice of the Settlement is given to Class Members and a Fairness Hearing is held by the Court. (See 5 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE §23.83[1], at 23-336.2 to 23-339 (3d ed. 2002).) In assessing the ultimate question of whether the Settlement is fair, reasonable, and adequate "[t]he burden is on the proponent of the settlement to show that it is fair and reasonable. However, 'a presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" (*Wershba, supra*, 91 Cal.App.4th at p. 245 citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

Notwithstanding an initial presumption of fairness, "the court should not give rubber-stamp approval." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116.) "Rather, to protect the interests of absent class members, the Court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished." (*Id*.) Plaintiff now requests that this Court take the first step in the process.

2. This Settlement Is Within the Range of Reasonableness

The Town has transferred or budgeted to transfer $6,021,653 as "franchise fees" in Fiscal Year 16-17 through Fiscal Year 18-19. (Benink Decl., ¶ 6.) It has also transferred or budgeted to transfer $3,251,429 as administrative overhead in Fiscal Year 16-17 through Fiscal Year 18-19. (*Ibid*.) However, Burton does not claim that all of the administrative overhead transfers are improper. In her Petition, she raised specific issues regarding a portion of the General Gov't Services budget: expenses related to the Town's golf course and parks and recreation department. In Fiscal Year 16-17, the Town budgeted the Solid Waste Fund to (indirectly) pay golf course and parks and recreation department costs totaling $286,744 (of the $2,076,309 *budgeted* to be transferred in total or ~14%.) But the Town only actually transferred $789,489 that year. The Town transferred $1,672,540 in Fiscal Year 17-18, but there is no cost allocation plan identifying how these funds were allocated. In Fiscal Year 18-19, the Town budgeted $789,000 in total, but again there is no cost allocation plan identifying

how these funds were allocated. (*Ibid*.)This novel case brings uncertainty and the probable risk of extended delay because the losing party is likely to appeal any adverse ruling. (Benink Decl., ¶ 7.) Class Counsel are not aware of any case where a court has adjudicated the legality of a franchise fee embedded in property-related rates imposed directly by a local agency. (*Ibid*.) Class Counsel is confident about its legal position, but Proposition 218 and 26 cases have been hotly litigated in the Court of Appeal and the California Supreme Court. (*Ibid*.) Class Counsel is aware that the landscape can change and has changed suddenly and unexpectedly in this area. Class Counsel views appellate proceedings as a detriment to ratepayers because it deprives them of immediate and substantial benefits. The *Jacks* cases, for example, was originally filed in the trial court in 2011 and after remand, is still being litigated in the trial court. (*Ibid*.)

Even if this Court were to agree with Burton that a franchise fee imposed directly by a local government is not a cost of providing service under article XIII D, section 6, the Town has adduced evidence through its expert that it incurs costs in the form of a deferred street maintenance impact of $1.9 million per year that is nearly the amount of the annual franchise fee. (*Id*., ¶ 8.) If this argument succeeded, Class Members would be entitled to a tiny fraction of the damages sought.

With regard to administrative overhead issues, the Town claims it makes these transfers "because the Solid Waste Fund does not exclusively support operation of the Town's multi-million dollar solid waste and recycling service program" and "operation of the solid waste program requires basic operational tools and support staff including accounting software and payment for services…" It claims that it previously prepared its own cost allocation plans, but in 2016, a third party, Cost Recovery Specialist, prepared a draft cost allocation plan that it has used as a reference point for transfers in Fiscal Years 16-17 through 18-19. It argues the courts have recognized that "some fees are not easily correlated to a specific, ascertainable cost" and "[c]ourts afford agencies a reasonable degree of flexibility to apportion the costs of regulatory programs in a variety of reasonable financing schemes." (Benink Decl. ¶ 9; see generally Town's Opposition Brief, filed March 20, 2019, pp. 19-20.)

Finally, Burton is mindful of the Town's size as well. The Town's General Fund budget is approximately $32 million and the Solid Waste Fund's budget is approximately $11.2 million. If

Burton prevailed on all issues, it could be extremely disruptive to the Town's finances and its ability to deliver other services. (Benink Decl, ¶ 10.)

In light of the novel issues raised herein, the uncertainty of the outcome, the possibility that the Court would find the Town's cost allocation methods sufficient, in whole or in part, and the probable risks of delay following a litigated judgment, Burton and Class Counsel believe that a $3,150,000 Common Fund, together with a rate freeze until July 1, 2021 is fair, adequate and reasonable, within the range of reasonableness, and should be preliminarily approved by the Court.

3. The Settlement Is the Result of Arm's-Length Bargaining

The proposed Settlement is presumptively fair because it was reached following protracted and arm's-length negotiations at two mediation sessions. (See *Wershba, supra,* 91 Cal.App.4th at p. 245.) The fact that mediation was overseen by a neutral third party is proof of the non-collusive nature of the negotiations. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 800 ["'The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.'"].)

4. Class Counsel Have Conducted Sufficient Investigation and Discovery

Given the: (i) significant legal and factual investigation conducted by Class Counsel, both prior to and after the filing of the complaints; (ii) extensive discovery conducted by Class Counsel including written discovery, and depositions of third party witnesses and the Town (iii) the voluminous documents obtained by Class Counsel and (iv) the extensive briefing prepared by both parties on the writ petition, Class Counsel is well able to judge the strengths and weaknesses of the claims asserted by Burton and defenses asserted by the Town as well as the propriety of the Settlement.

5. The Recommendations of Experienced Counsel Favor Preliminary Approval of the Proposed Settlement

Also weighing in favor of preliminary approval are Class Counsel's experience and success in similar class actions. (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) Class Counsel have developed an expertise in Proposition 218 and Proposition 26 cases and have prosecuted numerous class action cases. (Benink Decl., ¶ 11, Ex. A; Littlefield Decl., ¶¶ 2-4.) Class Counsel have a proven and extensive

track record of success in similar cases, obtaining judgments and reaching settlements that have provided substantial benefits to numerous classes of consumers and ratepayers. Drawing from these experiences, Class Counsel executed the Settlement Agreement confident that it constitutes a fair and adequate outcome, and that it is in the best interests of the Class. (Benink Decl., ¶ 13; Littlefield Decl., ¶ 5.)

B. THE SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The Code of Civil Procedure provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for benefit of all." (Cal. Code Civ. Proc. §382.) Indeed, the express judicial policy of California is to favor the maintenance of class actions. (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 473 (*Richmond*) ["…[t]his state has a public policy which encourages the use of the class action device."].) Any doubt as to the appropriateness of class treatment must be resolved in favor of certification, subject to later modification. (*Id*. at pp. 473-475.)

California courts have expressed only two primary requirements for maintaining a California class action: (1) an ascertainable class, and (2) a well-defined community of interest among the class members. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 (*Daar*); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347 (*B.W.I. Custom Kitchen*).) "Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question [citations omitted]." (*Richmond*, *supra*, 29 Cal.3d at p. 478.) The "community of interest" requirement embodies three factors: (a) predominant common questions of law or fact; (b) class representatives with claims or defenses typical of the class; and (c) class representatives who can adequately represent the class. (*Id*. at p. 470.) The elements of numerosity, typicality, adequacy, superiority and the predominance of common questions of law and fact have also been expressly adopted by the California Supreme Court for use by trial courts in determining whether the requirements of certification under Code of Civil Procedure section 382 have been met. (*Id*. at p. 473.) Class actions are utilized and encouraged to preclude a defendant from avoiding exposure for

wrongdoing because individual victims may lack the sophistication, financial motivation or resources to sue on their own. (*Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 808.)

1. The Class is Sufficiently Numerous

Class certification is appropriate where the class contains so many members that joinder of all would be impracticable. (Cal. Code Civ. Proc. §382.) Here, the Settlement Class is comprised of approximately 22,400 Account Holders.

2. The Class is Ascertainable

Implicit in the requirement of numerosity is that the identities of Class Members be ascertained, *i.e.*, ascertainability. Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. (*Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263 (*Reyes*); *Aguirre v. Amscan Holdings, Inc*. (2015) 234 Cal. App. 4th 1290, 1297; see also *Daar, supra,* 67 Cal.2d at 706 ["Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records."]; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1206.) Here, the class definition is objective. The Settlement Class is ascertainable because its members may be identified through the Town's customer records. Further, the Town has contact information for members of the Settlement Class.

3. Common Issues of Law and Fact Predominate Over Any Individual Issues

Each member of the proposed class is allegedly damaged by a common course of conduct. A community of interests exists among class members when common questions predominate over individualized questions. (*Brown v. Regents of University of California* (1984)151 Cal. App. 3d 982, 988; *Daar*, *supra*, 67 Cal.2d at p. 711.) "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." (*Rosario v. Livaditis* (7th Cir. 1992) 963 F.2d 1013, 1017-1018 (citation omitted).) Common questions, here, predominate over individual ones. Such common questions include:

a. Whether the Town charges excessive fees and charges in an amount that exceeds the cost of providing solid waste services;

b. Whether the franchise fee is a cost of providing solid waste service;

c. Whether the analysis in *Jacks* governs the franchise fee at issue herein;

d. Whether the Town's cost allocation methodologies are supportable; and

e. Whether Plaintiff and Class members are entitled to a refund;

In consideration of the foregoing, the Settlement Class satisfies the community of interest requirement.

4. Burton's Claims Are Typical

Typicality requires only that the proposed class representative's interests be significantly similar to those of the other class members of the proposed class. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47; *B.W.I. Custom Kitchen, supra,* at p. 1347; *Daniels v. Centennial Group, Inc.* (1983) 16 Cal.App.4th 467, 473 (*Daniels*); *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 501.) The claims of each class member need not be identical. (*Daniels*, *supra*, 16 Cal.App.4th at p. 473.) It is sufficient that the representative is similarly situated, so that he or she will have the motive to litigate on behalf of all class members. (See *Classen, supra,* 145 Cal.App.3d at p. 46.) "We know that it has never been the law in California that the class representative must have *identical* interest with the class members." (*Ibid*.) Here, Plaintiff's alleged injuries arise out of the fact that the Town imposed solid waste fees and charges that allegedly include "costs" that are not related to the provision of solid waste services. In consideration of the foregoing, Burton satisfies the typicality requirement.

5. Plaintiff Has, and Will Continue to, Fairly and Adequately Protect the Interests of the Settlement Class

In order to fairly and adequately protect the class, a plaintiff must (1) be represented by counsel qualified to conduct the litigation, and (2) not have interests that are antagonistic to those of the settlement class. (*McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450; *see also Barboza v. W. Coast Digital GSM, Inc*. (2009) 179 Cal.App.4th 540, 546.)

Eric J. Benink of Benink & Slavens, LLP and Prescott Littlefield of Kearney Littlefield, LLP are "'qualified, experienced and able to vigorously conduct the proposed litigation on behalf of the class.'" (*In re Quintus Secs. Litig.*, (N.D. Cal. 2001) 148 F.Supp.2d 967, 972.) They have extensive experience in Proposition 218 and 26 cases and in class actions. (Benink Decl, ¶ 11, Ex. A; Littlefield Decl., ¶¶ 2-4.)

Second, Burton has no interest that is antagonistic to the interests of the Class. In fact, to the

contrary, Burton's interests are directly aligned with the interests of members of the Class as they are all solid waste customers of the Town. Further, absent a showing to the contrary, adequacy may be assumed. (*Guarantee Ins. Agency Co. v. Mid-Continental Realty Co*. (ND Ill. 1972) 57 F.R.D. 555, 565-566 [absent any conflicts between the interests of the representative plaintiff and other class members and absent any indication that the representative will not aggressively conduct the litigation, fair and adequate protection of the class may be assumed].) In consideration of the foregoing, Burton satisfies the adequacy requirement.

6. A Class Action is Superior to Other Methods of Adjudication

As previously noted, the express judicial policy of California is to favor the maintenance of class actions. (*Richmond*, *supra*, 29 Cal.3d at p. 462.) A class action is plainly superior to the other methods available for the fair and efficient adjudication of this controversy. (See, e.g., *Reyes, supra,* 196 Cal.App.3d at p. 1270.) The class action device is particularly appropriate when numerous parties suffer injury in small amounts, because individual lawsuits would be uneconomical and the wrongdoer might otherwise escape liability. (*Daar*, *supra*, 67 Cal.2d at p. 715 [class action allowed to recover taxicab fare overcharges averaging no more than a few dollars per customer].) Here, the individual Settlement Class Members have incurred relatively small damages. Thus, it would not be economical to pursue their claims on an individual basis because the litigation costs would greatly exceed the potential recovery. Accordingly, a class action in this instance is superior to other available methods of resolution.

C. THE NOTICE PLAN SATISFIES DUE PROCESS

If a class action is to be effective, "members of the class must receive the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" (*Home Sav. & Loan Ass'n v. Superior Ct.* (1975) 42 Cal.App.3d 1006, 1012.) The standard in California for class notice is whether notice "has a reasonable chance of reaching a substantial percentage of the class members." (*Wershba*, *supra*, 91 Cal.App.4th at p. 251.) CRC 3.766(d) and (e) set forth the content, and manner of giving, notice.

The proposed notice program is reasonably calculated to provide meaningful notice, is the best notice practicable under the circumstances, and satisfies California law due process

requirements and CRC 3.766(d) and (e). It provides all of the information required by CRC 3.766(d) including but not limited to (1) an explanation of the case and basic contentions and denials of the parties, (2) statement of exclusion rights, (3) procedures for requesting exclusion, (4) a statement that the judgment will bind all members who do not request exclusion, and (5) a statement that members who no not request exclusion may enter an appearance through counsel. (See SA, Ex. C [Long Form Notice] at ¶¶ 13, 14, 16, 17-19.)

Except for former customers who will be provided notice by publication, the notice plan provides that a Summary Notice be mailed directly to current customers. (SA, ¶ 7.1.) The Summary Notice directs them to a Long Form Notice at the website AVTrashSettlement.com. (*Id*. at Ex. B.) Utilizing a summary notice that direct class members to a website containing a more detailed notice is "perfectly acceptable." (*In re Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1382.)

CONCLUSION

Burton requests that the Court issue a schedule consistent with the terms of the Settlement as specified in the Notice of Motion and proposed Order Preliminarily Approving Class Action Settlement, and set a Fairness Hearing on October 3, 2019 or on the first date thereafter that is convenient for the Court.

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