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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

PETITIONER AND PLAINTIFF CHRISTINA LOPEZ-BURTON'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Petition/Complaint Filed: December 20, 2017

DATE: October 16, 2019
TIME: 8:30 a.m.
DEPT: S26

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INTRODUCTION

On July 23, 2019, this Court entered an order preliminarily approving a proposed Class Action Settlement Agreement, certifying a Settlement Class, and approving the parties' proposed notice procedure ("Prelim. Order"). Notice was thereafter provided to the Class in compliance with the Prelim. Order. Petitioner and Plaintiff Christina Lopez-Burton ("Burton") now respectfully moves the Court for final approval of the Class Action Settlement Agreement entered into by and between Burton, on behalf of herself and a Settlement Class, and Respondent and Defendant Town of Apple Valley ("Defendant" or "Town"). For the reasons set forth in this memorandum and supporting documents, the proposed Settlement achieves an excellent recovery for class members, was the result of arm's-length, non-collusive negotiations between the parties, including two separate mediation sessions before Justice Jeffrey King (Ret.), and is fair, adequate, reasonable, and in the best interest of the Settlement Class[1]. The Settlement Class meets the requirements for certification, including numerosity, community of interest, typicality and adequacy.

Accordingly, Burton respectfully requests that the Court (1) grant final approval of the Settlement, (2) finally certify the Settlement Class, and (3) enter a Final Judgment and Final Order in the forms lodged herewith. Burton separately files herewith, a motion for an award of attorney's fees and reimbursement of expenses, and for a service award.

PROCEDURAL HISTORY

On December 20, 2017, Burton filed this class action ("Lawsuit" or "Action") against the Town of Apple Valley on behalf of herself and all others similarly situated. The Action alleges that the Town's solid waste[2] (trash) collection fees and charges[3] 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

[1] Capitalized terms refer to defined terms in the Class Action Settlement Agreement attached to the Declaration of Eric J. Benink in Support of Plaintiff and Petitioner Christina Lopez-Burton's Motion for Final Approval of Class Action Settlement , filed herewith, as Exhibit 1.

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

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

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. Meanwhile, 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 class-wide settlement in principle. The parties stipulated to vacating the writ petition hearing so that they could formalize the settlement and seek Court approval. (Declaration of Eric J. Benink in Support of Plaintiff and Petitioner Christina Lopez-Burton's Motion for Final Approval of Class Action Settlement, filed concurrently herewith, ("Benink Decl."), ¶¶ 5-6.)

On June 27, 2019, the parties executed a Class Action Settlement Agreement ("SA" or "Settlement" or "Agreement"). (Benink Decl., ¶ 6, Ex. 1 [SA].)[4] 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 19 months and to provide refunds to former solid waste customers who submit a valid and timely Claim Form. (See generally, SA, ¶ 6.) 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. (*Id*., ¶ 6.1.2 - 6.1.3.) The Town also agreed to freeze its solid waste rates until July 1, 2021. (*Id*., ¶ 6.1.4.) Attorney's fees and expenses and settlement administration costs will be paid from the Common Fund. No portion of the Common Fund reverts to the Town; there is no *cy pres* distribution. (*Id*., ¶ 6.1.3.2.) The entire net Common Fund will be distributed to Class Members. (*Ibid*.)

On July 23, 2019, the Court held a hearing on the motion for preliminary approval and entered the Prelim. Order preliminarily approving the Agreement, provisionally certifying the Settlement Class, approving Phoenix Settlement Administrators as the Claims Administrator, and directing notice to the class.

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[4] Unless otherwise indicated, citations to "SA" shall refer to the Class Action Settlement Agreement attached to the Declaration of Eric J. Benink in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, as Exhibit 1.

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 overcharged solid waste customers 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. 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 right to provide trash service in the Town as 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 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 purported 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. Because the Town cannot prove how it determined these allocations, it cannot carry its burden of demonstrating the transfers are legitimate expenses.[5] The Town contends that its methods for 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*,

[5] 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).)

the amount of the franchise fee is justifiable because it represents the value of the franchise rights and the amount of Burtec's deferred maintenance impact on the Town's rights-of-way. Burton disputes that *Jacks* is applicable to property-related fees governed by article XIII D, section 6 because *Jacks* involved electric utility fees charged by Southern California Edison (a private entity), which is not subject to section 6. Burton also contends the Town's expert's methodologies for calculating the value of the franchise fee are erroneous.

DISCOVERY

Burton has conducted extensive discovery in this Action, 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; 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 Benink Decl., ¶ 3.) 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. (*Ibid*.)

SETTLEMENT NEGOTIATIONS

The parties participated in two 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 Burton'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. The parties thereafter negotiated and exchanged drafts of the Settlement and the exhibits thereto; the final Agreement was executed on June 27, 2019. (Benink Decl., ¶ 6, Ex. 1.)

SUMMARY OF SETTLEMENT TERMS

I. THE SETTLEMENT CONSIDERATION

The Settlement establishes a common fund for the benefit of Class Members in the amount of $3,150,000 ("Common Fund"). (SA, ¶ 6.1.1.) After deducting attorneys' fees and expenses, a service award for Burton, class notice and administration costs, the balance ("Net Common Fund") will be distributed as refunds to former customers (Class Members who are no longer solid waste customers as of the exclusion deadline) who submitted timely claims, and as automatic monthly credits for existing 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 various customer rates, depending on the type and level of solid waste and recycling service. The amount of the monthly customer 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 entirety of the Net Common Fund will be distributed to Settlement Class Members, with no amount reverting back to the Town. (SA, ¶ 6.1.3.2.)

The Town has also agreed to not raise rates until July 1, 2021. (SA, ¶ 6.1.4.)

II. SETTLEMENT CLASS

The parties agreed to the certification of a Settlement Class, which the Court provisionally certified on July 23, 2019 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 [July 23, 2019], 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.

(Prelim. Order, ¶ 7.) The Court provisionally appointed Burton as the Class Representative and Eric J. Benink of Benink & Slavens, LLP and Prescott W. Littlefield of Kearney Littlefield, LLP as Class Counsel. (*Id*. at ¶ 8.)

III. RELEASE OF CLAIMS

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*.)

RESPONSE FROM THE CLASS

The Court ordered that former customers submit claim forms to the Claims Administrator, and that any putative class member may request exclusion or formally object to the Settlement no later than September 23, 2019. (Prelim. Order, ¶ 19.) Thus far, Class Counsel has received no objections and only one request for exclusion. (Benink Decl., ¶ 15.) As required by the Prelim. Order, Class Counsel will submit a declaration to the Court no later than October 8, 2019 identifying all requests for exclusion (to be attached to the Final Judgment) and will also file a response to any objections received. (Prelim. Order, ¶ 19.)

ARGUMENT

I. THE COURT SHOULD GIVE FINAL APPROVAL TO THE SETTLEMENT

A class action may not be dismissed, compromised or settled without Court approval. (Cal. R. Ct., 3.769 subd. (a).) Before final approval, the Court must conduct an inquiry into the fairness of the proposed settlement. (Cal. R. Ct., 3.769 subd. (g).) A court's analysis of a settlement should be conducted in light of the favorable view of settling disputes. (*Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.) This is particularly the case in class actions where substantial resources will be conserved by avoiding litigation: "In reviewing the fairness of a class action settlement '[d]ue regard'…'should be given to what is otherwise a private consensual agreement between the parties.' The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement

is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) In determining whether to approve or reject a proposed settlement, courts have broad discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), disapproved on other grounds by *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260.) A class settlement should be approved if the settlement is found to be fair, adequate, and reasonable. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*).)

A. This Settlement is Presumptively Fair

A class action settlement is presumed to be fair if: (1) it is "'reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" (*Chavez v. Netflix* (2008) 162 Cal.App.4th 43, 52 quoting *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

First, 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.'"].)

Second, Class Counsel had the benefit of negotiating this Settlement after an extensive discovery and review of the **entire** evidentiary record that would have been before the Court had this matter proceeded to trial. Indeed, the parties had already prepared and submitted their opening and opposition briefs for the liability phase of the trial and had lodged all evidence necessary to support their respective positions in the case. The maturity of the action alone is compelling. Indeed, before the parties engaged in mediation, the Town and a third-party had produced nearly 10,000 pages of

documents that Class Counsel thoroughly analyzed and then extensively argued in Burton's Opening Brief on the Writ Petition. (Benink Decl., ¶ 3.) Class Counsel had also taken depositions of Town and third-party witnesses. (*Ibid*.) Burton's Opening Brief reflects Class Counsel's studied and careful analysis in this action.

Given the: (i) significant legal and factual investigation conducted by Class Counsel, both prior to and after the filing of this action; (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.

Third, Class Counsel have extensive experience prosecuting Proposition 218 and 26 cases and class actions throughout California. (Benink Decl., ¶¶ 13-14; see also Declaration of Eric J. Benink, filed in Support of Motion for Attorney's Fees, ("Benink Fee Decl."), ¶ 6, Ex. 2; Declaration of Prescott W. Littlefield ("Littlefield Fee Decl."), filed in Support of Motion for Attorney's Fees, ¶¶ 4-17.) 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. (*Ibid*.) In light of their extensive knowledge and experience prosecuting Proposition 218 cases, Class Counsel are especially well suited to settle this Action with full confidence that it is a fair and adequate outcome, and that it is in the best interests of the Class.

As of the date of this filing, no class member has objected, albeit the objection deadline is September 23, 2019. (Benink Decl., ¶ 15.) Thus, there is a presumption that the Settlement is fair.

B. The Settlement is Fair Adequate and Reasonable

Beyond determining whether a settlement is entitled to a presumption of fairness, a court must further consider factors such as: (1) the strength of plaintiffs' claims, (2) the risk and expense of further litigation, (3) the risk of maintaining class status through trial, (4) the amount offered in settlement, (5) the extent of discovery completed, (6) the experience and views of counsel and (7)

the presence of a government participant (the "*Dunk* Factors"). (*Dunk*, 48 Cal.App.4th at p. 1801.) Here, the Settlement satisfies the *Dunk* Factors, thus, warranting final approval.

To settle this matter, the Town has agreed to create a Common Fund in the amount of $3,150,000 ("Common Fund") and to freeze its rates through 2021, likely saving existing customers an additional $1,700,000 based on previously planned rate increases. (See Benink Decl., ¶ 7.)

The Settlement amount here is reasonable and reflects the novelty and uncertainty of this case, including the risk of delay due to anticipated appeals. (Benink Decl., ¶¶ 9-12.) Class Counsel, who are well-versed in Proposition 218 jurisprudence, are not aware of any Proposition 218 case where a court has adjudicated the legality of a franchise fee embedded in a local agency's property-related fees. (*Id*., ¶ 9.) While Class Counsel are confident in Burton's legal position, Proposition 218 and 26 cases have been hotly litigated in the Court of Appeal and the California Supreme Court. (*Ibid*.) Class Counsel are aware that the legal landscape can change and has changed suddenly and unexpectedly in this area. Class Counsel view appellate proceedings as a detriment to ratepayers because it deprives them of immediate and substantial benefits. The *Jacks* case, for example, was originally filed in the trial court in 2011 and after remand by the California Supreme Court, judgment was just recently entered (in the City's favor). (*Ibid*.)

Moreover, even assuming Burton and the Class were successful in proving the Town is liable under Proposition 218, there would still be significant risks that they would recover substantially less than the face value of the challenged franchise fees in this case. The Town has transferred or had budgeted to transfer a total of $6,021,653 as "franchise fees" over a three year period from Fiscal Year 16-17 through Fiscal Year 18-19. (Benink Decl., ¶ 4.) But even if this Court were to agree with Burton that the franchise fee is not a cost of providing service under article XIII D, section 6, the Town has adduced evidence that it incurs costs in the form of a deferred street maintenance impact of $1.9 million per year that nearly matches the amount of the annual franchise fee. (*Id*., ¶ 12.) This evidence, if accepted, could have significantly impacted the Class claim for a refund. Indeed, Class Members could have been awarded a tiny fraction of the damages sought.

The Town also transferred or budgeted to transfer $3,251,429 as administrative overhead in Fiscal Year 16-17 through Fiscal Year 18-19. (Benink Decl., ¶ 4.) However, Burton does not claim

that all 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 actually transferred just $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*.) The Town also 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 also 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., ¶ 10; see generally Town's Opposition Brief, filed March 20, 2019, pp. 19-20.) If these arguments were to prevail, it could have significantly impacted the class recovery. In any event, "[a] settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable." (*Wershba*, 91 Cal.App.4th at 250; see also *Rebney v. Wells Fargo Bank*, (1990) 220 Cal. App. 3d 1117, 1139.)

Last, Class Counsel is cognizant of the Town's size. 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 Dec., ¶ 11.)

In light of the novel issues raised and the uncertainty of the outcome in this case, it is the opinion of experienced Class Counsel that the Settlement, which provides a $3,150,000 Common

Fund, together with a rate freeze until July 1, 2021 is fair, adequate and reasonable and in the best interest of the Class, and should be finally approved by the Court. (Benink Decl., ¶ 14; Littlefield Fee Decl., ¶ 23.]

II. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

Section 382 of the California Code of Civil Procedure sets forth four requirements for certification, including numerosity, community of interest, typicality and adequacy. (Cal. Code Civ. Proc. § 382; *Sav-On Drugs v. Superior Court* (2004) 34 Cal.4th 319, 326.) 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 (*Richmond*) ["This state has a public policy which encourages the use of the class action device."].) The Settlement Class meets these requirements.

A. The Class is Sufficiently Numerous and Ascertainable

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. (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 [no set minimum to meet numerosity requirement and class as few as 28 members is acceptable]; *see also Richmond, supra*, 29 Cal.3d at p. 478 [finding that a proposed class that numbers in the thousands makes joinder impractical].) The class members must also be ascertainable. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 (*Daar*).) Here, the proposed settlement class is ascertainable because its members are Town solid waste utility customers. Each customer has an account such that it is easy to determine if they are a member of the Class.

B. Community of Interest Requirement is Met

A community of interest among class members exists when common questions predominate over individual ones. (*Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988; *Daar*, *supra*, 67 Cal.2d. at p. 711.) This requirement is easily met here. Such common questions include (a) whether the Town imposes fees and charges in an amount that exceeds the cost of providing solid waste services in violation of Proposition 218; (b) whether the franchise fee is a cost of providing solid waste service; and (c) whether Plaintiff and Class members are entitled to a refund.

C. Burton's Claims Are Typical

The proposed class representative's interests must be substantially similar to members of the proposed class. Her claims need not be identical. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal.App.3d at 1347; *Daniels v. Centennial Group, Inc.* (1983) 16 Cal.App.4th 467, 473; *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 501.) It is sufficient that the representative is similarly situated, such that they are motivated to litigate on behalf of class members. (*Classen, supra,* 145 Cal.App.3d at p. 46.) Burton is a solid waste customer of the Town and has paid the fees and charges at issue during the class period. (See Verified Amended Petition, ¶ 3.) Thus, her claims are aligned with the Class's claims.

D. Burton Adequately Represents the Class

To fairly and adequately protect the class, a plaintiff must be represented by qualified counsel, and not have interests antagonistic to class members. (*McGee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Burton easily satisfies this requirement. She has retained highly qualified Class Counsel, who, as explained above, are experienced in class actions and in Proposition 218 litigation, such that they have and will vigorously represent the Settlement Class. Moreover, Burton has no interests antagonistic to the interests of the Settlement Class.

E. 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; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 883.) A class action is plainly superior to the other methods available for the fair and efficient adjudication of this controversy. (*Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1270.) The class action device is particularly appropriate when numerous parties suffer injury in small amounts, because individual lawsuits would not be economical 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].) Particularly in the settlement context, class resolution is superior to other available methods for the fair and efficient adjudication of large numbers of small individual claims. Here, the potential recovery for class members is relatively small. It would be financially infeasible for individual

class members to pursue these claims in thousands of separate lawsuits, because litigation costs would greatly exceed their potential recovery. (See *Daar, supra,* 67 Cal.2d 695 at pp. 714-15.) Accordingly, a class action is far superior to other available methods of resolution under the circumstances here.

In consideration of the foregoing, Burton respectfully requests that the Court finally certify the Settlement Class, appoint her as the Class Representative, and appoint Eric J. Benink and Prescott W. Littlefield as Class Counsel.

III. CLASS NOTICE SATISFIES DUE PROCESS

California Rules of Court require that notice of the final approval hearing, the proposed settlement, and class member objection procedures be given to putative class members in a manner specified by the Court (Cal. R. Ct., 3.769 subds. (d) and (e).) With regard to content, notice must include the following: (1) A brief explanation of the case, including the basic contentions or denials of the parties; (2) A statement that the court will exclude the member from the class if the member so requests by a specified date; (3) A procedure for the member to follow in requesting exclusion from the class; (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel. (Cal. R. Ct. R. 3.769, subd. (d).) The Long Form Notice included all such required information. (See Prelim. Order, Ex. B [Long Form Notice] Introduction Paragraph, ¶¶ 2, 10 13, 14, 15.)

With regards to the manner of notice, the standard is whether notice has "a reasonable chance of reaching a substantial percentage of the class members." (*Wershba*, *supra*, 91 Cal.App.4th at 251 citing *Cartt v. Superior Court* (1975) 42 Cal.App.3d 960, 974; *see also* CRC 3.766(e).) And, in deciding on the appropriateness of class notice, a court must consider the factors set forth in Rule 3.766(e): "(1) the interests of the class; (2) the type of relief requested; (3) the stake of the individual class members; (4) the cost of notifying class members; (5) the resources of the parties; (6) the possible prejudice to the class members who do not receive notice; and (7) the res judicata effect on class members." Finally, the trial court "has virtually complete discretion as to the manner of giving notice to class members." (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85

Cal.App.4th 1135, 1164 (citation omitted).)

Here, the Court ordered that a Summary Notice be mailed to Class Members and that a Publication Notice be published in the *San Bernardino Sun* twice, seven days apart, no later than August 9, 2019. Each directed Class Members to a website (www.AVTrashSettlement.com) that published the Long Form Notice. Utilizing a summary notice that directs class members to a website containing a more detailed notice is "perfectly acceptable." (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1392.) The Court further ordered that in addition to the Long Form Notice, the Settlement Agreement, the Claim Form and Opt Out Form be published on the website by August 9, 2019. (Prelim. Order, ¶¶ 6, 10 and 19, Exs. A, B, C and D; Settlement Agreement, ¶ 7, Ex. G.) The Court ordered that the website be updated with Class Counsel's application for attorney's fees and service award, and motion for final approval by September 9, 2019. (Prelim. Order, ¶¶ 6, 10; SA, ¶ 7.)

The website, www.AVTrashSettlement.com was launched on August 2, 2019. (Benink Decl., ¶ 8.) The Long Form Notice on the website's home page and the website provides links to the Settlement Agreement, the motion for preliminary approval and all supporting papers, the Prelim. Order, the Claim Form, Objection Form, and Request for Exclusion. (*Ibid*.) This motion and the motion for attorney's fees, and all supporting papers will be posted on the website September 9, 2019. (*Ibid*.) It is Class Counsel's understanding that the Town caused the Publication Notice to be published on August 2 and August 9, 2019 in the *San Bernardino Sun*. (*Ibid*.) It is Class Counsel's further understanding that the Town mailed the Summary Notice to Class Members on August 9, 2019. (*Ibid*.) Pursuant to the Prelim. Order, the Town and Claims Administrator will submit declarations of compliance with the class notice procedures in paragraph 7 of the Settlement Agreement no later than October 8, 2019. (Prelim. Order, ¶ 19.) Because this notice program comports with due process and was executed in compliance with the Prelim. Order, final approval is warranted.

IV. CLAIMS ADMINISTRATION EXPENSES SHOULD BE APPROVED

The Claims Administrator has provided and will continue to provide administration services on behalf of the Class, including the establishment of a settlement notice website; hosting a toll-free

number for class members to obtain forms and information; acting as repository for Class Member Claim forms; working with the Town to determine refund amounts; processing and mailing checks to Class Members; and establishing a qualified settlement fund. The Court ordered the Claims Administrator to provide a statement of its fees and an estimate of future fees no later than October 9, 2019. (*Ibid.*) Burton requests that the Court approve the Claims Administrator's fees to be paid from the Common Fund.

CONCLUSION

For all of the foregoing reasons, Burton respectfully requests that the Court grant final approval of the Settlement, finally certify the Settlement Class, and enter the Final Judgment and Final Order in the form lodged herewith.

BENINK & SLAVENS, LLP

DATED: September 9, 2019

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