

Supreme Court Copy

S174507

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, on behalf of himself
and all others similarly situated,
Plaintiff and Appellant,

SUPREME COURT
FILED

vs.

CITY OF LOS ANGELES
Defendant and Respondent.

FEB 10 2010

Frederick K. Ohlrich Clerk

Deputy

After a Decision By The Court of Appeal
Second Appellate District, Division Three
Case No. B201035

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC363959

NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Please take notice that, pursuant to California Rules of Court, rule 8.252, and Evidence Code sections 452(d) and (h), and 459, Plaintiff Estuardo Ardon hereby moves this Court to take judicial notice, for the purposes of this appeal, of the following true and correct documents, which are attached as Exhibits A and B to the Declaration of Rachele R. Rickert filed in support hereof (filed concurrently herewith):

- Exhibit A. Verified Complaint for Refund of Los Angeles Telephone Users Taxes (minus the exhibits), filed on January 27, 2009 in the Superior Court of the State of California, County of Los Angeles in *Nextel Boost of California LLC, DBA Boost Mobile v. City of Los Angeles*, Case No. BC 406437.
- Exhibit B. Complaint for Refund of Taxes filed on December 20, 2006 in the Superior Court of the State of California, County of Los Angeles in *Tracfone Wireless, Inc. v. City of Los Angeles*, Case No. BC 363735.

This motion is based on the attached Memorandum of Points and Authorities, true and correct copies of the above documents, which are attached as Exhibits A and B to the Declaration of Rachele R. Rickert filed in support hereof, and the accompanying proposed order granting this motion.

DATED: February 9, 2010

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT SHOULD TAKE JUDICIAL NOTICE AS REQUESTED

A. General Principles of Judicial Notice

Judicial notice may be taken of “[r]ecords of (1) any court of this state ...” (Evid. Code, §452(d).) Judicial notice also may be taken of “[f]acts ... that are not reasonably subject to dispute.” (*Id.* at subd. (h).) Judicial notice of such facts is mandatory upon request where the opposing party is permitted to raise objections and the court has enough information about the facts in order to make a determination that they come within a category subject to proper judicial notice. (Evid. Code, §453.) A reviewing court is permitted to judicially notice facts in the same manner as a trial court. (Evid. Code, §459(a).)

“Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 [62 Cal.Rptr.3d 59, 67] (citations omitted); Evid. Code, § 454.) “The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute.*” (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882 [110 Cal.Rptr.2d 877]; Cal. Evid. Code, § 452(h).)

B. The Court Should Take Judicial Notice Of The Complaints Filed In The *Nextel Boost* and *Tracfone Wireless* Cases

The Court should judicially notice the documents in Exhibits A and B. These documents are all records in another state court proceeding relevant to this action and may be judicially noticed pursuant to Evidence Code section 452(d). Further, these complaints contain allegations made by Nextel Boost of California LLC, DBA Boost Mobile and Tracfone Wireless, Inc., the fact that the allegations were made in the complaints is not reasonably subject to dispute, and the existence

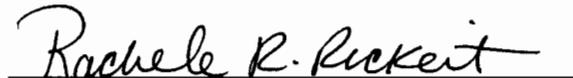
of such allegations in the complaints is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 726 [54 Cal.Rptr.3d 775, 808-809, 151 P.3d 1185, 1212-1213] [records from other state court proceedings involving plaintiff relevant and properly subject to judicial notice]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1357, fn. 7 [83 Cal.Rptr.3d 588, 593, fn. 7].)

II. CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Estuardo Ardon respectfully requests that the Court grant his motion to judicially notice the attached materials.

DATED: February 9, 2010

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Attorneys for Plaintiff and Appellant

DECLARATION OF COUNSEL

[CRC 8.54(a)(2)]

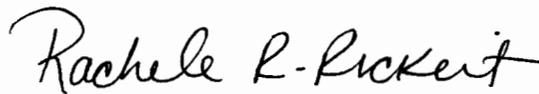
I, Rachele R. Rickert, declare as follows:

1. I am a member of Wolf Haldenstein Adler Freeman & Herz LLP, one of the counsel for Plaintiff and Appellant Estuardo Ardon in this appeal. I am an attorney in good standing and licensed to practice before this Court and the courts of this state.

2. Attached hereto as Exhibit A is a true and correct copy of the Verified Complaint for Refund of Los Angeles Telephone Users Taxes (minus the exhibits), filed on January 27, 2009 in the Superior Court of the State of California, County of Los Angeles in *Nextel Boost of California LLC, DBA Boost Mobile v. City of Los Angeles*, Case No. BC 406437.

3. Attached hereto as Exhibit B is a true and correct copy of the Complaint for Refund of Taxes filed in on December 20, 2006 in the Superior Court of the State of California, County of Los Angeles in *Tracfone Wireless, Inc. v. City of Los Angeles*, Case No. BC 363735.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of February, 2010.



Rachele R. Rickert

EXHIBIT A

Case assigned D20 to Judge Kevin A. Bergyle

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FILED
Los Angeles Superior Court

JAN 27 2009

John A. Clark, Executive Officer/Clerk
By *[Signature]* Deputy
DOROTHY SWAIN

ORIGINAL

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

15 NEXTEL BOOST OF CALIFORNIA LLC, DBA
16 BOOST MOBILE,

17 Plaintiff,

18 v.

19 CITY OF LOS ANGELES,

20 Defendant.

Case No.

BC406437

UNLIMITED JURISDICTION

**VERIFIED COMPLAINT FOR
REFUND OF LOS ANGELES
TELEPHONE USERS TAXES**

22 Plaintiff complains and alleges as follows:

23 **PARTIES**

24 1. Plaintiff, Nextel Boost of California LLC, dba Boost Mobile ("Boost Mobile")

25 is, and at all times mentioned herein was, a limited liability company organized under the laws of
26 Delaware. Boost's principal place of business is located at 6200 Sprint Parkway, Overland Park, KS
27 66251.

CIT/CASE: NC906437 CA/DEF#: 0310
RECEIPT # 03118782019
DATE PAID: 01/27/09 12:03:08 PM
PAYMENT: \$350.00
RECEIVED: 0310
CASH: 350.00
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RECEIPT # 03118782020
DATE PAID: 01/27/09 12:03:37 PM
PAYMENT: \$350.00
RECEIVED: 0310

1 (Former L.A. Mun. Code § 21.1.3(d).) A copy of the Pre-Amendment Ordinance is attached to this
2 Complaint as Exhibit A and incorporated as if set forth in full herein.

3 8. Beginning in 1965, the FET imposed tax on amounts paid for "local telephone
4 service," "toll telephone service," and "teletypewriter exchange service." (26 U.S.C. § 4251(a).)

5 9. On January 9, 2007, the City Council adopted, without voter approval, ordinance
6 number 178,219, which amended the Pre-Amendment Ordinance to remove the FET Exclusion and
7 to replace it with certain enumerated exemptions. The Amended Ordinance was purportedly
8 effective on February 16, 2007. A copy of ordinance number 178,219 is attached to this Complaint
9 as Exhibit B and incorporated as if set forth in full herein.

10 10. On March 5, 2008, the City Council adopted, after voter approval, ordinance number
11 179,686, which enacted a new Communications Users Tax ("2008 CUT") that imposed tax on a
12 broad array of communications services as defined in the 2008 CUT, including for the first time
13 "prepaid . . . telecommunications services." The 2008 CUT contained no exclusion for services not
14 subject to the FET, but specified certain enumerated exemptions. (L.A. Mun. Code §§ 21.1.1(b),
15 21.1.3(d).) The 2008 CUT was effective on March 15, 2008.

16 **FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS**

17 Boost's Service and Business Model

18 11. During the Refund Period, Boost provided prepaid wireless services, including but not
19 limited to telephone communications airtime ("Prepaid Service") throughout the United States,
20 including in the City.

21 12. In most instances, Boost sold tangible media, such as cellular telephones ("Phones")
22 and prepaid telephone calling cards ("Cards"), at a wholesale price to hundreds of different retailers
23 and distributors (which in turn sold to retailers) across the entire United States. The retailers then re-
24 sold the Phones and Cards to the ultimate users of Boost's Prepaid Service at a retail price.

25 13. The consumer redeemed the dollar value of the Card for Prepaid Service at a flat rate
26 anywhere and at any time within a prescribed period. When a consumer exhausted the value of the
27 Card, the consumer could purchase additional Cards or add to the value of the existing Card to use
28 additional Prepaid Service.

1 14. Boost had no point-of-sale contact with the ultimate user of the Prepaid Service in
2 substantially all of its sales. Boost had no information whatsoever about the identity of these users,
3 including but not limited to their names, addresses, or method of payment.

4 15. Boost's Prepaid Service provided consumers with access to a national telephone
5 network, and consumers could use the Prepaid Service to make wireless telephone calls anywhere in
6 the United States.

7 16. Boost had no knowledge of whether a consumer would redeem the value of the Card
8 for Prepaid Service, or for any other product offered by Boost (e.g., ringtones).

9 17. Boost also had no knowledge of the location in which the consumer purchased the
10 Card from the retailer or the location in which the consumer ultimately would use the Prepaid
11 Service.

12 18. The dollar value of a user's card account was debited at the same flat rate per minute
13 of Prepaid Service used in every jurisdiction in which Boost provided Prepaid Service, without regard
14 to whether or not the jurisdiction imposed a tax on the Prepaid Service.

15 19. The dollar value of a user's card account was debited at the same flat rate per minute
16 of usage of Prepaid Service without regard to the distance between the point of origination and
17 termination of the Prepaid Service.

18 Boost Paid the TUT

19 20. During the Refund Period, the Amended Ordinance imposed the TUT at a rate of ten
20 percent (10%) on "every person in the City of Los Angeles using telephone communication services
21 including . . . services for mobile cellular telephone communication when the owner or lessee of the
22 telephone has a billing address in the City." (Former L.A. Mun. Code § 21.1.3(a).)

23 21. For the Refund Period, Boost paid the TUT based on the number of minutes of
24 Prepaid Service used in the City.

25 22. Boost paid the TUT out of funds that otherwise would have represented additional
26 profits to Boost.

27 23. Boost did not collect the TUT from the users of its Prepaid Service.

1 commercial relationship with the consumer who purchased the Card, and thus the consumer had no
2 "billing address" for this purpose.

3 34. Because the users did not have "billing address[es] in the City," Prepaid Service was
4 not taxable under the Amended Ordinance.

5 35. Boost's Prepaid Service was not subject to tax under the Amended Ordinance.

6 Boost's Prepaid Service Was Excluded from the Pre-Amendment Ordinance Because It Was
7 Not Subject to the FET

8 36. Until the City passed the Amended Ordinance, the Pre-Amendment Ordinance
9 contained the FET Exclusion, which provided that the TUT was not imposed on services that were
10 "exempt from or not subject to" the FET.

11 37. Between 2005 and 2006, five federal courts of appeals, two courts of federal claims,
12 and at least seven federal district courts (collectively the "Federal Decisions") have held that
13 telephone service for which the user pays a charge that varies based only on the length of time of the
14 call ("time-only service") is not taxable under the FET. See, e.g., *Am. Bankers Ins. Group v. United*
15 *States* (11th Cir. 2005) 408 F.3d 1328; *OfficeMax, Inc. v. United States* (6th Cir. 2005) 428 F.3d 583;
16 *Nat'l R.R. Passenger Corp. v. United States* (D.C. Cir. 2005) 431 F.3d 374; *Fortis, Inc. v. United*
17 *States* (2d Cir. 2006) 447 F.3d 190; *Reese Bros., Inc. v. United States* (3d Cir. 2006) 447 F.3d 229.

18 38. On or about May 25, 2006, the Internal Revenue Service ("IRS") acquiesced to the
19 Federal Decisions and issued a ruling indicating that it would discontinue collection of the FET on
20 time-only service (the "IRS Acquiescence"). (Notice 2006-50 (June 19, 2006) 2006-25 Int.Rev. Bull.
21 1141, § 1(a).) A copy of the IRS Acquiescence is attached to this Complaint as Exhibit C and
22 incorporated as if set forth in full herein.

23 39. On or about January 29, 2007, the IRS issued a second notice, again pursuant to the
24 Federal Decisions, specifically enumerating prepaid telephone cards and prepaid cellular telephones
25 and other similar services as not subject to tax under the FET. (Notice 2007-11 (Jan. 29, 2007) 2007-
26 5 Int.Rev. Bull. 405, §§ 2, 6, 7(a)(1).) A copy of this notice is attached to this Complaint as Exhibit
27 D and incorporated as if set forth in full herein.

1 40. Boost's Prepaid Service was charged on the basis of time only and was not subject to
2 the FET, and therefore not subject to the Pre-Amendment Ordinance.

3 41. Boost did not remit any FET for periods after the second quarter of 2006.

4 The City Passed the Amended Ordinance in Violation of Proposition 218 in Reaction to the
5 Developments in the FET Law

6 42. Following the issuance of the IRS Acquiescence, on or about June 1, 2006, the City
7 issued statements that "[t]he City's telephone tax ordinance is linked to the federal excise tax, and
8 about two-thirds of the \$270 million in telephone tax revenue may be at risk." A copy of this
9 statement is attached to this Complaint as Exhibit E and incorporated as if set forth in full herein.

10 43. Notwithstanding the Federal Decisions and the IRS Acquiescence, on or about
11 September 27, 2006, the City Council instructed the Los Angeles Office of Finance "to prepare and
12 send a letter to the utility companies instructing them to continue to collect the federal excise tax on
13 time-only long distance services." A copy of the instruction is attached to this Complaint as Exhibit
14 F and incorporated as if set forth in full herein.¹

15 44. On or about December 1, 2006, the Los Angeles City Attorney ("City Attorney")
16 presented to the City Council the Amended Ordinance, which removed the FET Exclusion and
17 replaced it with a list of enumerated exemptions, none of which are applicable to the service provided
18 by Boost.

19 45. The City Council adopted the Amended Ordinance on January 9, 2007.

20 46. The City never submitted the Amended Ordinance to the electorate for a vote.

21 47. In 1996, California voters passed Proposition 218 to amend the California
22 Constitution. Proposition 218 was designed to "protect[] taxpayers by limiting the methods by which
23 local governments exact revenue from taxpayers without their consent." (Prop. 218, § 2.)
24

25 ¹ The City Council also amended this instruction to read as follows: "to prepare and send a
26 letter to all telephone companies (including wireless carriers) instructing utility companies to
27 continue to collect the City's Telephone Users Tax, in the same manner as was done prior to the IRS
28 notice." This amendment is attached to this Complaint together with the original instruction as
Exhibit F.

1 48. Proposition 218 requires local governments to submit to the electorate for approval by
2 a vote laws that "impose, extend, or increase" any tax. (Cal. Const., art. XIII C, § 2(b), (d).)

3 49. The City's enactment of the Amended Ordinance without voter approval violated
4 Proposition 218 by imposing TUT on telecommunications services that were not subject to the FET,
5 and therefore excluded from the Pre-Amendment Ordinance.

6 50. Because the Amended Ordinance violated Proposition 218 and was therefore
7 unconstitutional under the California Constitution, it was invalid and inapplicable.

8 51. Thus, the Pre-Amendment Ordinance with the FET Exclusion applies to Boost's
9 Refund Claim.

10 52. Boost's Prepaid Service was not taxable under the Pre-Amendment Ordinance,
11 because it was not subject to the FET.

12 53. For all the foregoing reasons, Boost has overpaid TUT and thus is entitled to recovery
13 in the form of a refund.

14 **SECOND CLAIM FOR RELIEF**

15 (Violation of Due Process and Equal Protection Clauses and Commerce Clause)

16 54. Plaintiff repeats, realleges, and incorporates as if fully set forth in this paragraph each
17 and every allegation contained in paragraphs 1 through 53 hereof.

18 55. The City's denial of Plaintiff's Refund Claim violates Plaintiff's rights under the
19 Commerce Clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3) by taxing service
20 that does not meet the requirements of *Goldberg v. Sweet* (1989) 488 U.S. 252, as well as under the
21 Due Process Clauses of the California and United States Constitutions (Cal. Const., art. I, § 7; U.S.
22 Const., amend. XIV, § 1), because the City's TUT was imposed under unfair circumstances and
23 beyond the jurisdiction of the City, and under the Equal Protection Clauses of the California and
24 United States Constitutions (Cal. Const., art. I, § 7; U.S. Const., amend. XIV, § 1), because, on
25 information and belief, the City imposed the TUT on Boost more harshly than on similarly situated
26 taxpayers.

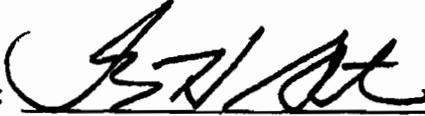
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WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For a refund of all TUT paid by Plaintiff to date, for the Refund Period in the amount of \$6,335,856.79, plus interest from the dates of payment as provided by law;
2. For attorneys' fees;
3. For costs of suit; and
4. For such other and further relief as the Court deems appropriate.

Dated: January 26, 2009

THOMAS H. STEELE
ANDRES VALLEJO
KIRSTEN WOLFF
MORRISON & FOERSTER LLP

By: 

THOMAS H. STEELE
Attorneys for Plaintiff
NEXTEL BOOST OF CALIFORNIA
LLC

01/26/09

1 VERIFICATION

2 I, Mark Beshears, declare:

3 I am Vice President of State and Local Tax of Sprint Nextel and Nextel Boost of
4 California LLC, dba Boost Mobile, a corporation organized and existing under the laws of
5 Delaware, which is the Plaintiff in the above-entitled action, and I have been authorized to make
6 this verification on its behalf.

7 I have read the foregoing Verified Complaint for Refund of Los Angeles Telephone Users
8 Taxes on file herein and know the contents thereof. The same is true of my own knowledge,
9 except as to those matters which are therein stated on information and belief, and, as to those
10 matters, I believe them to be true.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed at Overland Park, Kansas on January 23, 2009.

14 
15 _____
16 Mark Beshears, Vice President State and Local Tax
17 of Sprint/Nextel and Nextel Boost of California
18 LLC, dba Boost Mobile
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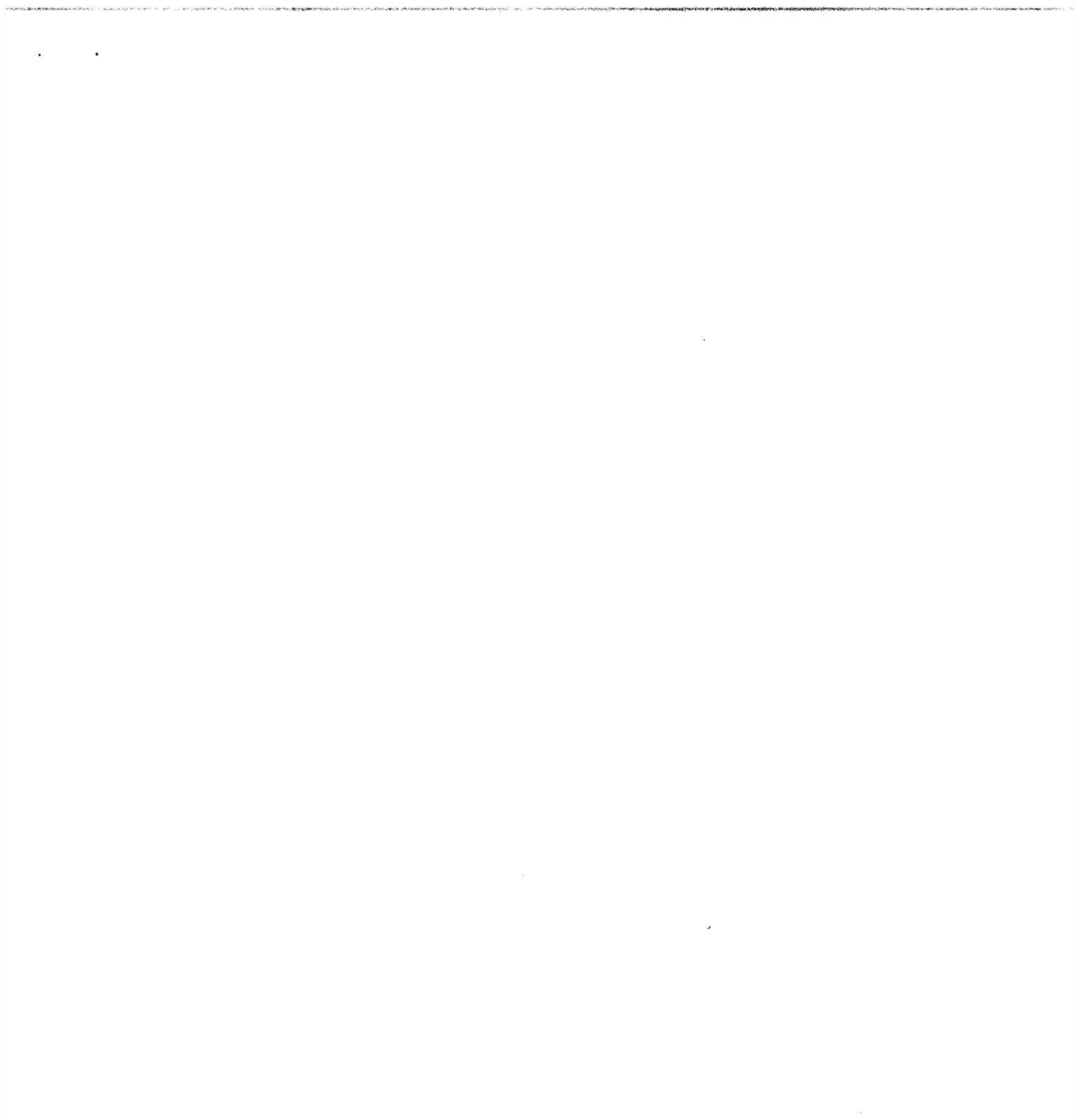


EXHIBIT B

1 **PARTIES**

2 1. Plaintiff TracFone Wireless, Inc. is a corporation organized and existing under the laws
3 of the State of Florida. TracFone's principal place of business is located at 8390 N.W. 25th Street,
4 Miami, Florida 33122.

5 2. Defendant City of Los Angeles is a political subdivision of the State of California. City
6 is and was at all relevant times empowered to assess and collect telephone user taxes pursuant to
7 Los Angeles Municipal Code ("Code") § 21.1.3. Upon information and belief, City's principal
8 place of business is located at 200 North Spring Street, Los Angeles, CA 90012.

9 **JURISDICTION AND VENUE**

10 3. Jurisdiction and venue in this Court are proper pursuant to California Government
11 Code §§ 945 and 945.6, and California Code of Civil Procedure § 394.

12 **FACTUAL ALLEGATIONS**

13 *Nature of TracFone's Business*

14 4. TracFone is a vendor of prepaid telephone calling cards ("Cards") throughout the
15 United States, including the City.

16 5. TracFone typically sells the Cards to retailers, which in turn resell the Cards to
17 consumers. In the vast majority of transactions, TracFone has no point of sale contact with the
18 ultimate consumers of the Cards.

19 6. Each Card entitles the ultimate consumer to a specific number of "units" or minutes of
20 wireless telephone calls. When a consumer exhausts the number of units on its Card, it may
21 purchase additional units.

22 7. The Cards provide consumers with access to a national telephone network, allowing
23 consumers to place wireless telephone calls to virtually anywhere in the United States.

24 8. Telephone calls must be made by each consumer on certain wireless handsets sold by
25 TracFone. Each authorized handset connects to the national telephone network through the use of
26 cellular technology.

1 The City's Telephone User Tax and TracFone's Payment of the Tax

2 9. Section 21.1.3 of the Code imposes a telephone user tax ("Tax") at the rate of ten
3 percent (10%) on all charges for intrastate, interstate, and international telephone services, and
4 charges for mobile cellular telephone communication services when the owner or lessee of the
5 telephone has a billing address in the City.

6 10. Between December 2004 and December 2005, TracFone paid the Tax for the
7 months of November 2004 through November 2005 ("Period at Issue") in the aggregate amount
8 of \$180,482.15.

9 11. TracFone did not charge the Tax to consumers of the telephone service. Rather,
10 TracFone paid the Tax itself because, due to its lack of point of sale contact with the vast majority
11 of ultimate consumers, it was unable to collect the Tax from the ultimate consumers.

12 12. The City has previously asserted that the Company is responsible for paying local
13 telephone user taxes despite the Company's lack of point of sale contact with the majority of
14 ultimate consumers. In fact, in February 2005, the City issued an assessment to the Company for
15 alleged underpaid tax, penalty, and interest.

16 Basis for TracFone's Exemption from the Tax

17 13. Subsection (d) of Code § 21.1.3 exempts from the scope of the Tax all telephone
18 services that "are exempt from or not subject to the tax imposed under Section 4251 of Title 26 of
19 the United States Code, as such Section existed on November 1, 1967." The referenced
20 Section 4251 of the Internal Revenue Code imposes a three percent (3%) federal excise tax
21 ("FET") on charges for certain "communications services," which term is further defined in
22 Section 4251(b) to encompass three categories of service: "local telephone service," "toll
23 telephone service," and "teletypewriter-exchange service."

24 14. Over recent years, numerous federal courts have held that the FET does not apply
25 to national calling plans that impose charges based solely on the elapsed transmission time of
26 placed calls. Specifically, the courts have held that such access to a national telephone network
27 constitutes neither "local telephone service" nor "toll telephone service" as understood within the
28

1 FET statutes. *See, e.g., Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005);
2 *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Nat'l R.R. Passenger Corp. v.*
3 *United States*, 431 F.3d 374 (D.C. Cir. 2005); *Fortis v. United States*, 447 F.3d 190 (2d Cir.
4 2006); and *Reese Bros. v. United States*, 447 F.3d 229 (3d Cir. 2006).

5 15. In the wake of these and other decisions, the Internal Revenue Service ("IRS"), in
6 May 2006, issued Notice 2006-50 ("Notice"), in which it stated it would follow the holdings of
7 the above-referenced cases. In the Notice, the IRS specifically confirmed that the FET did not
8 apply to prepaid telephone cards that provided bundled local and long distance telephone
9 services. *See* Notice, § 3.

10 16. Accordingly, it is now beyond dispute that TracFone's sales are not subject to the
11 FET. And therefore, as a result of Code § 21.1.3(d), TracFone's sales are also not subject to the
12 Tax.

13 *TracFone's Refund Claim and Defendants' Response*

14 17. On December 20, 2005, TracFone timely filed a refund claim ("Claim") with the
15 Los Angeles City Clerk ("City Clerk"), seeking a refund of the Tax it had paid for the Period at
16 Issue. The Claim requested an aggregate refund of \$180,482.15.

17 18. The Claim satisfied all required elements of California Government Code § 910 *et*
18 *seq.* The City Clerk never issued a notice of insufficiency in accordance with Government
19 Code § 910.8.

20 19. The City never responded to the Claim. Under City Charter § 350 (b), the Claim
21 has been deemed denied.

22 20. This Complaint is timely and properly filed under California Government
23 Code § 945.6.

24 **FIRST CAUSE OF ACTION (FOR REFUND OF TAXES)**

25 21. TracFone incorporates herein by reference the allegations set forth in paragraphs 1
26 through 20 of this Complaint.

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1 22. TracFone's sales during the Period at Issue were and are exempt from the Tax
2 under Code § 21.1.3(d) because such sales are not subject to the tax imposed under Section 4251
3 of the Internal Revenue Code.

4 23. TracFone therefore is entitled to a refund of all Tax paid for the Period at Issue.

5 **SECOND CAUSE OF ACTION (DUE PROCESS VIOLATION)**

6 24. TracFone incorporates herein by reference the allegations set forth in paragraphs 1
7 through 23 of this Complaint.

8 25. The Defendant's refusal to refund to TracFone all of the Tax paid for the Period at
9 Issue violates TracFone's due process rights under the U.S. and California Constitutions.

10 **THIRD CAUSE OF ACTION (UNCONSTITUTINAL TAKING)**

11 26. TracFone incorporates herein by reference the allegations set forth in paragraphs 1
12 through 25 of this Complaint.

13 27. The Defendant's refusal to refund to TracFone all of the Tax paid for the Period at
14 Issue constitutes the taking of private property without adequate compensation under the U.S. and
15 California Constitutions.

16 **WHEREFORE**, Plaintiff prays that this Court issue a judgment against Defendant as
17 follows:

- 18 1. Order Defendant to grant the Claim and refund to Plaintiff \$180,482.15, together
19 with interest thereon;
- 20 2. Grant Plaintiff its costs and attorney's fees in this matter; and
- 21 3. Grant Plaintiff such other relief as the Court deems just and proper.

22 Dated this 20th day of December, 2006.

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Attorneys for Plaintiff
TracFone Wireless, Inc., a Florida
Corporation

S174507

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, on behalf of himself
and all others similarly situated,
Plaintiff and Appellant,

vs.

CITY OF LOS ANGELES
Defendant and Respondent.

After a Decision By The Court of Appeal
Second Appellate District, Division Three
Case No. B201035

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC363959

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I, Maureen Longdo, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California. 92101.

2. That on February 9, 2010, declarant filed an original and 8 copies of the NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE and [PROPOSED] ORDER GRANTING MOTION FOR JUDICIAL NOTICE via Federal Express Overnight Delivery to the Supreme Court of California and served one copy of the NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE and [PROPOSED] ORDER GRANTING MOTION FOR JUDICIAL NOTICE via Federal Express Overnight Delivery on the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 9th day of February 2010, at San Diego, California.



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