S S202037

LIU, J.

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE

After Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Appeal from the Superior Court of
the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

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S_____

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Please take notice that, pursuant to California Rule of Court 8.252 and Evidence Code section 452 subdivision (d), Petitioner City of Long Beach hereby moves this Court to take judicial notice for the purposes of the accompanying Petition for Review, of the following true and correct documents, which are attached as Exhibits A through I to the Declaration of Tiana J. Murillo filed in support hereof:

A. Unpublished Opinion of the Court of Appeal, Second Appellate District, Division 3, in the matter of *Granados v. County of Los Angeles*, Court of Appeal Case No. B200812, filed March 28, 2012.

B. "Petition For Review and Request for Immediate Stay" filed on April 5, 2012 in the Supreme Court of California by the City of Chula Vista, re *Chula Vista v. Superior Court of the State of California*, Court of Appeal Case No. D061561.

C. "First Amended Complaint for Refunds of Taxes Erroneously Collected and Paid" filed in *Sipple et al. v. City of Alameda et al.* on January 5, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

D. "Notice of Demurrer and General and Special Demurrer to Plaintiffs' First Amended Complaint and Memorandum of

Points and Authorities in Support Thereof," filed in *Sipple et al. v. City of Alameda et al.* on January 31, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

E. Excerpts from "Defendant AT&T Mobility LLC's Memorandum in Support of Motion for Final Approval of Settlement," filed in the matter of *In Re AT&T Mobility Wireless Data Service Tax Litigation* (court order approving final settlement), Case No. 1:10-cv-02278 in the United States District Court for the Northern District of Illinois, Eastern Division, assigned to Hon. Amy J. St. Eve, dated February 23, 2011.

F. Excerpts from "Global Class Action Settlement Agreement," filed in the matter of *In Re AT&T Mobility Wireless Data Service Tax Litigation*, Case No. 1:10-cv-02278 in the United States District Court for the Northern District of Illinois, Eastern Division, assigned to Hon. Amy J. St. Eve. A full copy of this document, with exhibits, can be found at: http://attmsettlement.com/files/Settlement%20Agreement%20with%20Exhibits%209-24-10.pdf.

G. "First Amended Individual and Class Action Complaint Against the City of El Paso De Robles for Violation of California Constitution Articles XIII C and D and Declaratory and Injunctive Relief," filed in *Borst et al. v. City of Paso Robles*

on July 28, 2009 in the San Luis Obispo County Superior Court, Case Number CV 09-8117.

H. "Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Class Certification," filed in *Shames v. City of San Diego* on May 27, 2005 in the San Diego County Superior Court, Case Number GIC831539.

I. "Class Action Complaint For Injunctive and Declaratory Relief, Replevin, Constructive Trust, Restitution, Money Had and Received, Violation of Constitutional Rights," filed in *Hanns v. City of Chico* on February 3, 2010 in the Butte County Superior Court, Case Number 149292.

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 through I to the Declaration of Tiana J. Murillo filed in support hereof, and the accompanying proposed order granting this motion.

DATED: April 27, 2012

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ATTORNEYS FOR DEFENDANT/PETITIONER

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE REQUESTED JUDICIAL NOTICE IS APPROPRIATE

A. General Principles of Judicial Notice.

Judicial notice may be taken of "records of ... any court of this state or ... any court of record of the United States." (Cal. Evid. Code § 452, subd. (d).)

"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." (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882 (citations and quotations omitted); Cal. 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 at 882; Cal. Evid. Code § 452(h).)

B. The Court Should Take Judicial Notice of Pleadings in Related Court Actions.

The Court should judicially notice the documents in Exhibits A through I. These documents are pleadings filed in pertinent court actions, both state and federal courts, and are subject to notice pursuant to Evidence Code § 452 (d). Notice of the existence of these pending class actions and class-like actions will aid this Court's review of the accompanying Petition for Review by demonstrating that the questions the

Petition presents are of pressing concern in many cases in various courts affecting more than 100 local governments, millions of dollars of local taxes and fees, and essentially all Californians.

II. CONCLUSION

Therefore, the City respectfully submits this Court should, after expiration of opposing counsel's opportunity to respond under rule 8.54(a)(3) of the California Rules of Court, grant Petitioner City of Long Beach's motion to judicially notice the attached materials.

DATED: April 27, 2012

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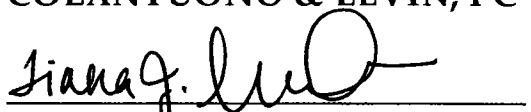

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ATTORNEYS FOR DEFENDANT/RESPONDENT

DECLARATION OF COUNSEL
[CRC 8.54(a)(2)]

1. I am an attorney in good standing licensed to practice before the Courts of this state.

2. Attached hereto as Exhibit A is the Unpublished Opinion of the Court of Appeal, Second Appellate District, Division 3, in the matter of *Granados v. County of Los Angeles*, Court of Appeal Case No. B200812, filed March 28, 2012.

3. Attached hereto as Exhibit B is the "Petition For Review and Request for Immediate Stay" filed on April 5, 2012 in the Supreme Court of California by the City of Chula Vista, re *Chula Vista v. Superior Court of the State of California,* Court of Appeal Case No. D061561.

4. Attached hereto as Exhibit C is the "First Amended Complaint for Refunds of Taxes Erroneously Collected and Paid" filed in *Sipple et al. v. City of Alameda et al.* on January 5, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

5. Attached hereto as Exhibit D is the "Notice of Demurrer and General and Special Demurrer to Plaintiffs' First Amended Complaint and Memorandum of Points and Authorities in Support Thereof," filed in *Sipple et al. v. City of Alameda et al.* on January 31, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

6. Attached hereto as Exhibit E are excerpts from "Defendant AT&T Mobility LLC's Memorandum in Support of Motion for Final Approval of Settlement," filed in the matter of *In Re AT&T Mobility*

Wireless Data Service Tax Litigation (court order approving final settlement), Case No. 1:10-cv-02278 in the United States District Court for the Northern District of Illinois, Eastern Division, assigned to Hon. Amy J. St. Eve, dated February 23, 2011.

7. Attached hereto as Exhibit F are excerpts from "Global Class Action Settlement Agreement," filed in the matter of I*n Re AT&T Mobility Wireless Data Service Tax Litigation*, Case No. 1:10-cv-02278 in the United States District Court for the Northern District of Illinois, Eastern Division, assigned to Hon. Amy J. St. Eve. A full copy of this document, with exhibits, can be found at: http://attmsettlement.com/files/Settlement%20Agreement%20with%20Exhibits%209-24-10.pdf.

8. Attached hereto as Exhibit G is the "First Amended Individual and Class Action Complaint Against the City of El Paso De Robles for Violation of California Constitution Articles XIII C and D and Declaratory and Injunctive Relief," filed in *Borst et al. v. City of Paso Robles* on July 28, 2009 in the San Luis Obispo County Superior Court, Case Number CV 09-8117.

9. Attached hereto as Exhibit H is "Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Class Certification," filed in *Shames v. City of San Diego* on May 27, 2005 in the San Diego County Superior Court, Case Number GIC831539.

10. Attached hereto as Exhibit I is the "Class Action Complaint For Injunctive and Declaratory Relief, Replevin, Constructive Trust,

Restitution, Money Had and Received, Violation of Constitutional Rights," filed in *Hanns v. City of Chico* on February 3, 2010 in the Butte County Superior Court, Case Number 149292.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on this 26th day of April 2012.

By: Tiana J. Murillo

Tiana J. Murillo

[Proposed]

ORDER TAKING JUDICIAL NOTICE OF PLEADINGS FILED IN RELATED ACTIONS

Good cause appearing, IT IS HEREBY ORDERED that the Motion Requesting Judicial Notice is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

1. Unpublished Opinion of the Court of Appeal, Second Appellate District, Division 3, in the matter of *Granados v. County of Los Angeles,* Court of Appeal Case No. B200812, filed March 28, 2012.

2. "Petition For Review and Request for Immediate Stay" filed on April 5, 2012 in the Supreme Court of California by the City of Chula Vista, re *Chula Vista v. Superior Court of the State of California,* Court of Appeal Case No. D061561.

3. "First Amended Complaint for Refunds of Taxes Erroneously Collected and Paid" filed in *Sipple et al. v. City of Alameda et al.* on January 5, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

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6. Excerpts from "Global Class Action Settlement Agreement," filed in the matter of *In Re AT&T Mobility Wireless Data Service Tax Litigation*, Case No. 1:10-cv-02278 in the United States District Court for the Northern District of Illinois, Eastern Division, assigned to Hon. Amy J. St. Eve. A full copy of this document, with exhibits, can be found at: http://attmsettlement.com/files/Settlement%20Agreement%20with%20Exhibits%209-24-10.pdf.

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Dated: _____

_____
Chief Justice Tani Cantil-Sakauye

Filed 3/28/12 Granados v. County of Los Angeles CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILLY GRANADOS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent	B200812 (Los Angeles County Super. Ct. No. BC361470)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Reversed in part, affirmed in part.

Wolf Haldenstein Adler Freeman & Herz, Francis M. Gregorek and Rachele R. Rickert; Tostrud Law Group, Jon A. Tostrud; Chimicles & Tikellis, Timothy N. Mathews; Cuneo Gilbert & Laduca and Sandra W. Cuneo for Plaintiff and Appellant.

Jones Day, Elwood Liu, Brian D. Hershman , Brian M. Haffstadt, Katie A. Richardson and Erica L. Reilley for Defendant and Respondent.

INTRODUCTION

In this class action plaintiff Willy Granados challenges the legality of the telephone user tax (TUT) he and other class members paid to the County of Los Angeles (County). Granados appeals an order of dismissal entered after the trial court sustained the County's demurrer to his complaint. We reverse in part and affirm in part.

Before filing a tax refund action the plaintiff must first file a claim containing the information required by Government Code section 910 (section 910). The trial court ruled that Granados could not file a section 910 claim on behalf of the class he purports to represent and, based on that ruling, sustained the County's demurrer to each of the complaint's five causes of action. When the trial court sustained the County's demurrer, however, it did not have the benefit of *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 (*Ardon*). Under *Ardon*, Granados can file a class claim for a TUT refund. The County concedes this point.

Granados's complaint, however, does not state sufficient facts to support the fourth cause of action for violation of due process and fifth cause of action for a writ of mandate. These causes of action are based on Granados's assertion that he cannot obtain a clear and certain remedy if the TUT is ultimately found unlawful. Granados concedes that in light of *Ardon*, these causes of action are moot. Accordingly, we affirm the order of dismissal with respect to the fourth and fifth causes of action in the complaint but reverse the order with respect to the remaining causes of action.

FACTS

1. *Allegations in the Complaint*

The complaint alleges the following. Pursuant to Los Angeles County Code section 4.62.060, subdivision (a) the County imposes a five percent TUT on amounts paid for telephone services by persons or entities located in unincorporated areas in the County. The TUT is paid for by service users (taxpayers) and collected by service providers (telephone companies). If a service user refuses to pay the TUT, the County can impose a 25 percent penalty. Granados is a resident of an unincorporated area of the County who has paid and continues to pay the TUT.

Los Angeles County Code section 4.62.060, subdivision (d) excludes from the TUT amounts paid for telephone services exempt from the tax imposed under section 4251 of title 26 of the Internal Revenue Code (Federal Excise Tax). Under numerous federal court decisions and a 2006 Internal Revenue Service notice, the Federal Excise Tax only applies to long distance service charged by time and distance. Today, however, "most long distance telephone service is charged under a postalized fee structure where the amount of the charge depends only upon the amount of elapsed transmission time and not the distance of the call." The Federal Excise Tax and thus the TUT cannot be imposed on such services. The County has nevertheless unlawfully collected and continues to collect the TUT from Granados and other class members on telephone service exempt from the Federal Excise Tax.

Los Angeles County Code section 4.62.190[1] sets forth a means of obtaining a refund of TUT improperly collected. This section provides:

"A. Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the tax administrator under this chapter, it may be refunded as provided in this section.

"B. Notwithstanding the provisions of subsection A of this section, a *service supplier* may, with prior written approval from the tax administrator, claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received when it is established that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the service user or credited to charges subsequently payable by the service user to the person required to collect and remit. A service supplier that has collected any amount of tax in excess of the amount of tax imposed by this chapter and actually due from a service user, may refund such amount to the service user . . . .

---

[1] We quote Los Angeles County Code section 4.62.190 (section 4.62.190) as set forth in the complaint. Section 4.62.190 was amended after the complaint was filed.

"C. No refund shall be paid under the provisions of this section unless the claimant establishes his right thereto by written records showing entitlement thereto." (Italics added.)

This refund provision does not provide a mechanism for an individual service user (i.e., taxpayer) to seek a refund of illegally collected TUT. Further, under section 799 of the Public Utilities Code, taxpayers cannot require service providers to seek refunds on their behalf.

On August 25, 2006, Granados sent a letter to the County demanding on his own behalf and on behalf of similarly situated taxpayers a refund of the TUT improperly collected and a cessation of improper collection of the TUT. The County did not respond to this claim.

Based on these allegations, the complaint sets forth five causes of action. The first cause of action is for declaratory and injunctive relief preventing further collection of the TUT.

The second cause of action is for money had and received and the third cause of action is for unjust enrichment. In these causes of action, Granados seeks a refund of improperly collected TUT on his own behalf and on behalf of all members of the class.

The fourth cause of action is for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint alleges that because the County "provides neither an adequate pre-deprivation nor post-deprivation relief" to taxpayers for unlawfully collected taxes, the County has violated the due process rights of Granados and all class members.

Finally, the fifth cause of action is for a writ of mandate. The complaint alleges the County "is obligated, but has failed, to provide adequate pre-deprivation or post-deprivation remedies for the illegal collection of the [TUT]." Plaintiff seeks a writ of mandate requiring the County to provide an adequate remedy.

2. *Procedural History*

On November 6, 2006, Granados filed his complaint against the County. The County demurred to the complaint on January 3, 2007.

In its memorandum in support of the demurrer, the County argued the complaint failed to state facts sufficient to constitute a cause of action for four reasons. First, the County argued that Granados could not assert a pre-lawsuit claim with the County on behalf of the entire class and thus the class claims are barred due to plaintiffs' failure to exhaust administrative remedies.

The County's second argument was that the complaint states no cause of action in equity because a refund suit is an adequate remedy at law.

Next, the County argued the fourth and fifth causes of action failed because the County was not required to provide a pre-deprivation remedy and Granados had an adequate post-deprivation remedy, namely a refund suit.

Finally, the County argued the complaint failed to state a cause of action because the TUT was not unlawful.

On April 13, 2007, the trial court sustained the demurrer with 60 days leave to amend. The transcript of the hearing on demurrer indicates the trial court sustained the demurrer mainly on the ground that Granados could not file a pre-lawsuit claim on behalf of the class. The court, however, rejected the County's argument that equitable relief was unavailable on the ground that declaratory relief was available if the TUT was indeed unlawful.

On May 8, 2007, the trial court held a hearing on an ex parte application filed by Granados. At that hearing Granados's counsel stated that Granados would not amend his complaint before the expiration of the 60-day period granted by the court.

On June 12, 2007, the trial court entered an order of dismissal prepared by the Granados's counsel. Granados filed a timely appeal of the June 12, 2007, order of dismissal.

On August 20, 2008, after the parties filed their briefs in this court, we stayed the appeal pending the resolution of the *Ardon* case in the California Supreme Court. The *Ardon* opinion was published on July 25, 2011.

On August 26, 2011, we lifted the stay and requested additional briefing regarding the affect of *Ardon*, if any, on the issues in this case. Both parties responded by filing additional briefs, which we have considered.

DISCUSSION

1. *Standard of Review*

We review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) We assume all of the facts alleged in the complaint are true and make all reasonable inferences from those facts in favor of plaintiff. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 713.) "However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

2. *Under Ardon, Granados Can File a Section 910 Class Claim*

The California Supreme Court held in *Ardon* that a taxpayer can file a section 910 class claim against a municipal governmental entity for a refund of local taxes. (*Ardon, supra*, 52 Cal.4th at p. 245.) In its supplemental brief, the County conceded that "the lower court's decision concluding otherwise must be reversed . . . ."

The County also stated in its supplemental brief that "two other points warrant mention." The first is that the County amended its code in 2007 and that under this amended code there are very specific requirements for asserting a class claim. We do not express an opinion regarding the 2007 amendment because the County does not contend Granados's claim was governed by that amendment.

The County also argued that "because the class claim issue was the only basis on which the trial court sustained the demurrer below, any of [Granados's] arguments beyond that issue were not considered by the trial court and should not be considered here." Granados asks this court to rule on the County's argument in the trial court that the TUT was lawful.

We decline to address the issue of whether the TUT was lawful for two reasons. First, the trial court did not specifically address the issue. Second, the County has not pursued that argument on appeal and has offered no briefing on the issue.

3. *The Complaint Does Not State Sufficient Facts to Support the Fourth and Fifth Causes of Action*

At oral argument plaintiff conceded that his fourth cause of action for violation of due process and fifth cause of action for a writ of mandate are moot because plaintiff has an adequate "post-deprivation" remedy in light of *Ardon*, namely a class claim for a tax refund.[2] The trial court therefore correctly sustained the County's demurrer to these causes of action.

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[2] The fourth and fifth causes of action are based on *McKesson Corp. v. Florida Alcohol & Tobacco, Div.* (1990) 496 U.S. 18.

DISPOSITION

The order of dismissal dated June 12, 2007, is reversed with respect to the first, second, and third causes of action of the complaint, and affirmed with respect to the fourth and fifth causes of action of the complaint. In the interests of justice, both parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF CHULA VISTA, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, Respondent. CARLA VILLA and VANESSA GARZA, Real Parties-In-Interest Plaintiffs.	**Supreme Court Case No.** **[Court of Appeal Case No.: D061561** **Superior Court Case No.: 37-2011-00093296-CU-MC-CTL]** **Superior Court Trial Date: January 18, 2013**

PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY

After An Order the Court of Appeal
Fourth Appellate District, Division One, Case No. D061561
San Diego Superior Court Case No. 37-2011-00093296-CU-MC-CTL

Hon. Richard E.L. Strauss
Judge of the Superior Court

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CITY OF CHULA VISTA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Pursuant to California Rules of Court, Rule 8.500 (a)(1), defendant and petitioner the City of Chula Vista seeks review of a March 23, 2012 order from the California Court of Appeal, Fourth Appellate District, Division One, summarily denying the City's petition for a peremptory writ of mandate.[1]

I.

ISSUE PRESENTED

The legal issue presented is this petition is whether a local government entity can control the pre-lawsuit claim filing procedures for refunds of local taxes (the lifeblood of local government entities) by enacting a municipal code governing the presentation and maintenance of such claims and, in particular, a municipal code precluding the filing of class claims for tax refunds.[2] The answer lies in a determination whether "statute" -- as used in Government Code section 905, subdivision (a) --

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[1]Attached to this petition is a copy of the March 23, 2012 order.

[2]The issue here involves whether a pre-litigation claim made to the City may be filed by a representative on behalf of a class, not whether a class action lawsuit is permissible where each class member has properly complied with the applicable pre-litigation claims filing procedure.

RULES OF COURT AND STATUTES

OTHER

encompasses a municipal code.[3] A current conflict exists between appellate courts on this issue.

II.

WHY REVIEW SHOULD BE GRANTED AND A STAY ORDERED

In *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65 ("*Batt*"), the First Appellate District held that a municipal code precluding class claims for local tax refunds constituted a "statute" under section 905, subdivision (a). In direct conflict, however, is *County of Los Angeles v. Superior Court (Oronoz)* (2008) 159 Cal.App.4th 353 ("*Oronoz*") wherein the Second Appellate District held that a municipal code governing the presentation of local tax refund claims was not a "statute" under section 905, subdivision (a).[4] *Batt* and *Oronoz* came to different conclusions primarily due to different interpretations of certain language used in this Court's opinion in

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[3]All statutory references are to the Government Code unless otherwise noted.

[4]On March 28, 2012, the Second Appellate District issued an unpublished opinion in *McWilliams v. City of Long Beach*, B200831, adopting the conclusion reached in *Oronoz*, that a municipal code is not a "statute" under section 905, subdivision (a).

Volkswagen Pacific, Inc. v. City of Los Angeles (1972) 7 Cal.3d 48 ("*Volkswagen Pacific*").[5]

In *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 ("*Ardon*"), this Court concluded that class claims for local tax refunds were permissible under section 910 unless otherwise precluded by "statute." However, this Court did not specifically address or decide the question of whether a municipal code provision precluding class claims for local tax refunds is a "statute" under §905, subdivision (a) and did not resolve the conflict between *Batt* and *Oronoz*.

As evidenced by *Batt* and *Oronoz*, there is not uniformity in the law. And this Court's opinion in *Ardon* did not resolve the conflict. This Court should thus grant review to "secure uniformity of decision" and to clarify the actual holding in *Volkswagen Pacific*. (California Rules of Court, Rule 8.500(b)(1).) Moreover, whether local government entities can enact local claiming procedures governing the presentation of claims for local

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[5]As discussed *post* in footnote 9, *Oronoz* also conflicts with *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, an earlier decision from the same Court of Appeal.

tax refunds is an important question of law. Local government entities, as well as courts and claimants, need to know whether such enactments are valid and enforceable. Thus, this Court should grant review "to settle an important question of law." (California Rules of Court, Rule 8.500(b)(1).)[6] This Court should issue a stay of the underlying action pending resolution of the issue on the merits. Absent a stay, the City must litigate at the expense of the public fisc a large and complex lawsuit seeking class wide relief in the form of local tax refunds when the potential exists that no class action lawsuit can be maintained against the City due to non-compliance with the pre-lawsuit claim filing procedures.

As an alternative to granting review, this Court can grant the petition to transfer the case back to the Fourth Appellate District with instructions to conduct further proceedings on the merits of the City's petition. (California Rules of Court, Rule

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[6]The conclusion that this Court should grant review is not altered because the City seeks review of the Fourth Appellate District's interlocutory order summarily denying the City's writ petition as the order is a final decision subject to review by this Court. (California Rules of Court, Rule 8.500(a)(1); see also California Rules of Court, Rule 8.490(b)(1) (summary denial of writ petition is a "decision").)

8.500(b)(4).)

III.

BACKGROUND

The City is a defendant in an action pending before the Superior Court of California, County of San Diego, styled as *Carla Villa and Vanessa Garza v. City of Chula Vista*, Case No. 37-2011-0093296-CU-MC-CTL. Carla Villa filed a pre-lawsuit claim with the City demanding, on her own behalf and those similarly situated, that the City stop collecting what she believes is an illegal Utility Users' Tax ("UTT") on mobile phone services under Chula Vista Municipal Code (CVMC) section 3.44.030. Villa also demanded return of collected UUTs in an amount exceeding $10,000. The City denied Villa's claim for a number of reasons, including CVMC section 3.44.120's preclusion of class claims for local tax refunds.

Villa and Vanessa Garza (Garza filed no pre-lawsuit claim) maintain individual and class claims for refunds from the City for the allegedly improper collection of the UUT. Relying on *Batt*, the City demurred to Villa and Garza's complaint arguing that CVMC section 3.44.120 precludes the filing of class claims for tax

refunds. Villa and Garza opposed the City's demurrer arguing that their class claims were brought pursuant to section 910 and thus proper under *Ardon*. They further argued that under *Oronoz*, CVMC section 3.44.120 did not constitute a statute under section 905, subdivision (a). Although acknowledging *Batt*, the trial court overruled the City's demurrer based on *Oronoz* and *Ardon*.

The City petitioned the Fourth Appellate District for a peremptory writ of mandate directing the trial court to vacate its order overruling the City's demurrer to Villa and Garza's complaint and to enter an order sustaining the demurrer. The City's petition was summarily denied on March 23, 2012.

IV.

LEGAL DISCUSSION

The Government Claims Act (§810, et seq.) (hereafter, the "Act") establishes the general rule that a claim must first be filed under this statutory scheme to pursue monetary relief against a government agency. However, section 905 exempts certain classes of claims from the Act's sweep. Specifically, subdivision (a) of section 905 excepts from the Act:

> Claims under the Revenue and Taxation Code *or other statute* prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto. (Emphasis added.)

In turn, subdivision (a) of section 935 authorizes local governments to establish local claiming procedures for those claims exempted by section 905, subdivision (a):

> Claims against a local public entity for money or damages which are excepted by Section 905 ... and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity.

Section 905, subdivision (a) and section 935, subdivision (a) accordingly allow the City to prescribe claiming requirements for local tax refund claims. CVMC section 3.44.120 precludes class claims for refunds of taxes collected by the City and imposes other requirements, such as filing a claim signed under the penalty of perjury.[7] There is no other applicable statute or regulation expressly governing claims against local government entities for

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[7]Villa did not sign her claim. As previously noted, Garza filed no claim.

recovery of UUTs.

A. *Batt*: A Local Government Enactment Is A Statute Under Section 905, Subdivision (a)

In *Batt*, a hotel guest sued the City and County of San Francisco on behalf of herself and on behalf of others similarly situated challenging San Francisco's enactment of a transient occupancy hotel tax. She had previously filed a pre-lawsuit claim on her own behalf and on behalf of a similar situated class. (*Batt, supra*, 155 Cal.App.4th at 68-71.) The Court of Appeal held that the class action lawsuit could not proceed because the governing pre-litigation claim ordinance found in the San Francisco Municipal Code stated that "class claims for refunds shall not be permitted. . . ." (*Id.* at 77-78.) The Court of Appeal held that the Act allows a municipal ordinance to supply tax refund claiming requirements that displace the general claim requirements set forth in the Act.

> Although the Claims Act requires presentation of a claim for 'money or damages' prior to commencing litigation, it excepts from that requirement 'Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.' (Gov. Code, §905, subd. (a).)

> It also has a provision specifying that 'Claims against a local public entity ... which are excepted by Section 905 ... and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity.' (Gov. Code, §935, subd. (a).) In short, those statutes allow a scope of operation for local statutes to occupy the field of local refund actions, if the locality so chooses. Here, the City has so chosen, a choice in full conformity with the Claims Act.

(*Batt, supra*, 155 Cal. App. 4th 65, 78; see *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415, fn.3 (stating "the reference in [Section 905, subdivision (a)] to 'The Revenue and Taxation Code or other statute' is not a limitation upon the type of tax claims excepted" from the Act.) In reaching its conclusion that Section 905, subdivision (a) excepts locally authorized tax refund procedures from the Act, the Court of Appeal rejected plaintiff's argument that this Court held in *Volkswagen Pacific* that a local ordinance is not a "statute" under §905, subdivision (a). (*Batt, supra*, 155 Cal.App.4th at 83.)

In *Volkswagen Pacific, supra*, 7 Cal.3d 48, 60-63, this Court determined the limitations period applicable to a claim for the refund of an allegedly invalid municipal tax brought under a Los Angeles Municipal Code, and concluded that a six-month

limitations period applied under section 945.6. This Court's conclusion did not depend upon its interpretation of section 905, subdivision (a). This Court reasoned that if the section 905, subdivision (a) exception did not apply, then the section 945.6 limitations period supplied the general rule. On the other hand, if the section 905, subdivision (a) exception did apply, the section 945.6 limitation was still applicable, by operation of section 935, because that latter statutory section provides that claiming rules established by local agencies are subject to the limitations period set forth in section 945.6. (*Id.* at 63.)

Importantly, this Court in *Volkswagen Pacific* did not invalidate the Los Angeles Municipal Code claim provision at issue, but rather enforced it. Indeed, this Court held that the statute of limitations in section 945.6 applied to suits for tax refunds filed following the rejection of a refund claim brought under a municipal claiming provision. (*Volkswagen Pacific, supra*, 7 Cal.3d at 61-63.) While discussing in dictum whether Los Angeles local tax refund claim ordinance was an authorized alternative claiming procedure under section 905, subdivision (a), this Court did not decide that question because "whether section

905, subdivision (a) is read to either exclude or include the instant tax refund action, section 945.6 provides the applicable statute of limitations." (*Id.* at 62.) As the Court of Appeal stated in *Batt*:

> ... [T]he language in *Volkswagen Pacific* on which plaintiff relies was dictum, as plaintiff herself acknowledges. [fn.] Perhaps more importantly, that dictum cannot support plaintiff here, because if it meant what plaintiff claims it meant, the Supreme Court would have invalidated the Los Angeles ordinance, which it did not do. And most importantly, plaintiff's argument is belied by the many cases that have dealt with local ordinances in tax refund cases, illustrated best by *Volkswagen Pacific* itself, which enforced a Los Angeles municipal ordinance requiring pre-suit filing of a claim for refund of a local tax. (*Volkswagen Pacific, supra*, 7 Cal.3d 48, 60-63.) To the same effect are *Howard Jarvis Taxpayers Assn. [v. City of Los Angeles* (2000)] 79 Cal.App.4th 242, 249, where the Court of Appeal relied on Los Angeles Municipal Code provisions governing tax refund claims; and *Flying Dutchman [Park, Inc. v. City and County of San Francisco* (2001)] 93 Cal.App.4th 1129, 1139, where we held that the San Francisco Municipal Code provisions requiring pre-suit claims governed refund suits.

(*Batt, supra*, 155 Cal.App.4th at 83.)

B. *Oronoz*: A Local Government Enactment Is Not A Statute Under Section 905, Subdivision (a)

In *Oronoz,* the Second Appellate District held that a municipal code - controlling the presentation of claims for refunds

of Los Angeles County's local telephone taxes but not precluding class refund claims - was not a "statute" under section 905, subdivision (a) and therefore the plaintiff's claim was subject to the Act which allows class claims under section 910. (*Oronoz, supra,* 159 Cal.App.4th at 360-361.) Central to the Court of Appeal's conclusion was *Volkswagen Pacific.*[8] However, the Court of Appeal ascribed a holding to *Volkswagen Pacific* that does not exist. The Court of Appeal erroneously read *Volkswagen Pacific* to hold that "tax refund procedures prescribed by a City ordinance and charter provision [do] not establish an exception under section 905, subd.(a) because the local enactments were not statutes." (*Oronoz, supra,* 159 Cal.App.4th at 361, citing *Volkswagen Pacific, supra,* 7 Cal.3d at 62.) But *Volkswagen*

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[8]The Court of Appeal also relied on section 811.8's definition of "statute" as "an act adopted by the Legislature of this State or by Congress of the United States, or a statewide initiative act." (*Oronoz, supra,* 159 Cal.App.4th at 361; see also *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463 (holding that a city tariff/ordinance shielding the city from vicarious liability was preempted by section 815 which makes public entity liability governed by statute because the city tariff/ordinance was not a statute under section 811.8).)

Pacific does not hold what the Court of Appeal believed.[9] At best, this Court's discussion of the issue was dictum.[10] (See *Batt, supra*, 155 Cal.App.4th at 83; see also *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1076 ("It is a well-established rule that an opinion is only authority for those issues actually considered or described.")

C. *Ardon*: Section 910 Allows Class Claims; No Decision On Whether Local Enactments Are "Statutes" Under Section 905, Subdivision (a)

In *Ardon, surpa*, 52 Cal.4th 241, this Court held that a class action could proceed against the City of Los Angeles for refund of a Telephone Users Tax because class claims for taxpayer refunds against local governmental entities brought under section 910 are permitted. (*Id.* at 253.) This Court

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[9]The Court of Appeal also contradicted its earlier treatment of the issue and holding in *Pasadena Hotel, supra,* 119 Cal App. 4th 412, that the use of the word "statute" in section 905, subdivision (a) was meant to authorize - not forbid - local ordinances and charters governing claims for local tax refunds. (See *Pasadena Hotel, supra*, 119 Cal App. 4th at 415, fn. 3) In the *McWilliams* case (see footnote 2, *ante*), the Court of Appeal's unpublished opinion stated that *Pasadena Hotel* incorrectly interpreted section 905, subdivision (a).

[10]The Court of Appeal in *McWilliams* again relied on what it believed this Court held in *Volkswagen Pacific* but this time noted that the holding was arguably dicta.

permitted the class action to proceed because in the absence of a applicable local ordinance, the applicable claims statute was section 910, which does permit claims to be filed on behalf of a class. "While the Act contains an exemption for '[c]laims under the Revenue and Taxation Code or other *statute* prescribing procedures for the refund ... of any tax,' the claim here did not involve any applicable municipal code or statute governing claims for refunds. (Gov. Code, § 905, subd. (a), italics added.)." (*Ardon, supra*, 52 Cal. 4th at 251.)

Critically, this Court did not overrule or even criticize *Batt* but rather distinguished the facts before it from those in *Batt* on the ground that *Batt* "considered *[a] statute[ ] or municipal ordinance [ ]* enacted to provide specific procedures for filing tax claims against government entities - *procedures that are not applicable or required in this case.*" (*Ardon, supra*, 52 Cal.4th at 250 (emphasis added); see *Id.* at 246, fn.2 ("[W]e do not address any issues involving preemption of the Municipal Code provisions in this case.").)[11]

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[11]While the issue of the potential application of a municipal code was raised before the Court of Appeal in the underlying matter, the issue was not raised before this Court. "Subsequent

Because the class claim in *Ardon* was brought under section 910 and no municipal ordinance was involved, this Court did not resolve the conflict between *Batt* and *Oronoz*. And because no municipal ordinance was at issue, this Court did not have occasion to revisit *Volkswagen Pacific*. But what this Court did do was confirm that courts must examine applicable claims statutes before determining whether class claims are permissible. (See *Ardon, supra,* 52 Cal.4th at 250.) And while this Court certainly held that section 910 permits class claims, that limited holding is irrelevant here because section 910 does not govern plaintiffs' claims due to the existence of the governing CVMC section 3.44.120. Accordingly, this Court did not undermine the conclusion that compliance with the claiming process established

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to Ardon's filing his complaint, the City amended Los Angeles Municipal Code section 21.1.3 to remove all references to the FET. The city council passed the amendment to the ordinance on January 9, 2007. (L.A. Ord. No. 178219.) In the Court of Appeal, the City contended that Ardon must file the refund claim under Los Angeles Municipal Code section 21.07 and former section 21.1.2 governing claims for refund of overpayment of business or use taxes. As the court observed, however, those code sections do not apply to Ardon's claim that the City's TUT was an illegal tax. The City does not renew its claim here. Therefore, we do not address any issues involving preemption of the municipal code provisions in this case." (*Ardon, supra,* 52 Cal. 4th at 246, fn. 2.)

by the relevant legislature - the Chula Vista City Council - is required, and because that legislature did not authorize class claims, no class claim may be asserted.[12] Likewise, the unverified claim Villa filed on her behalf is defective due to non-compliance with CVMC section 3.44.120.

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[12]At least one commentator has recognized the continued viability of *Batt* subsequent to *Ardon*. (See California Forms of Pleading and Practice - Annotated (Matthew Bender & Company, Inc. (2012), ch. 1, New Developments, §1.158 ("Local Law May Disallow Use of Class Actions. In *Batt v. City & County of San Francisco* (2007) 155 Cal. App. 4th 65, the court has enforced a local ordinance disallowing the use of class actions to claim refunds of local taxes."); California Forms of Pleading and Practice - Annotated (Matthew Bender & Company, Inc. (2012) ch. 120, Class Actions, §120.10 ("State or local laws may restrict the availability of class actions in certain contexts. For example, state law does not authorize class actions for the refund of vehicle license fees [*Woosley v. State* (1992) 3 Cal. 4th 758, 790 [ ] (Veh. Code § 42231 requires that any "person" seeking refund of license fee must file application for refund before filing suit, and "person" does not include class)]. Similarly, a local ordinance may disallow the use of class actions to claim refunds of local taxes [see, e.g., *Batt v. City & County of San Francisco* (2007) 155 Cal. App. 4th 65, 74-79 [ ] (trial court properly sustained demurrer to class action seeking refund of local hotel tax, based on local ordinance that expressly disallowed class claims for tax refunds)]. However, unless a specific provision governs, the Government Claims Act [Gov. Code § 900 et seq.] generally authorizes class claims against local governmental entities [*Ardon v. City of Los Angeles* (2011) 52 Cal. 4th 241, 247-250 [ ] (claim for refund of local taxes); *City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 455 [ ] (nuisance and inverse-condemnation claims))."

V.

CONCLUSION

The Court of Appeals' opinions in *Batt* and *Oronoz* directly conflict reaching opposite conclusions on the question of whether a municipal code or local ordinance is a "statute" within the meaning of section 905, subdivision (a). And this Court did not resolve the conflict in *Ardon*. Until this Court conclusively resolves the conflict, continued uncertainty exists. Because this petition presents this Court with the proper vehicle and opportunity to resolve the conflict, this Court should grant the petition and issue a stay of the underlying matter.

Dated: April 4, 2012

DALEY & ~~HEFT~~, LLP

By: _____

MITCHELL D. DEAN
SCOTT NOYA
LEE H. ROISTACHER
Attorneys for Petitioner
CITY OF CHULA VISTA

CERTIFICATION OF WORD COUNT

The text of this petition, excluding the table of contents and table of authorities, consists of 3,629 words as counted by the Microsoft Office 2010 word-processing program used to generate this petition.

Dated: April 4, 2012

DALEY & HEFT, LLP

By: _____

MITCHELL D. DEAN
SCOTT NOYA
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Attorneys for Petitioner
CITY OF CHULA VISTA

AF 1 MDD
JG

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF CHULA VISTA, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D061561 (San Diego County Super. Ct. No. 37-2011-00093296-CU-MC-CTL)
CARLA VILLA et al., Real Parties in Interest.	

THE COURT:

The petition for writ of mandate has been read and considered by Justices Nares, Haller and McDonald. The petition is DENIED.

NARES, Acting P. J.

Copies to: All parties

City of Chula Vista v. Superior Court of the State of California
Supreme Court Case No. _____
4th District Court of Appeal Case N. D061561
(San Diego Superior Court Case No. 37-2011-00093296-CU-MC-CTL)

CERTIFICATE OF SERVICE BY FEDERAL EXPRESS

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States; I am over the age of 18 years of age and not a party to the above entitled action. My business address is 462 Stevens Avenue, Suite 201, Solana Beach, California 92075.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with Federal Express/Overnight Mail; and that the correspondence shall be deposited with Federal Express this same day in the ordinary course of business.

I caused to be served copies of the following document(s):

PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY

by placing true and correct copies of said documents in a separate envelope to be addressed to each and depositing in the Federal Express Box at Solana Beach, California this 5th day of April 2012.

SEE ATTACHED SERVICE LIST

///

///

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed this 5th day of April, 2012 at Solana Beach, California.

Linda Quiroz, Declarant

CASE NAME: *Carla Villa, et al. v City of Chula Vista*	CASE NUMBER: 37-2011-00093296-CU-MC-CTL

ATTACHMENT TO PROOF OF SERVICE - CIVIL (PERSONS SERVED)
Name, Address, and Other Applicable Information About Persons Served:

Name of Person Served:	***Where Served:*** *(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic notification address, as applicable.)*	***Time of Service:*** *(Complete for service by fax transmission or electronic service.)*
Thomas D. Penfield, Esq. Jeremy Robinson, Esq. Casey Gerry Schenk Francavilla Blatt & Penfield LLP **Attorneys for Plaintiffs**	Casey Gerry Schenk Francavilla Blatt & Penfield LLP 110 Laurel Street San Diego, CA 92101 Phone: 619-238-1811 Fax: 619-544-9232	Time:
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Hon. Richard E.L. Strauss Superior Court of the State of California County of San Diego **Respondent/Trial Court**	Hall of Justice 330 West Broadway San Diego, CA 92101 Telephone: (619) 450-7075	Time:
Court of Appeal of the State of California Court Appellate District Division One **Appellate Court**	750 B Street San Diego, CA 92101 Telephone: (619) 744-0760	
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

FILED BY FAX

CASE NO. BC462270

DONALD SIPPLE, JOHN SIMON, KARL SIMONSEN, and CHRISTOPHER JACOBS, Settlement Class Representatives; NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability company,

Plaintiffs,

vs.

The City of Alameda, California; Alameda County, California; The City of Alhambra, California; The City of Arcadia, California; The City of Baldwin Park, California; The City of Bell, California; The City of Bellflower, California; The City of Benecia, California;

FIRST AMENDED COMPLAINT FOR REFUNDS OF TAXES ERRONEOUSLY COLLECTED AND PAID

The City of Berkeley, California;
The City of Burbank, California;
The City of Calabasas, California;
The City of Ceres, California;
The City of Chico, California;
The City of Chula Vista, California;
The City of Citrus Heights, California;
The City of Claremont, California;
The City of Colton, California;
The City of Compton, California;
The City of Covina, California;
The City of Cudahy, California;
Culver City, California;
The City of Cupertino, California;
Daly City, California;
The City of Desert Hot Springs, California;
The City of Dinuba, California;
The City of Downey, California;
The City of East Palo Alto, California;
The City of El Cerrito, California;
The City of El Monte, California;
The City of El Segundo, California;
The City of Exeter, California;
The City of Fairfield, California;
The City of Gardena, California;
The City of Gilroy, California;
The City of Glendale, California;
The City of Gonzales, California;
The City of Guadalupe, California;
The City of Gustine, California;
The City of Hawthorne, California;
The City of Hayward, California;
The City of Hercules, California;
The City of Hermosa Beach, California;
The City of Holtville, California;
The City of Huntington Park, California;
The City of Huntington Beach, California;
The City of Huron, California;
The City of Indio, California;
The City of Inglewood, California;
The City of Irwindale, California;
The City of Lakewood, California;
The City of La Palma, California;
The City of La Verne, California;
The City of Lawndale, California;
The City of Lindsey, California;
The City of Long Beach, California;
The City of Los Alamitos, California;
The City of Los Altos, California;
The City of Los Angeles, California;
Los Angeles County, California;
The City of Lynwood, California;
The City of Malibu, California;
The City of Mammoth Lakes, California;
The City of Maywood, California;

The City of Menlo Park, California;
The City of Modesto, California;
The City of Montclair, California;
The City of Monterey, California;
The City of Monterey Park, California;
The City of Moreno Valley, California;
The City of Mountain View, California;
The City of Norwalk, California;
The City of Oakland, California;
The City of Orange Cove, California;
The City of Pacific Grove, California;
The City of Palm Springs, California;
The City of Palo Alto, California;
The City of Paramount, California;
The City of Pasadena, California;
The City of Pico Rivera, California;
The City of Piedmont, California;
The City of Pinole, California;
The City of Placentia, California;
The City of Pomona, California;
The City of Port Hueneme, California;
The City of Porterville, California;
The City of Rancho Palos Verdes, California;
The City of Redondo Beach, California;
Redwood City , California;
The City of Richmond, California;
The City of Sacramento, California;
The City of San Bernardino, California;
The City of San Buenaventura (Ventura) , California;
The City of San Francisco, California;
The City of San Gabriel, California;
The City of San Jose, California;
The City of San Leandro, California;
The City of San Luis Obispo, California;
The City of San Marino, California;
The City of Sanger, California;
The City of Santa Ana, California;
The City of Santa Barbara, California;
The City of Santa Cruz, California;
The City of Santa Monica, California;
The City of Seal Beach, California;
The City of Sierra Madre, California;
The City of Soledad, California;
The City of South Pasadena, California;
The City of Stanton, California;
The City of Stockton, California;
The City of Sunnyvale, California;
The City of Torrance, California;
The City of Tulare, California;
The City of Waterford, California;
The City of Westminster, California;
The City of Whittier, California;
The City of Winters, California;
The City of Woodlake, California; and

DOES 1-50, inclusive,,)
)
Defendants.)
)

Plaintiffs allege the following:

OVERVIEW OF THE ACTION

1. This is an action to recover refunds of taxes erroneously paid and illegally collected by two California counties and 115 California cities.[1] This action arises after the settlement of a consolidated Multi-District Litigation proceeding in the United States District Court for the Northern District of Illinois before the Honorable Amy J. St. Eve, case No. 1:10-cv-02278, a series of federal class action cases, including cases in California Federal Court in which Plaintiffs Donald Sipple, John Simon, Karl Simonsen and Christopher Jacobs sued Plaintiff New Cingular Wireless PCS LLC ("New Cingular") on behalf of California consumers alleging that New Cingular erroneously and mistakenly charged them for taxes on internet access which New Cingular then remitted to the Defendants herein.

2. As part of the settlement of that class action, Judge St. Eve certified a series of subclasses including a California Settlement Subclass and authorized New Cingular and the California Settlement Subclass, through Class Representatives Donald Sipple, John Simon, Karl Simonsen and Christopher Jacobs to act as the representatives and legal agents for all California Settlement Subclass Members for the purpose of procuring refunds from Defendants of the taxes unlawfully collected from New Cingular by Defendants. Each paid the subject claimed taxes to at least one of the defendants. And each has exhausted his administrative remedies.

New Cingular also has standing to seek tax refunds of the taxes it erroneously paid on behalf of consumers because these taxes were in fact paid by New Cingular under the mistaken assumption that these taxes should have been collected and in light of the penalties and interest that would be assessed by Defendants if these taxes were not timely paid by New Cingular.

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[1] The original Complaint included 134 cities. Over 40 claims have settled. Nineteen dismissals have been filed. Numerous additional settlements are in process.

4. In accordance with the United States District Court's Order finally approving the settlement, New Cingular and the other Plaintiffs submitted refund requests to Defendants on behalf of every person who overpaid the subject taxes in California. These refund requests itemized the specific amount of the tax refund due to each of the individuals for whom the Certified Subclass was authorized to seek refunds under the federal court order. Such refund requests included a detailed statement which summarized the legal and factual basis for each refund request, the standing of the parties requesting the refund, as well as a description of the various assignments and authorizations made between New Cingular and the Settlement Subclass in order to effectuate such refund applications under the laws of the variety of taxing jurisdictions to which they were directed. Instead of filing thousands of substantially identical separate claim forms the plaintiffs herein jointly completed a single claim form for each jurisdiction, and attached to it a CD detailing all of the individualized pertinent information called for on each relevant claim form for each individual claimant. Defendants each denied or failed to respond to the refund requests.

5. Plaintiffs have reached tax refund settlements with numerous cities including many of the defendants named in the original complaint in this action. Defendants herein, however, have refused to provide tax refunds based on a variety of assertions including that neither of the Plaintiffs -- either New Cingular or the class representatives -- have standing to seek tax refunds on behalf of any other individuals and that Plaintiffs have failed to comply with all the technical requirements of the refund statutes. Plaintiffs allege they have adequately complied with all claims statutes, codes and ordinances applicable. To the extent plaintiffs may not have precisely complied, if applicable at all, with Defendants' technical requirements for tax refunds, Plaintiffs have, in fact, substantially complied with such requirements. Defendants have suffered no prejudice in the event of any technical noncompliance. To the extent Plaintiffs have not precisely complied, enforcement of Defendants' technical requirements for tax refunds and denial of the refunds sought in this case would result in a denial of due process and the unjust enrichment of Defendants. Strictly interpreting Defendants' technical requirements for a refund including, in some cases, the purported standing requirements, would result in an injustice and frustrate the

settlement of the Multi-district Litigation by preventing California residents from recovering the amounts they were overcharged by New Cingular which was unlawfully collected and is now being unlawfully retained by Defendants.

6. Joinder of the claims against each Defendant in this single action is appropriate under Code of Civil Procedure Section 1048(a). Plaintiffs' claims against Defendants all arise from the same series of transactions or occurrences, and involve common issues of fact or law. Joinder of the claims will result in judicial economy and convenience and will not prejudice any of the Defendants.

JURISDICTION

7. This Court has jurisdiction pursuant to Cal. Gov. Code §§ 905 and/or 935 and pursuant to the various City Codes and ordinances adopted by Defendants

VENUE

8. Pursuant to Cal. Code of Civ. Pro. § 395, venue is proper in this Court because Defendants the County of Los Angeles and the cities of Los Angeles, Long Beach, Glendale, Burbank, Norwalk, El Monte, Pasadena, Torrance, Arcadia, Baldwin Park, Bell, Bellflower, Calabasas, Claremont, Compton, Covina, Culver City, Downey, El Segundo, Gardena, Hawthorne, Hermosa Beach, Huntington Park, Inglewood, Irwindale, La Verne, Lawndale, Lynwood, Malibu, Maywood, Monterey Park, Paramount, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Gabriel, San Marino, Santa Monica, South Pasadena, and Whittier, are located in this County.

PARTIES

9. Plaintiff New Cingular Wireless PCS LLC ("New Cingular") is a Delaware limited liability company. New Cingular maintains its principal place of business at 5565 Glenridge Connector, Glenridge Two, Atlanta, GA 30342. It is registered to do business in California. Plaintiff does business throughout California.

10. Plaintiffs Donald Sipple, John Simon, Karl Simonsen and Christopher Jacobs are individual residents of the State of California and are the duly appointed Settlement Subclass

representatives for the California subclass pursuant to the Memorandum Opinion and Order granting Preliminary approval of the Class Settlement described below. Sipple is a resident of Montecito, California, Simon is a resident of Long Beach, California. Simonsen is a resident of San Jose, California. Jacobs is a resident of Los Angeles, California.

11. Defendant City of Alameda is a California city that may be served with process through its city clerk. The city clerk may be found at 2263 Santa Clara Ave., Room 380, Alameda, CA 94501.

12. Defendant County of Alameda is a California county that may be served with process through its county clerk. The county clerk may be found at 1106 Madison Street, Oakland, California, 94607.

13. Defendant City of Alhambra is a California city that may be served with process through its city clerk. The city clerk may be found at 111 South First St., Alhambra, CA 91801.

14. Defendant City of Arcadia is a California city that may be served with process through its city clerk. The city clerk may be found at 240 West Huntington Dr., Arcadia, CA 91066.

15. Defendant City of Baldwin Park is a California city that may be served with process through its city clerk. The city clerk may be found at 14403 East Pacific Ave., Baldwin Park, CA 91706.

16. Defendant City of Bell is a California city that may be served with process through its city clerk. The city clerk may be found at 6330 Pine Ave., Bell, CA 90201

17. Defendant City of Bellflower is a California city that may be served with process through its city clerk. The city clerk may be found at 16600 Civic Center Dr., Bellflower, CA 90706.

18. Defendant City of Benecia is a California city that may be served with process through its city clerk. The city clerk may be found at 250 East L. St., Benecia, CA 94510.

19. Defendant City of Berkeley is a California city that may be served with process through its city clerk. The city clerk may be found at 2180 Milvia St., Berkeley, CA 94704

20. Defendant City of Burbank is a California city that may be served with process through its city clerk. The city clerk may be found at 275 East Olive Ave., Burbank, CA 91502

21. Defendant City of Calabasas is a California city that may be served with process through its city clerk. The city clerk may be found at 100 Civic Center Way, Calabasas, CA 91302.

22. Defendant City of Ceres is a California city that may be served with process through its city clerk. The city clerk may be found at 2720 Second St., Ceres, CA 95307.

23. Defendant City of Chico is a California city that may be served with process through its city clerk. The city clerk may be found at 411 Main St., Chico, CA 95928.

24. Defendant City of Chula Vista is a California city that may be served with process through its city clerk. The city clerk may be found at 276 Fourth Ave., Chula Vista, CA 91910.

25. Defendant City of Citrus Heights is a California city that may be served with process through its city clerk. The city clerk may be found at 6237 Fountain Square Dr., Citrus Heights, CA 95621.

26. Defendant City of Claremont is a California city that may be served with process through its city clerk. The city clerk may be found at 207 Harvard Ave., Claremont, CA 91711.

27. Defendant City of Colton is a California city that may be served with process through its city clerk. The city clerk may be found at 650 N. La Cadena Dr., *Colton, CA* 92403.

28. Defendant City of Compton is a California city that may be served with process through its city clerk. The city clerk may be found at 700 N. Bullis Rd., Compton, CA 90220.

29. Defendant City of Covina is a California city that may be served with process through its city clerk. The city clerk may be found at 125 E. College St., Covina, CA 91723-2199.

30. Defendant City of Cudahy is a California city that may be served with process through its city clerk. The city clerk may be found at 5220 Santa Ana St., Cudahy, CA 90201.

31. Defendant Culver City is a California city that may be served with process through its city clerk. The city clerk may be found at 9770 Culver Blvd., Culver City, CA 90232.

32. Defendant City of Cupertino is a California city that may be served with process through its city clerk. The city clerk may be found at 10300 Torre Ave., Cupertino, CA 95014-3202.

33. Defendant Daly City is a California city that may be served with process through its city clerk. The city clerk may be found at 333 90th St., Daly City, CA 94015.

34. Defendant City of Desert Hot Springs is a California city that may be served with process through its city clerk. The city clerk may be found at 65-950 Pierson Blvd. Desert Hot Springs, CA 92240.

35. Defendant City of Dinuba is a California city that may be served with process through its city clerk. The city clerk may be found at 405 East Ave. 416, Dinuba, CA 93618.

36. Defendant City of Downey is a California city that may be served with process through its city clerk. The city clerk may be found at 11111 Brookshire Ave., *Downey, CA* 90241.

37. Defendant City of East Palo Alto is a California city that may be served with process through its city clerk. The city clerk may be found at 2415 University Ave., East Palo Alto, CA 94303.

38. Defendant City of El Cerrito is a California city that may be served with process through its city clerk. The city clerk may be found at 10890 San Pablo Ave., El Cerrito, CA 94530-2323.

39. Defendant City of El Monte is a California city that may be served with process through its city clerk. The city clerk may be found at 11333 Valley Blvd., *El Monte, CA* 91731.

40. Defendant City of El Segundo is a California city that may be served with process through its city clerk. The city clerk may be found at 350 Main St., El Segundo, CA 90245-3895

41. Defendant City of Exeter is a California city that may be served with process through its city clerk. The city clerk may be found at 137 North F St., Exeter, CA 93221-1629.

42. Defendant City of Fairfield is a California city that may be served with process through its city clerk. The city clerk may be found at 1000 Webster St. # 4, Fairfield, CA 94533.

43. Defendant City of Gardena is a California city that may be served with process through its city clerk. The city clerk may be found at 1700 West 162nd St., *Gardena, CA* 90247.

44. Defendant City of Gilroy is a California city that may be served with process through its city clerk. The city clerk may be found at 7351 Rosanna St., *Gilroy*, CA 95020.

45. Defendant City of Glendale is a California city that may be served with process through its city clerk. The city clerk may be found at 613 E. Broadway, Glendale, CA 91206.

46. Defendant City of Gonzales is a California city that may be served with process through its city manager/city clerk. The city manager/city clerk may be found at 147 4th St., Gonzales, CA 93926.

47. Defendant City of Guadalupe is a California city that may be served with process through its city clerk. The city clerk may be found at 918 Obispo St., Guadalupe, CA 93434-1451.

48. Defendant City of Gustine is a California city that may be served with process through its city clerk. The city clerk may be found at 682 3rd Ave., Gustine, CA 95322-1102.

49. Defendant City of Hawthorne is a California city that may be served with process through its city clerk. The city clerk may be found at 4455 W. 126th St., Hawthorne, CA 90250.

50. Defendant City of Hayward is a California city that may be served with process through its city clerk. The city clerk may be found at 777 B St., Hayward, CA 94541-5007.

51. Defendant City of Hercules is a California city that may be served with process through its city clerk. The city clerk may be found at 111 Civic Dr., Hercules, CA 94547.

52. Defendant City of Hermosa Beach is a California city that may be served with process through its city clerk. The city clerk may be found at 1315 Valley Dr., Hermosa Beach, CA 90254.

53. Defendant City of Holtville is a California city that may be served with process through its city clerk. The city clerk may be found at 121 West 5th St., Holtville, CA 92250.

54. Defendant City of Huntington Park is a California city that may be served with process through its city clerk. The city clerk may be found at 6550 Miles Ave. # 145, Huntington Park, CA 90255.

55. Defendant City of Huntington Beach is a California city that may be served with process through its city clerk. The city clerk may be found at 2000 Main St., Huntington Beach, CA 92648

56. Defendant City of Huron is a California city that may be served with process through its city clerk. The city clerk may be found at 36311 South Lassen Ave., Huron, CA 93234.

57. Defendant City of Indio is a California city that may be served with process through its city clerk. The city clerk may be found at 100 Civic Center Mall, Indio, CA 92201.

58. Defendant City of Inglewood is a California city that may be served with process through its city clerk. The city clerk may be found at One Manchester Blvd., Inglewood, CA 90301.

59. Defendant City of Irwindale is a California city that may be served with process through its city clerk. The city clerk may be found at 5050 North Irwindale Ave., Irwindale, CA 91706.

60. Defendant City of Lakewood is a California city that may be served with process through its city clerk. The city clerk may be found at Lakewood City Hall, 5050 Clark Ave., Lakewood, CA 90712.

61. Defendant City of La Palma is a California city that may be served with process through its city clerk. The city clerk may be found at 7822 Walker St., La Palma, CA 90623.

62. Defendant City of La Verne is a California city that may be served with process through its city clerk. The city clerk may be found at 3660 "D" St., La Verne, CA 91750.

63. Defendant City of Lawndale is a California city that may be served with process through its city clerk. The city clerk may be found at 14717 Burin Ave., Lawndale, CA 90260.

64. Defendant City of Lindsey is a California city that may be served with process through its city clerk. The city clerk may be found at 251 E. Honolulu St., Lindsay, CA 93247.

65. Defendant City of Long Beach is a California city that may be served with process through its city clerk. The city clerk may be found at 333 W. Ocean Blvd., Long Beach, CA 90802.

66. Defendant City of Los Alamitos is a California city that may be served with process through its city clerk. The city clerk may be found at 3191 Katella Ave., Los Alamitos, CA 90720-5600.

67. Defendant City of Los Altos is a California city that may be served with process through its city clerk. The city clerk may be found at One North San Antonio Rd., Los Altos, CA 94022.

68. Defendant City of Los Angeles is a California city that may be served with process through its city clerk. The city clerk may be found at 555 Ramirez St., #320, Los Angeles, CA 90012.

69. Defendant County of Los Angeles is a California county that may be served with process through its county clerk. The county clerk may be found at 12400 Imperial Highway, Norwalk, CA 90650.

70. Defendant City of Lynwood is a California city that may be served with process through its city clerk. The city clerk may be found at 11330 Bullis Rd., Lynwood, CA 90262.

71. Defendant City of Malibu is a California city that may be served with process through its city clerk. The city clerk may be found at 23815 Stuart Ranch Rd., Malibu, CA 90265.

72. Defendant City of Mammoth Lakes is a California city that may be served with process through its city clerk. The city clerk may be found at 437 Old Mammoth Rd., Suite R, Mammoth Lakes, CA 93546.

73. Defendant City of Maywood is a California city that may be served with process through its city clerk. The city clerk may be found at 4319 Slauson Ave., Maywood, CA 90270-2851.

74. Defendant City of Menlo Park is a California city that may be served with process through its city clerk. The city clerk may be found at 701 Laurel St., Menlo Park, CA 94025.

75. Defendant City of Modesto is a California city that may be served with process through its city clerk. The city clerk may be found at 1010 10th St., Modesto, CA 95354.

76. Defendant City of Montclair is a California city that may be served with process through its city clerk. The city clerk may be found at 5111 Benito St., Montclair, CA 91763.

77. Defendant City of Monterey is a California city that may be served with process through its city clerk. The city clerk may be found at 580 Pacific St., Monterey, CA 93940.

78. Defendant City of Monterey Park is a California city that may be served with process through its city clerk. The city clerk may be found at 320 West Newmark Ave., Monterey Park, CA 91754.

79. Defendant City of Moreno Valley is a California city that may be served with process through its city clerk. The city clerk may be found at 14177 Frederick St., Moreno Valley, CA 92553.

80. Defendant City of Mountain View is a California city that may be served with process through its city clerk. The city clerk may be found at 500 Castro St., Mountain View, CA 94039.

81. Defendant City of Norwalk is a California city that may be served with process through its city clerk. The city clerk may be found at 12700 Norwalk Blvd., Norwalk, CA 90650.

82. Defendant City of Oakland is a California city that may be served with process through its city clerk. The city clerk may be found at 1 Frank H. Ogawa Plz. #101, Oakland, CA 94612.

83. Defendant City of Orange Cove is a California city that may be served with process through its city clerk. The city clerk may be found at 633 6th St., Orange Cove, CA 93646-2451.

84. Defendant City of Pacific Grove is a California city that may be served with process through its city clerk. The city clerk may be found at 300 Forest Ave., Pacific Grove, CA 93950.

85. Defendant City of Palm Springs is a California city that may be served with process through its city clerk. The city clerk may be found at 3200 East Tahquitz Canyon Way, Palm Springs, CA 92262.

86. Defendant City of Palo Alto is a California city that may be served with process through its city clerk. The city clerk may be found at 250 Hamilton Ave., Palo Alto, CA 94301.

87. Defendant City of Paramount is a California city that may be served with process through its city clerk. The city clerk may be found at 16400 Colorado Ave., Paramount, CA 90723-5050.

88. Defendant City of Pasadena is a California city that may be served with process through its city clerk. The city clerk may be found at Room S228, 100 N. Garfield Ave., Pasadena, CA 91101-1782.

89. Defendant City of Pico Rivera is a California city that may be served with process through its city clerk. The city clerk may be found at 6615 Passons Blvd., Pico Rivera, CA 90660-1016.

90. Defendant City of Piedmont is a California city that may be served with process through its city clerk. The city clerk may be found at 120 Vista Ave., Piedmont, CA 94611.

91. Defendant City of Pinole is a California city that may be served with process through its city clerk. The city clerk may be found at 2131 Pear St., Pinole, CA 94564.

92. Defendant City of Placentia is a California city that may be served with process through its city clerk. The city clerk may be found at 401 East Chapman Ave., Placentia, CA 92870.

93. Defendant City of Pomona is a California city that may be served with process through its city clerk. The city clerk may be found at 505 S. Garey Ave., Pomona, CA 91766.

94. Defendant City of Port Hueneme is a California city that may be served with process through its city clerk. The city clerk may be found at 250 N. Ventura Rd., Port Hueneme, CA 93041.

95. Defendant City of Porterville is a California city that may be served with process through its city clerk. The city clerk may be found at 291 North Main St., Porterville, CA 93257.

96. Defendant City of Rancho Palos Verdes is a California city that may be served with process through its city clerk. The city clerk may be found at 30940 Hawthorne Blvd., Rancho Palos Verdes, CA 90275.

97. Defendant City of Redondo Beach is a California city that may be served with process through its city clerk. The city clerk may be found at 415 Diamond St., Redondo Beach, CA 90277.

98. Defendant Redwood City is a California city that may be served with process through its city clerk. The city clerk may be found at 1017 Middlefield Rd., Redwood City, CA 94063.

99. Defendant City of Richmond is a California city that may be served with process through its city clerk. The city clerk may be found at 450 Civic Center Plaza, Richmond, CA 94804.

100. Defendant City of Sacramento is a California city that may be served with process through its city clerk. The city clerk may be found at 915 I St., Sacramento, CA 95814

101. Defendant City of San Bernardino is a California city that may be served with process through its city clerk. The city clerk may be found at 300 N. "D" St., San Bernardino, CA 92418.

102. Defendant City of San Buenaventura (Ventura) is a California city that may be served with process through its city clerk. The city clerk may be found at 501 Poli St., Ventura, CA 93001.

103. Defendant City of San Francisco is a California city that may be served with process through its city clerk. The city clerk may be found at 1 Dr. Carlton B. Goodlett Pl., San Francisco, CA 94102.

104. Defendant City of San Gabriel is a California city that may be served with process through its city clerk. The city clerk may be found at 425 S. Mission Dr., San Gabriel, CA 91776.

105. Defendant City of San Jose is a California city that may be served with process through its city clerk. The city clerk may be found at San Jose City Hall, 200 East Santa Clara St., San Jose, CA 95113.

106. Defendant City of San Leandro is a California city that may be served with process through its city clerk. The city clerk may be found at 901 East 14th St., San Leandro, CA 94577.

107. Defendant City of San Luis Obispo is a California city that may be served with process through its city clerk. The city clerk may be found at 990 Palm St., San Luis Obispo, CA 93401.

108. Defendant City of San Marino is a California city that may be served with process through its city clerk. The city clerk may be found at 2200 Huntington Dr., San Marino, CA 91108.

109. Defendant City of Sanger is a California city that may be served with process through its city clerk. The city clerk may be found at 1700 7th St., Sanger, CA 93657.

110. Defendant City of Santa Ana is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 20 Civic Center Plaza, Santa Ana, CA 92701.

111. Defendant City of Santa Barbara is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 735 Anacapa St., Santa Barbara, CA 93101.

112. Defendant City of Santa Cruz is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 809 Center St., Santa Cruz, CA 95060.

113. Defendant City of Santa Monica is a California city that may be served with process through its city clerk. The city clerk may be found at 1685 Main St., Santa Monica, CA 90401.

114. Defendant City of Seal Beach is a California city that may be served with process through its city clerk. The city clerk may be found at 211 8th St., Seal Beach, CA 90740.

115. Defendant City of Sierra Madre is a California city that may be served with process through its city clerk. The city clerk may be found at 232 W. Sierra Madre Blvd., Sierra Madre, CA 91024.

116. Defendant City of Soledad is a California city that may be served with process through its city clerk. The city clerk may be found at 248 Main St., Soledad, CA 93960-2619.

117. Defendant City of South Pasadena is a California city that may be served with process through its city clerk. The city clerk may be found at 1414 Mission St., South Pasadena, CA 91030.

118. Defendant City of Stanton is a California city that may be served with process through its city clerk. The city clerk may be found at 7800 Katella Ave., Stanton, CA 90680.

119. Defendant City of Stockton is a California city that may be served with process through its city clerk. The city clerk may be found at 425 N. El Dorado St., Stockton, CA 95202.

120. Defendant City of Sunnyvale is a California city that may be served with process through its city clerk. The city clerk may be found at Sunnyvale City Hall, 456 W. Olive Ave., Sunnyvale, CA 94086.

121. Defendant City of Torrance is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 3031 Torrance Blvd., Torrance, CA 90503.

122. Defendant City of Tulare is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 411 East Kern Ave., Tulare, CA 93274.

123. Defendant City of Waterford is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 312 E St., Waterford, CA 95386.

124. Defendant City of Westminster is a California city that may be served with process through its city clerk. The city clerk may be found at the Civic Center, 8200 Westminster Blvd., Westminster, CA 92683.

125. Defendant City of Whittier is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 13230 Penn St., Whittier, CA 90602.

126. Defendant City of Winters is a California city that may be served with process through its city clerk. The city clerk may be found at Winters City Hall, 318 First St., Winters, CA 95694.

127. Defendant City of Woodlake is a California city that may be served with process through its city clerk. The city clerk may be found at City Hall, 350 N. Valencia Blvd., Woodlake, CA 93286.

128. The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 50, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

129. Defendants named in paragraphs 4 through 127 inclusive are sometimes hereafter referred to as "cities" or "defendants" when speaking of the Defendants generally, including defendant Counties.

BACKGROUND FACTS

130 Plaintiff New Cingular is the defendant in Sipple v. AT&T Mobility LLC, et al. Case No. 3:10-cv-00184-BTM-RBB (S.D. Cal) and Simon, et al, v. AT&T Mobility, LLC, et al, Casae No. 2:10-cv-00791-DSF-JEM (Central Dist. Cal). It was also part of a large number of similar cases filed across the United States that were consolidated in a Multi-District Litigation proceeding in the United State District Court for the Northern District of Illinois before the Honorable Amy J. St. Eve, case No. 1:10-cv-02278. The lawsuits arose from the payment, by New Cingular, to the defendant cities in this action, of taxes New Cingular erroneously believed to be due on wireless data services providing internet access.

131. These taxes were not, in fact, due to the defendant cities under settled federal law. Pursuant to a Settlement Agreement and upon order of the Court after final approval of such agreement, New Cingular and the Settlement Subclass for California have now made a series of claims for the benefit of the Settlement Class for refunds of the amounts mistakenly collected and erroneously paid to these cities.

132. The Internet Tax Freedom Act, 47 U.S.C. § 151 (1998), as amended, imposed a

national moratorium on state and local government taxation on internet access. "No State or political subdivision thereof shall impose any of the following taxes during the period beginning November 1, 2003, and ending November 1, 2014: ... (1) Taxes on Internet access."

133. Under the Internet Tax Freedom Act ("ITFA"), the phrase "internet access" means: "a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet; (B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold.-- (i) to provide such service; or (ii) to otherwise enable users to access content, information or other services offered over the Internet[.]"

134. Many of the defendants have additional prohibitions in their own city ordinances prohibiting the taxes in question.

135. New Cingular erroneously charged its customers state and/or local tax on internet access on its monthly bills in California and paid those taxes to the defendant cities. Such Internet Access Services included Plan Category and Primary Features/Characteristics as follows:

- **Data Connect Plans** – Web access and ability to send and receive Internet e-mail through a computer equipped with a laptop data card.
- **Smart-phone Data Features "Bolt-on"** – Web access and ability to send and receive Internet email.
- **Smart-phone Standalone Data Plans** – Web access and ability to send and receive Internet email.
- **iPhone Data Plans** – Web access and ability to send and receive Internet e-mail.
- **Personal Blackberry Plans** – Web access and ability to send and receive Internet e-mail; also includes access to Blackberry APN, which provides push e-mail, and contacts/calendar synchronization through RIM server.
- **Enterprise Smartphone Plans (using RIM/Blackberry, Goodlink, or Microsoft application provider)** – Same as Personal Blackberry plans, and also provides enterprise customer's end users the ability to send and

receive internal and Internet e-mail to and from e-mail addresses provided by the enterprise customer.

All of the taxes collected by New Cingular were remitted to the defendant cities.

136. In accordance with Cal. Gov. Code §§ 905 and/or § 935, and the Codes and Ordinances of each defendant City, which include provisions for the refund of the taxes in question. New Cingular and the class representatives have filed claims for refunds of the erroneously charged and remitted taxes to the California cities named in this complaint and sent separate notice of such claims to the City Clerks of such cities. Under the language of the refund applications, the refund claims were filed by New Cingular for itself, the class representatives on behalf of class members, or both, to comply with various municipal code provisions related to refund applications for erroneously paid taxes.

COMPLIANCE WITH THE PRESENTATION OF CLAIMS REQUIREMENT

137. On or about November 9, 2010, New Cingular filed refund requests, joined in by the Settlement Subclass, with all of the Defendants pursuant to each applicable claims statute code or ordinance. Each claim with each city itemized every single refund requested by amount, and by name of the person entitled to the refund. Each claimant authorized the class representatives and/or New Cingular to submit claims on their behalf.

138. Each of these refund claims sought refunds for the maximum period permitted by the applicable statute of limitations.

139. Each of these refund claims was properly presented under Cal. Gov. Code §§ 905 and/or 935 and the city and county codes and ordinances enacted by Defendants.

140. Each Defendant has either declined the refund by letter or has refused to issue a refund irrespective of whether it has issued a denial letter.

141. Defendants' failure to refund the erroneously paid taxes is wrongful and is in violation of their respective municipal or county code as well as state law and other binding authorities.

142. Plaintiffs seek a refund of all taxes erroneously collected by Defendants for the

maximum time permitted by law.

143. This lawsuit is brought within the six month time period permitted under Cal. Gov. Code § 912.4.

144. As part of the settlement of the Multi-District class action, Judge St. Eve certified a Settlement Subclass and authorized New Cingular and Donald Sipple, John Simon, Karl Simonsen, and Christopher Jacobs to act as the agents for all California Settlement Sub-class Members for the purpose of procuring refunds from Defendants of the taxes unlawfully collected from New Cingular by Defendants. Each of the Settlement subclass Members was given the opportunity to decline to be included in the federal court's order authorizing Plaintiffs to seek a tax refund for them by opting out of the Settlement Subclass. Plaintiffs are suing on behalf of the Settlement Subclass members who consented to the order authorizing Plaintiffs to seek a tax refund for them by electing not to opt out of the Settlement Subclass.

145. Government Code section 910 allows taxpayers to file actions, including class action claims against municipal and county governmental entities for the refund of local taxes. As Judge St. Eve ruled in granting the motion for class certification of the Settlement Subclass, the Settlement Subclass meets all the requirements for class certification. While additional class certification is unnecessary for Plaintiffs to act on behalf of the California members of the Settlement Subclass in accordance with Judge St. Eve's Order, Plaintiffs also could and would satisfy the requirements for class certification under Section 382 of the California Code of Civil Procedure. Under principles of comity, the decision of the federal district court certifying the class is entitled to substantial deference in this Court.

146. Plaintiffs allege they have fully or substantially complied with all applicable claims statutes. Such refund requests included a detailed statement which summarized the basis for the refund request, the standing of the parties requesting the refund as well as a description of the various assignments and authorizations made between New Cingular and the Settlement subclass in order to effectuate such refund applications under the laws of the variety of taxing jurisdictions to which they were directed. A copy of such statement is attached as Exhibit A. To the extent this has not occurred, if at all, Plaintiffs allege enforcement of Defendants' technical

requirements for tax refunds and denial of the refunds sought in this case would result in a denial of due process and the unjust enrichment of Defendants because compliance with Defendants' technical requirements for tax refunds is not completely practicable here. Strictly interpreting some of the Defendants' technical requirements for a refund including the purported standing requirements would result in an injustice and frustrate the settlement of the Multidistrict Litigation by preventing California consumers from recovering the amounts they were overcharged by New Cingular and which were unlawfully collected by Defendants. Under California Government Code §910 and the various municipal codes and ordinances enacted by defendants herein,either New Cingular or the Settlement Subclass or both have standing to pursue this lawsuit arising out of the denial of the refund applications filed against Defendants in this case.

147. Under California law, individuals who are erroneously and mistakenly charged an invalid municipal utility tax by a utility are prohibited from recovering the improperly collected taxes from the utility. Cal. Pub. Util. Code § 799(a)(2):

> (2) In connection with any actions or claims relating to or arising from the invalidity of the tax ordinance, in whole or in part, the public utility or other service supplier shall not be liable to any customer as a consequence of collecting the tax....

Thus, the only recourse to recover invalid utility tax is to seek a refund from the municipality that collected the tax.

148. To the extent that a defendant municipality prohibits class actions for purposes of seeking a tax refund of invalid taxes, such an ordinance violates California's public policy in that (a) the consumer is powerless to alter the arrangement between him/herself and the city; (b) the amounts involved are predictably small; (c) the purpose of the ordinance is to deliberately erect artificial barriers that result in municipalities being permitted to retain taxes mistakenly and improperly paid under an invalid ordinance – in other words to cheat large numbers of consumers out of small sums of money.

FIRST CAUSE OF ACTION:

CLAIM FOR TAX REFUNDS AGAINST DEFENDANTS BASED ON STATE STATUTE AND CITY OR COUNTY CODE OR ORDINANCE

149. Plaintiffs incorporate by reference paragraphs 1-148 as if fully set forth herein.

150. On or about November 9, 2010, New Cingular filed a refund request, joined in by the Settlement Subclass, with each and every defendant named herein, which refund request was based on the defendants' municipal or county code or ordinance which provided for the refund of such taxes. Under the language of the refund applications the refund claims were filed by New Cingular for itself, the class representatives on behalf of class members, or both, to comply with various municipal code provisions related to refund applications for erroneously paid taxes. To the extent that a municipal ordinance imposes a tax on sales of internet access services, the tax is invalid under the Internet Tax Freedom Act.

151. The plaintiffs complied or substantially complied with all requirements under said Code or Ordinances, such that each defendant was sufficiently apprised of the nature of the claim being made, the details of such claim, and each defendant was given an adequate opportunity to investigate and settle such claim. To the extent plaintiffs may have in any way failed to strictly comply with the code or ordinance in question, defendants have suffered no prejudice from such failure considering the fact that substantial compliance was made. Class claims are permissible under California Government Code §910, and to the extent that any of the defendant cities' claims code or ordinance purports to prohibit class claims or to require more than is required under the California Government Code, such code or ordinance is inapplicable.

152. The refund claims sought refunds for the maximum period permitted by the applicable statute of limitations.

153. The claims were properly presented under California Government Code §905 and/or 935.

154. Each defendant has failed to issue a refund within 45 days.

155. This lawsuit is brought within the six month time period permitted under California Government Code §912.4.

156. Each defendant's denial of the refund claim is wrongful and is in violation of defendants' municipal or county code, ordinance, state law and other binding authority.

157. Plaintiffs seek a refund of all taxes unlawfully collected by defendants for the maximum time permitted by law.

SECOND CAUSE OF ACTION:

COMMON LAW RESTITUTION BASED UPON UNJUST ENRICHMENT

158. Plaintiffs incorporate by reference paragraphs 1-157 as if fully set forth herein.

159. By their conduct described above, Defendants have been unjustly benefited and enriched at the expense of Plaintiffs and members of the Settlement Subclass.

160. Each time New Cingular erroneously paid and Defendants collected the erroneous, improper tax payments, the common law of California created an "implied in law" contract by which Defendants had a duty to make restitution to Plaintiffs and California members of the Settlement Subclass.

161. Defendants have failed and refused to perform that duty and have thereby breached their implied in law contracts to make restitution to Plaintiffs and California members of the Settlement Subclass.

162. Plaintiffs have fulfilled all conditions and performed all duties on their part to be fulfilled or performed under the implied in law contract, except for such duties or conditions that are immaterial or have been waived or excused.

163. Defendants' retention of the improperly collected tax payments was and is unjust.

164. The measure of restitution that Defendants must make to Plaintiffs and California members of the Settlement Subclass is the amount unjustly received by Defendants, and because Defendants' unjust conduct was intentional, any profits Defendants derived from the money they unjustly received. The Court should impose a constructive trust upon any money that Defendants unjustly received and any profits therefrom, in order to enforce the implied in law contract of restitution.

THIRD CAUSE OF ACTION:

MONEY HAD AND RECEIVED

165. Plaintiffs incorporate by reference paragraphs 1-164 as if fully set forth herein.

166. By their conduct described above, Defendants are indebted to the Plaintiffs and California members of the Settlement Subclass in sums certain for money had and received by the Defendants for the use of the Plaintiffs and members of the Settlement Subclass.

167. As alleged above, Plaintiffs have demanded payment of the unlawful taxes from Defendants by filing claims specifically stating the certain amount due to each member of the Settlement Subclass on whose behalf the demand was made.

168. Defendants have failed and refused to make any payments to Plaintiffs or members of the Settlement Subclass.

FOURTH CAUSE OF ACTION:

VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDENTS TO THE UNITED STATES CONSTITUTION

169. Plaintiffs incorporate by reference paragraphs 1-168 as if fully set forth herein.

170. The Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require local governmental entities to have a meaningful opportunity to secure post-payment relief for taxes erroneously paid and improperly collected and to provide a clear and certain remedy to the taxpayers.

171. Because Plaintiffs have provided Defendants with all the information Defendants reasonably need to support and verify the refund claim of Plaintiffs and each of the members of the Settlement Subclass, due process requires Defendants to provide a remedy in the form of a tax refund to Plaintiffs and the members of the Settlement Subclass.

172. By their conduct described above, including Defendants' failure and refusal to provide the tax refunds claimed by, and on behalf of, Plaintiffs and the Settlement Subclass members, Defendants have violated the rights of Plaintiffs and members of the Settlement

Subclass to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION:

VIOLATION OF THE DUE PROCESS CLAUSE OF THE CALIFORNIA CONSTITUTION

173. Plaintiffs incorporate by reference paragraphs 1-172 as if fully set forth herein.

174. The Due Process clause of the Article 1, Section Six of the California Constitution requires local governmental entities to provide a meaningful and effective opportunity to secure post-payment relief for taxes erroneously paid and improperly collected and to provide a clear and certain remedy to the taxpayer.

175. Because Plaintiffs have provided Defendants with all the information Defendants reasonably need to support and verify the claim of Plaintiffs and each of the members of the Settlement Subclass, due process requires Defendants to provide a remedy in the form of a tax refund to Plaintiffs and the California members of the Settlement Subclass.

176. By their conduct described above, including Defendants' failure and refusal to provide the tax refunds claimed by and on behalf of Plaintiffs and the Settlement Subclass members, based on Defendants' purported technical claims requirements, Defendants have violated the rights of Plaintiffs and members of the Settlement Subclass to due process under of the California Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against Defendants:

1. For refunds, in accordance with proof at trial;
2. For an award of the costs of the suit; and
3. Such other and further relief as may be just and proper.

Respectfully submitted,

Dated: December 15, 2011

By: _____
CONAL DOYLE
Attorney for Plaintiffs

Dated: December 15, 2011

By: _____
STEPHEN B. MORRIS
Attorney for Plaintiffs

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Exempt from Filing Fees
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST

DONALD SIPPLE, JOHN SIMON, KARL SIMONSEN, CHRISTOPHER JACOBS and NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability company,

Plaintiffs,

v.

THE CITY OF ALAMEDA, CALIFORNIA, et al.,

Defendants.

CASE NO. BC462270

(Case assigned to Hon. William F. Highberger)

1) NOTICE OF DEMURRER AND GENERAL AND SPECIAL DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT; AND

2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Filed concurrently with Request for Judicial Notice)

Complaint Filed: May 27, 2011

Hearing Date: April 17, 2012
Time: 11:00 a.m.
Dept.: 307

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 17, 2012 at 11:00 a.m. or as soon thereafter as the matter will be heard in Department 307 of the above-entitled Court, located at 600 South Commonwealth Avenue, Los Angeles, California 90005, the following defendants (the "Alhambra Coalition") will and hereby do demur to the First Amended Complaint filed by Plaintiffs in the above-captioned action: the Cities of Alhambra, Berkeley, Burbank, Calabasas, Chico, Chula Vista, Culver City, Cupertino, Daly City, East Palo Alto, El Monte, Exeter, Gardena, Gilroy, Glendale, Guadalupe, Huntington Beach, Huntington Park, Los Altos, Los Angeles, Montclair, Monterey, Moreno Valley, Mountain View, Pacific Grove, Pomona, Porterville, Richmond, San Bernardino, San Jose, Santa Cruz, Sierra Madre, Stockton, Torrance, Tulare, Waterford, and Winters.

The Alhambra Coalition demurs generally pursuant to Code of Civil Procedure section 430.10(e) on the ground that the causes of action alleged against the Alhambra Defendants as set forth in the First Amended Complaint fail to state facts sufficient to constitute a cause of action.

The Alhambra Coalition further demurs specially pursuant to Code of Civil Procedure section 430.10(d) on the ground that there is a defect or misjoinder of parties in each of the causes of action alleged in the First Amended Complaint and as enumerated in the attached demurrer.

The Alhambra Coalition further demurs specially pursuant to Code of Civil Procedure section 430.10(f) on the ground that each cause of action set forth in the First Amended Complaint and as enumerated in the attached demurrer is uncertain.

The demurrer is based on this notice, the attached Demurrer, the attached Memorandum of Points and Authorities, and the Request for Judicial Notice filed concurrently herewith, the pleadings, records and files in this action, and such argument as may be presented by the Alhambra Coalition at or before the hearing.

DATED: January 31, 2012

COLANTUONO & LEVIN, PC

SANDRA J. LEVIN
MICHAEL G. COLANTUONO
HOLLY O. WHATLEY
BRIAN R. GUTH
Attorneys for Defendants
ALHAMBRA COALITION

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GENERAL DEMURRER

1. The Alhambra Coalition demurs to the first cause of action in the First Amended Complaint for Refunds of Taxes Erroneously Collected and Paid ("First Amended Complaint") on the ground that it does not state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

2. The Alhambra Coalition demurs to the second cause of action in the First Amended Complaint on the ground that it does not state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

3. The Alhambra Coalition demurs to the third cause of action in the First Amended Complaint on the ground that it does not state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

4. The Alhambra Coalition demurs to the fourth cause of action in the First Amended Complaint on the ground that it does not state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

5. The Alhambra Coalition demurs to the fifth cause of action in the First Amended Complaint on the ground that it does not state facts sufficient to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

SPECIAL DEMURRER

First Cause of Action

1. The Alhambra Coalition specially demurs to the first cause of action in the First Amended Complaint on the ground that there is a defect or misjoinder of parties. Cal. Code Civ. Proc. § 430.10(d).

2. The Alhambra Coalition specially demurs to the first cause of action in the First Amended Complaint on the ground that it is uncertain for two reasons. Defendants cannot determine which plaintiffs, if any, allegedly have tax refund claims against which defendants, if any. Cal. Code Civ. Proc. § 430.10(f). In particular, at page 4, lines 21-22, the First Amended Complaint fails

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to identify the defendants to which each of the four named individual plaintiffs' taxes were purportedly remitted. Further, in none of the five pleaded causes of action do plaintiffs specify which party asserts the cause of action against which defendant. Accordingly, the defendants cannot determine which causes of action, if any, they must respond to.

Second Cause of Action

1. The Alhambra Coalition specially demurs to the second cause of action in the First Amended Complaint on the ground that there is a defect or misjoinder of parties. Cal. Code Civ. Proc. § 430.10(d).

2. The Alhambra Coalition specially demurs to the second cause of action in the First Amended Complaint on the ground that it is uncertain for two reasons. Defendants cannot determine which plaintiffs, if any, allegedly have tax refund claims against which defendants, if any. Cal. Code Civ. Proc. § 430.10(f). In particular, at page 4, lines 21-22, the First Amended Complaint fails to identify the defendants to which each of the four named individual plaintiffs' taxes were purportedly remitted. Further, in none of the five pleaded causes of action do plaintiffs specify which party asserts the cause of action against which defendant. Accordingly, the defendants cannot determine which causes of action, if any, they must respond to.

Third Cause of Action

1. The Alhambra Coalition specially demurs to the third cause of action in the First Amended Complaint on the ground that there is a defect or misjoinder of parties. Cal. Code Civ. Proc. § 430.10(d).

2. The Alhambra Coalition specially demurs to the third cause of action in the First Amended Complaint on the ground that it is uncertain for two reasons. Defendants cannot determine which plaintiffs, if any, allegedly have tax refund claims against which defendants. Cal. Code Civ. Proc. § 430.10(f). In particular, at page 4, lines 21-22, the Complaint fails to identify the defendants to which each of the four named individual plaintiffs' taxes were purportedly remitted. Further, in none of the five pleaded causes of action do plaintiffs specify which party asserts the cause of action against which defendant. Accordingly, the defendants cannot determine which causes of action, if any, they must respond to.

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Fourth Cause of Action

1. The Alhambra Coalition specially demurs to the fourth cause of action in the First Amended Complaint on the ground that there is a defect or misjoinder of parties. Cal. Code Civ. Proc. § 430.10(d).

2. The Alhambra Coalition specially demurs to the fourth cause of action in the First Amended Complaint on the ground that it is uncertain for three reasons. Defendants cannot determine which plaintiffs, if any, allegedly have tax refund claims against which defendants. Cal. Code Civ. Proc. § 430.10(f). In particular, at page 4, lines 21-22, the First Amended Complaint fails to identify the defendants to which each of the four named individual plaintiffs' taxes were purportedly remitted. Further, in none of the five pleaded causes of action do plaintiffs specify which party asserts such cause of action against which defendant, if any. Accordingly, the defendants cannot determine which causes of action, if any, they must respond to. Finally, at page 25, line 17 to page 26, line 20, the First Amended Complaint fails to identify which cities allegedly violated plaintiffs' due process rights, or the specific municipal code provisions that are the alleged source of the due process violation. Because defendants have distinct municipal codes with differing substantive requirements, they cannot determine which allegations, if any, they must respond to.

Fifth Cause of Action

1. The Alhambra Coalition specially demurs to the fifth cause of action in the First Amended Complaint on the ground that there is a defect or misjoinder of parties. Cal. Code Civ. Proc. § 430.10(d).

2. The Alhambra Coalition specially demurs to the fifth cause of action in the First Amended Complaint on the ground that it is uncertain for three reasons. Defendants cannot determine which plaintiffs, if any, allegedly have tax refund claims against which defendants. Cal. Code Civ. Proc. § 430.10(f). In particular, at page 4, lines 21-22, the First Amended Complaint fails to identify the defendants to which each of the four named individual plaintiffs' taxes were purportedly remitted. Further, in none of the five pleaded causes of action do plaintiffs specify which party asserts the cause of action against which defendant. Accordingly, the defendants cannot determine which causes of action, if any, they must respond to. Finally, at page 25, line 17 to page

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26, line 20, the First Amended Complaint fails to identify which cities allegedly violated plaintiffs' due process rights, or the specific municipal code provisions that are the alleged source of the due process violation. Because defendants have distinct municipal codes with differing substantive requirements, they cannot determine which allegations, if any, they must respond to.

DATED: January 31, 2012

COLANTUONO & LEVIN, PC

SANDRA J. LEVIN
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HOLLY O. WHATLEY
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In this action, four individuals and New Cingular Wireless PCS LLC ("New Cingular") have sued 115 cities and two counties to recover taxes that New Cingular purportedly remitted to defendants. However, despite a prior demurrer and amendment, plaintiffs have failed to plead even the most basic facts to establish standing, proper joinder, or exhaustion of administrative remedies. First, the First Amended Complaint ("FAC") reveals that New Cingular lacks standing. The funds at issue were paid by New Cingular's customers, not New Cingular itself. New Cingular has lost no money, suffered no injury, and does not allege otherwise. Even had New Cingular paid the funds, it would lack standing because it paid as a volunteer; no defendant compelled collection of the taxes at issue. Indeed, the FAC admits the taxes were collected due to New Cingular's own error and contrary to the express requirements of local and federal law. California law is clear that one who pays voluntarily may not sue for a refund. Nor can New Cingular cure this defect.

Similarly, the FAC is devoid of allegations to establish standing for the individual plaintiffs. Each individual can only have a claim against the city to which his funds were remitted. Yet the FAC fails to allege that the individual plaintiffs paid taxes to any particular city. Thus, the FAC's allegations are insufficient to establish the individual plaintiffs' standing. The FAC also fails to establish that either New Cingular or the ill-defined "Settlement Subclass" has standing to assert the rights of New Cingular's customers.

The FAC is also deficient because it does not allege facts sufficient to show that either New Cingular or the individual plaintiffs complied with local claiming requirements. New Cingular failed to refund the taxes to its customers before seeking its own refund from the cities and the individual plaintiffs did not file a refund claim at all. Without standing and without exhausting their administrative remedies by complying with claiming requirements, the plaintiffs can have no claims.

Even if the plaintiffs had standing, the FAC contains another defect – misjoinder. Had the individuals pleaded the jurisdiction to which their funds were remitted, the pleading would necessarily demonstrate improperly joined refund claims against the remaining defendants to which the individuals paid no taxes.

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This court should decline plaintiffs' invitation to ignore fundamental rules regarding standing, joinder, and exhaustion of administrative remedies and recognize the FAC's deficiencies. Accordingly, the defendants listed in the above notice and demurrer (the "Alhambra Coalition") urge this court to sustain their demurrer without leave to amend.[1]

II. Statement of Facts

A. Underlying Federal Class Action Suits

In fall 2009, customers in 46 states, Puerto Rico, and the District of Columbia, filed a number of putative class actions against AT&T Mobility LLC ("AT&T") in various federal courts alleging, *inter alia*, that AT&T breached its service contracts and violated various consumer protection laws. (See RJN Exh. A, p. 3.) In the end, a total of 54 suits were filed, five in California. None named any California city as a defendant. (See RJN Exh. B, pp. 1-3.) All 54 suits were transferred to the Northern District of Illinois for case management purposes. (See RJN Exh. C, p. 1.)

In these underlying suits, the customers claimed that AT&T had collected tax on telecommunications services alleged to be exempt from taxation under the federal Internet Tax Freedom Act, (Pub. L. No. 105-277 (Oct. 21, 1998) 112 Stat. 2681-719, as amended, 47 U.S.C. § 151 (historical and statutory notes) ("ITFA").) In particular, the plaintiffs in these federal class actions alleged AT&T unlawfully collected taxes on internet access services. On June 24, 2010, class counsel moved the federal trial court for approval of a proposed settlement of all 54 class actions. (See RJN Exh. A.)

AT&T admits it had been negotiating with class counsel to resolve the dispute since at least December 2009. (See AT&T Motion to Approve Final Settlement, pp. 2-3 [Exh. A to RJN].) But AT&T also admits that, with two exceptions not relevant here, it waited until September 7, 2010 to cease collecting the questioned taxes. (See AT&T Motion to Approve Final Settlement, p. 20 [Exh. A to RJN].) In short, although AT&T had notice no later than fall 2009 that its collection of taxes on certain services was purportedly wrongful under the ITFA, it nevertheless continued to collect those

[1] Not all of the defendant cities represented by Colantuono & Levin, PC demur. This demurrer is made on behalf of those specified in the notice and demurrers alone.

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taxes for another year – until September 2010. Thus, over nine months after it entered into settlement negotiations, and almost three months after the motion to approve the settlement was filed, AT&T continued to collect state and local phone taxes and to remit them to taxing agencies, representing them as properly collected, paid and due.

Ultimately, the federal court approved the settlement on June 2, 2011. (See RJN Exh. B.) None of the defendant cities was a party to the federal court cases or to the settlement – AT&T and its customers arranged settlement terms to suit them without input from the taxing agencies whose funding was in issue. (See RJN Exh. C). As the federal court noted:

> The Settlement is an agreement that, once approved by this Opinion, will only bind the private parties that are privy to it. The Settlement does not purport to dictate to any state or local authority the makeup of its applicable law.

(See Order Approving Settlement, p. 82 [RJN Exh. B].)

B. The Present Complaint

Four individuals and New Cingular filed suit for tax refunds against 132 California cities and two California counties. After six demurrers and a motion for change of venue were filed by various defendants, Plaintiffs filed the FAC naming 115 California cities and two California counties.[2] The FAC alleges that New Cingular "erroneously charged its customers state and/or local tax on internet access . . ." (FAC, ¶ 135.) It further alleges that New Cingular remitted these taxes to the defendant cities. (*Id.*) The FAC does not allege that any city acted negligently or wrongfully or compelled or required New Cingular to collect these funds; indeed, it alleges that "Many of the defendants have additional prohibitions in their own city ordinances prohibiting the taxes in question." (FAC, ¶ 134.) Moreover, the FAC does not allege that New Cingular refunded the "erroneously" collected taxes to the individual plaintiffs or any other California resident – or that New Cingular itself was harmed in any way.

Nowhere does the FAC allege the individual plaintiffs were customers of New Cingular, or

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[2] Although two of the 134 defendants originally sued, and of the 117 remaining, are counties, for economy, this memorandum refers to all defendants as "cities." The reduction in the number of defendants reflects a few errors in those originally named and several settlements.

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that they paid taxes to any particular defendant. They allege only that they "Each paid the subject claimed taxes to at least one of the defendants." (*Id.*, ¶ 2.) Similarly absent from the FAC is any allegation the individuals filed an administrative claim for a refund with any defendant.

For the reasons set forth below, the FAC fails to set forth facts sufficient to state a cause of action against any of the following defendants: the Cities of Alhambra, Berkeley, Burbank, Calabasas, Chico, Chula Vista, Culver City, Cupertino, Daly City, East Palo Alto, El Monte, Exeter, Gardena, Gilroy, Glendale, Guadalupe, Huntington Beach, Huntington Park, Los Altos, Los Angeles, Montclair, Monterey, Moreno Valley, Mountain View, Pacific Grove, Pomona, Porterville, Richmond, San Bernardino, San Jose, Santa Cruz, Sierra Madre, Stockton, Torrance, Tulare, Waterford, and Winters.

III. Legal Standards

The applicable legal standards on demurrer are familiar: A party may demur to a complaint that does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).) A party may also demur to a complaint if there is a misjoinder of parties. (*Id.*, § 430.10(d).) Finally, a party may demur to a complaint if it is "uncertain." (*Id.*, § 430.10(f).) A demurrer tests the legal sufficiency of a complaint, accepting as true all facts properly pled or subject to judicial notice. (*Writers Guild of Am., Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 477.) But the court need not assume the truth of contentions, deductions, or conclusions of fact or law. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) And, a court must disregard an allegation contrary to law or to a judicially noticeable fact. (*Planning & Cons. League v. Castaic Lake Water Agency* (2010) 180 Cal.App.4th 210, 225-226.) If the complaint does not state facts sufficient to constitute a cause of action, and the plaintiff cannot show a reasonable possibility of curing that defect by amendment, the demurrer should be sustained without leave to amend. (*Flying Dutchman Park, Inc. v. City & County of San Francisco* (2001) 93 Cal.App.4th 1129, 1134.)

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IV. New Cingular Lacks Standing

"Standing is a jurisdictional issue that . . . must be established in some appropriate manner." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232.) "A demurrer lies for lack of standing when the defect appears on the face of the pleading or from judicially noticeable matters." (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.) A person who does not have a right to relief does not have standing and cannot state a cause of action. (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 208.) "A lack of standing is a jurisdictional defect to an action that mandates dismissal." (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501.)

As explained in greater detail below, New Cingular lacks standing because it suffered no injury in fact, because it voluntarily paid the taxes that it now claims it erroneously collected from its customers, and because it failed to comply with local requirements to refund the erroneously collected taxes to its customers before seeking a refund itself. Because New Cingular lacks standing, it cannot state a cause of action against any of the Alhambra Coalition cities and this demurrer must be sustained as to all five causes of action in the FAC.

A. New Cingular Has Suffered No Injury-in-Fact and Therefore Lacks Standing

To maintain a suit, a plaintiff must suffer an injury in fact. It is this injury that establishes standing. A party must be able to demonstrate that he or she has some beneficial interest that is concrete and actual, and not conjectural or hypothetical. (*Chiatello v. City & County of San Francisco* (2010) 189 Cal.App.4th 472, 480-81.) Whether a plaintiff has standing is generally decided by reference to the allegations of a complaint. (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751; *Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1111.)

Here, careful review of the FAC reveals that New Cingular suffered no injury-in-fact and lacks standing as a result. The FAC itself alleges that the funds New Cingular purportedly remitted to the defendant cities were not its own. Rather, New Cingular remitted its customers' money. (FAC, ¶ 135.) "New Cingular erroneously charged its customers state and/or local tax on internet

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access on its monthly bills in California and paid those taxes to the defendant cities." (*Id.*) In other words, New Cingular lost no money as a result of its error. Nowhere does it allege that it has refunded the disputed taxes to its customers. Nor does it allege that it was itself a taxpayer. Accordingly, New Cingular will suffer no damage if refunds are not issued. It therefore has **no** interest in this case. New Cingular suffered no injury, lacks a beneficial interest in such injury as may exist, and as a result, does not have standing.

Moreover, New Cingular cannot plead around its lack of standing. At past status conferences, counsel for the individual plaintiffs suggested that any problem with New Cingular's standing could be cured because the agreement to settle the federal suits requires New Cingular to refund to customers money it wrongly collected in a given jurisdiction if it receives a request from that defendant jurisdiction to do so. Paying refunds out of its own pocket would then create the necessary injury in fact.

This assertion suffers from several flaws. First, the terms of this obligation are not alleged in the FAC. Second, even if they were pled, there is no allegation that New Cingular complied with the obligation and provided refunds in those jurisdictions that require them. Third, even if the law allowed New Cingular to avoid the requirements of local ordinances until the city affirmatively requested compliance with those ordinances, the FAC lacks an allegation that in fact none of the cities notified New Cingular of the refund requirement when the claims were filed.

More importantly, however, such settlement terms would not be sufficient to confer standing in any event. Standing is jurisdictional and cannot be waived. (*Cummings, supra*, 177 Cal.App.4th at p. 501.) Nor can an allegation that a plaintiff "might" incur future injury convey standing. (See *Coral Const. Inc. v. City & County of San Francisco* (2004) 116 Cal.App.4th 6, 25 [alleged injury must not be imaginary or speculative].)

Even if New Cingular had complied with the settlement agreement's terms, there would be no injury-in-fact because the settlement agreement's purported "requirement" is illusory. The agreement provides that if AT&T Mobility and/or its subsidiaries including New Cingular, is required to refund the erroneously collected money to the affected customers, it will deposit the funds in a "Pre-Refund Escrow Fund." (Settlement Agreement, § 8.7 [Exh. C to RJN].) But the

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agreement's provisions for those funds reveal a shell game. Specifically, the escrow funds are released when a "Pre-Refund Escrow Release Event" occurs. The agreement defines such an event as either of the following:

> (a) the Taxing Jurisdiction in question pays monies to AT&T Mobility or provides tax credits in full or partial satisfaction of the refund claims filed with the Taxing Jurisdiction. ... or
>
> (b) a final determination has been issued, for which further appeal is either not available or not pursued, by either the Taxing Jurisdiction in question denying all or any portion of the refund claims for Internet Taxes filed with that Taxing Jurisdiction or by a court of competent jurisdiction in an action initiated to compel the Taxing Jurisdiction to act on the refund claim, which action results in no refund or credit being received by AT&T Mobility.

(Settlement Agreement, § 8.7 [Exh. C to RJN].) Upon either occurrence, "all amounts previously paid by AT&T Mobility to the Pre-Refund Escrow Fund, and any interest earned thereon, that are attributable to the refund claims filed with the particular Taxing Jurisdiction at issue shall be paid to AT&T Mobility."[3] (Settlement Agreement, § 8.7 [Exh. C to RJN].)

In other words, New Cingular gets its money back, with interest, regardless of how this lawsuit turns out. If the defendant cities refund all or a portion of the funds, either voluntarily through settlement or in response to a final judgment, New Cingular gets its money back. If a court rules that no refund is due, New Cingular gets its money back. Either way, New Cingular gets its money back. And because it gets interest on the deposited funds, it does not even lose the time value of the money. Thus, New Cingular has no beneficial interest in this suit regardless of whether it has deposited funds in a so-called "Pre-Refund Escrow Account" (which the FAC does not allege it has done). Nor could New Cingular establish a stake in this dispute via amendment. Unless New Cingular can truthfully allege that it has already refunded any wrongfully collected taxes **to its customers**, it has suffered no injury and therefore has no standing. Moreover, New Cingular has already amended once – after being served with a demurrer reciting these same arguments – and

[3] "AT&T Mobility" is a defined term in the Settlement Agreement that includes its affiliates such as New Cingular. (See RJN Exh. C, p. 4.)

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failed to plead any injury or grounds for standing. Accordingly, the Alhambra Coalition urges this Court to grant its demurrer as to New Cingular's claims without leave to amend.

B. New Cingular Also Lacks Standing Because It Paid as a Volunteer

New Cingular also lacks standing because it voluntarily paid to the defendants the taxes that it alleges it erroneously collected.

> Under the 'voluntary payment' doctrine, . . . it is settled that taxes freely and voluntarily paid may not be recovered by a taxpayer in the absence of a statute permitting the refund thereof, and that this is so even if the taxes are illegally levied or collected.

(*Sierra Investment Corp. v. County of Sacramento* (1967) 252 Cal.App.2d 339, 342.) One who pays a tax under the mistaken belief that it is owed, or who is under no compulsion to pay a tax, but does so anyway, is a volunteer and lacks standing. (*Id.*; *Scol Corp. v. City of Los Angeles* (1970) 12 Cal.App.3d 805, 810-811 [retailer responsible for collecting "tipplers' tax" from customers lacked standing because it voluntarily paid taxes on behalf of its customers]; *Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663 677 [*Scol* plaintiff lacked standing because city's actions "did not constitute a demand, express or implied, that [plaintiff] pay the tax from his own funds"]; *Tracfone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1367 [although plaintiff need not be denominated a taxpayer, requisite compulsion or necessity to pay is not established where taxing authority did not require payment of tax or assert plaintiff was liable for it].)

Here, New Cingular does not allege its collection and payment was involuntary. On the contrary, New Cingular admits the defendants did **not** require or compel New Cingular to collect the taxes at issue and that it remitted the tax payments due to its own mistake. New Cingular does not allege the defendant cities compelled New Cingular to collect or pay the taxes and its own allegations bar it from truthfully doing so now

New Cingular simply has not, and cannot, plead involuntariness. Establishing the involuntary nature of a tax payment in the absence of a clear statutory duty "requires proof that circumstances would have caused a reasonable man to pay the tax," **and** that the plaintiff actually considered that "to protect business interests, it was necessary to make the payment." (*Chrysler Credit Corp., supra*, 42 Cal.App.3d at p. 678.) New Cingular has not alleged the circumstances that caused it to collect

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and remit the taxes, or even that it was reasonable to do so. In fact, New Cingular admits that many cities **prohibit** collection of the taxes in issue here. (FAC, ¶ 134.) Collecting and paying to a city taxes that one is legally **forbidden** to collect is hardly "necessary" or even "reasonable." It is negligent and possibly tortious. Nor does the FAC allege that New Cingular decided that payment was necessary to protect its business interests after considering whether it was necessary to collect and remit the taxes.[4] (See *Chrysler Credit Corp., supra*, 42 Cal.App.3d at p. 678.) The FAC also does not allege—nor could it—that any defendant city enacted an ordinance, issued any assessment, or took any action whatsoever which New Cingular might reasonably believe compelled it to collect tax on services exempt from tax due to the ITFA. (FAC, ¶ 134.) In fact, New Cingular admits it merely **assumed** the taxes were due. (*Id.*, at ¶ 2.) For these reasons, New Cingular's payments were voluntary and it lacks standing to maintain this action.

Furthermore, New Cingular cannot establish standing based on a right to equitable relief. In *Sierra Investment Corp.*, the plaintiff obtained a tax bill for real property it did not own, through no fault of the defendant county. (*Sierra Investment Corp., supra*, 252 Cal.App.2d at p. 341.) The plaintiff mistakenly believed it owned the property, despite the fact that the tax bill accurately described the taxed property. (*Id.*) The plaintiff paid the tax bill. (*Id.*) After discovering its mistake, the plaintiff petitioned the county's board of supervisors for a refund of the "erroneously collected" taxes. (*Id.*, at p. 342.) On these facts, the court held that the plaintiff was a volunteer and therefore could not seek a refund. (*Id.*, at p. 346.)

The court's analysis distinguished between "erroneously collected" taxes, which resulted from the taxing jurisdiction's error, and "mistakenly paid" taxes, which were due to a taxpayer's error. The court held that the plaintiff did not have an equitable right to relief for payments that resulted from its own error. (*Id.*, at p. 342-43.) Because the mistake resulted from the plaintiff's lack of diligence and because the plaintiff did not discover the mistake or take any action for almost three years, the equities were not in its favor. (*Id.*, at p. 346.)

Sierra Investment Corp. 's reasoning applies equally here. The FAC alleges New Cingular

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[4] Indeed, it would be difficult to fathom that New Cingular could honestly allege such facts inasmuch as, according to counsel for the individual plaintiffs, none of New Cingular's competitors collected taxes on the services that are the subject of this action.

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collected and paid the taxes at issue not because of the cities' error, but because of its own. (FAC, ¶ 135.) In addition, based on the content of the refund claims, New Cingular maintained its mistaken collection and payment practice for almost **five years**. Even when its error was brought to its attention by the plaintiff class in the federal cases, New Cingular continued to collect the taxes and remit them to the defendant local governments for many months. (See AT&T Motion to Approve Final Settlement, p. 20 [Exh. A to RJN].) In short, New Cingular's inability to allege anything other than its own mistake prevents it from establishing standing here.

C. New Cingular Failed to Refund the Taxes to Its Customers Before Seeking Its Own Refund as Local Law Requires

New Cingular also lacks standing to sue several defendant cities because it failed to comply with their ordinances requiring it to refund the taxes to its customers **before** seeking a refund from the cities. The following members of the Alhambra Coalition impose such a requirement:

Defendant City	Municipal Code Provision
1. Burbank	Burbank Municipal Code § 2-4-1119(C) [See RJN Exh. G.]
2. Chula Vista	Chula Vista Municipal Code § 3.44.120(G) [See RJN Exh. J.]
3. Cupertino	Cupertino Municipal Code § 3.35.150(C)(3) [See RJN Exh. L.]
4. Daly City	Daly City Municipal Code § 3.40.170(F) [See RJN Exh. M.]
5. El Monte	El Monte Municipal Code § 3.22.150(C) [See RJN Exh. O.]
6. Exeter	Exeter Municipal Code § 3.32.140 (B) [See RJN Exh. P.]
7. Gardena	Gardena Municipal Code § 3.20.180(H) [See RJN Exh. Q.]
8. Glendale	Glendale Municipal Code § 4.38.150(H) [See RJN Exh. S.]

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	Defendant City	Municipal Code Provision
9.	Guadalupe	Guadalupe Ordinance No. 85-248, § 15(b) [See RJN Exh. T.]
10.	Huntington Beach	Huntington Beach Municipal Code § 3.38.140(c) [See RJN Exh. U.]
11.	Huntington Park	Huntington Park Municipal Code § 3-9.15 (c) [See RJN Exh. V.]
12.	Los Altos	Los Altos Municipal Code § 3.42.116(C) [See RJN Exh. W.]
13.	Los Angeles	Los Angeles Municipal Code § 21.1.12(e) [See RJN Exh. X.]
14.	Montclair	Montclair Municipal Code § 3.36.160(B) [See RJN Exh. Y.]
15.	Moreno Valley	Moreno Valley Municipal Code § 3.26.210(D) [See RJN Exh. AA.]
16.	Mountain View	Mountain View Municipal Code § 29.15.7(B) [See RJN Exh. BB.]
17.	Pacific Grove	Pacific Grove Municipal Code § 6.10.150 (b) [See RJN Exh. CC.]
18.	Pomona	Pomona Municipal Code § 50-214(a) [See RJN Exh. DD.]
19.	Porterville	Porterville Municipal Code § 22-56(B) [See RJN Exh. EE.]
20.	Richmond	Richmond Municipal Code § 13.54.150(3) [See RJN Exh. FF.]
21.	San Jose	San Jose Municipal Code § 4.70.700(B) [See RJN Exh. HH.]
22.	Santa Cruz	Santa Cruz Municipal Code § 3.29.230(e) [See RJN Exh. II.]

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	Defendant City	Municipal Code Provision
23.	Sierra Madre	Sierra Madre Municipal Code § 3.36.160(B) [See RJN Exh. JJ.]
24.	Stockton	Stockton Municipal Code § 3.24.140(B) [See RJN Exh. KK.]
25.	Torrance	Torrance Municipal Code § 225.1.15(g) [See RJN Exh. LL.]
26.	Waterford	Waterford Municipal Code §13.08.160(B) [See RJN Exh. NN.]
27.	Winters	Winters Municipal Code § 3.22.140(C) [See RJN Exh. OO.]

The FAC does not allege New Cingular complied with this requirement, even though it was raised in demurrers to the initial complaint. Because "[d]oubt in the complaint may be resolved against plaintiff and facts not alleged are presumed not to exist," it can be inferred that the required refunds never occurred. (*C. & H. Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1062.) Compliance with local claiming requirements is a precondition to suit for a tax refund. (See *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591 [timely claim presentation is a condition precedent to refund action against the public entity for refund of sewer fees]; *Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 79 [Government Claims Act allows public agencies to require compliance with administrative claim process as precondition to suit].) Accordingly, New Cingular's failure to allege it refunded the taxes in issue to its customers before seeking its own refund justifies granting this demurrer as to New Cingular.

V. The Individual Plaintiffs Also Lack Standing

The FAC lists four individuals as plaintiffs in the caption, but labels them representatives of the "California Settlement Subclass." (FAC, ¶ 2) The FAC does not name the Settlement Subclass as a plaintiff, but alleges at times that it has standing to pursue this lawsuit. (See, e.g., *Id.*, ¶ 146.) It is unclear whether plaintiffs intended for the suit to be filed on behalf of the four named individuals

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or the entity referred to as the Settlement Subclass, but ultimately it does not matter because the FAC does not plead facts sufficient to establish that either the individuals or the Settlement Subclass have standing here.

The individual plaintiffs lack standing because they do not allege that they paid taxes to any particular city and because they do not allege that they filed refund claims to recover the taxes they purportedly paid. Because the FAC fails to adequately allege facts sufficient to show that the individual plaintiffs have standing, it fails to state a cause of action against any of the Alhambra Coalition and this demurrer should be sustained. (*Qualified Patients Assn., supra*, 187 Cal.App.4th at p. 752 ["A demurrer lies for lack of standing when the defect appears on the face of the pleading or from judicially noticeable matters."].)

No person may seek refund of a tax she has not paid. (*TracFone, supra*, 163 Cal.App.4th at p. 1364.) The FAC alleges that the individual plaintiffs "paid taxes," but also alleges that all taxes were paid to New Cingular by its customers rather than directly to any of the city defendants. (See FAC, ¶¶ 2, 135.) The FAC does not allege, however, that these taxes were paid to a particular city (either directly **or** through New Cingular). It is therefore impossible for the defendant cities, or this Court, to determine against which defendants the individual plaintiffs might have a claim. In fact, there are no allegations to establish the individual plaintiffs' standing to claim a refund from any specific city.

It cannot be disputed that the individual plaintiffs only have claims against the cities to which their funds were paid. (See *TracFone, supra*, 163 Cal.App.4th at p. 1364.) Yet the FAC completely fails to allege which cities these might be (again, even though this deficiency was raised in demurrers to the original complaint). Moreover, common sense dictates that it is unlikely that any individual plaintiff paid taxes to every telephone tax jurisdiction in California from Chico to Chula Vista. Causes of action against a public entity must be pled with particularity. (*Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 819.) Thus, the individual plaintiffs' failure to allege that they paid taxes to a particular city subjects the FAC to demurrer for failure to state a cause of action. (*Id.*)

The individual plaintiffs appear to rely on class certification in the federal litigation to

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establish their standing. (See FAC, p. 4, lines 16-21.) Such reliance is misplaced. A federal court's certification of a class does not bind a state court in another action. (See *Smith v. Bayer Corp.* (2011) 131 S.Ct. 2368, 2376.) That is particularly true here, where none of the defendant cities was party to the federal litigation, and the issues in this case are entirely different from those raised in the federal litigation. (See *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1555 [res judicata only bars re-litigation of issues in a second suit involving the same cause of action and the same parties].) Nor was the class certification the result of vigorous advocacy and adjudication of a disputed issue; it was a settlement with a telephone carrier that, under the terms of the settlement, had no real stake in the matter – in effect, it used the cities' money to buy peace with its customers.

There is no basis for binding defendants here with such a class determination, much less for determining that the federal class certification creates standing under California law which would not otherwise exist as to state law claims the federal court expressly denied it was determining. In fact, even the plaintiff here, New Cingular Wireless PCS LLC, was not party to the federal litigation; AT&T Mobility LLC was the named defendant. (See, e.g., RJN Exh. D, [Complaint in *Simon et al. v. AT&T Mobility LLC*, U.S. Dist. Ct. Central Dist., Case No. CV 10-0791].) The FAC does not allege any relationship between New Cingular and AT&T Mobility LLC. It simply asserts that New Cingular was the defendant in the federal litigation. Because this allegation is contradicted by judicially noticeable facts, it is not controlling (to the extent it is even relevant). (*B&P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 952-953.) Thus, the mere allegation that the individual defendants are class representatives of some type in ongoing federal litigation among different parties is plainly insufficient to establish their standing to maintain **this** action.

In sum, the individual plaintiffs have not alleged facts sufficient to establish standing in this case and as a result, have failed to allege facts sufficient to constitute a cause of action against the Alhambra Coalition defendants.

VI. The Individual Plaintiffs' Claims Are Uncertain

The individual plaintiffs' claims also fail because they are uncertain. (See Cal. Code Civ.

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Proc. § 430.10(f).) As discussed above, the FAC fails to identify the defendants to which the named individual plaintiffs' taxes were remitted. (See FAC, p. 4, lines 21-22.) Further, plaintiffs fail to specify which party asserts each cause of action against which defendant. Accordingly, the defendants cannot determine which individual plaintiff's claim, if any, the defendant must respond to. For this reason also, the Alhambra Coalition's demurrer should be sustained.

VII. The Individual Plaintiffs Failed to Exhaust Administrative Remedies

The individual plaintiffs' claims are also barred because they cannot establish that they exhausted their administrative remedies. The law here is clear: Parties must exhaust their administrative remedies before they sue. (*City of Industry, supra*, 198 Cal.App.4th at p. 209.) Until administrative remedies are exhausted, the court lacks subject matter jurisdiction. (See, e.g., *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76 (abrogated on other grounds).) Failure to exhaust administrative remedies is grounds for demurrer. (See *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) Moreover, plaintiffs bear the burden to plead exhaustion of their administrative remedies. (*Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37.)

The FAC fails these standards. Though the individual defendants allege they "exhausted administrative remedies," the FAC also alleges that New Cingular filed the administrative claims (joined in by the Settlement Subclass). (See FAC, ¶¶ 2, 137.) The individual plaintiffs do not allege they filed or joined in any administrative claim. The individual plaintiffs' general statement that they exhausted administrative remedies is a legal conclusion that is contradicted by the more specific allegation in paragraph 137 of the FAC. Thus, it may not be considered in evaluating this demurrer. (*B&P Development Corp., supra*, 185 Cal.App.3d at 952-953 [specific factual allegations modify and limit inconsistent general statements].)

Moreover, the FAC fails to allege facts sufficient to determine whether a representative administrative claim is allowed by any city, whether one was actually filed and, if so, whether that representative claim was in compliance with the unstated requirements of the unidentified municipal code of the unnamed city with which it was filed. Finally, because the FAC does not allege that the

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four individuals filed administrative claims, they could not have verified those claims as required under some of the Alhambra Coalition's ordinances. Each of these failures is fatal to plaintiffs' claims and provides grounds to grant this demurrer. (See *Westinghouse Elec. Corp., supra*, 42 Cal.App.3d at p. 37 [plaintiffs bear burden to plead exhaustion].)

VIII. New Cingular and the "Settlement Subclass" Lack Representative Standing

The FAC alleges that either New Cingular or the undefined "Settlement Subclass" has standing to maintain this lawsuit as a representative of all the individual customers that New Cingular mistakenly charged taxes to. (FAC, ¶ 146.) However, both entities lack standing to assert the customers' rights.

"[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Independent Roofing Contractors v. California Apprenticeship Council* (2002) 114 Cal. App. 4th 1330, 1341 (quoting *Warth v. Seldin* (1975) 422 U.S. 490, 499). A plaintiff:

> may assert a claim on behalf of a third party only when (1) the plaintiff has suffered an injury in fact; (2) the plaintiff has a relationship with the third party so that it can, and will, effectively present the third party's rights; and (3) obstacles exist preventing the third party from asserting his own rights.

(*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1297.) Neither New Cingular nor the "Settlement Subclass" satisfies these requirements.

As discussed in Section IV.A above, New Cingular suffered no injury in fact, the first requirement for asserting a third party's legal rights. (*Id.*) But in addition, the relationship between New Cingular and its customers does not ensure that New Cingular will "effectively present" their rights. (*Id.*) New Cingular's only relationships are through its contracts with its customers and as a purported defendant in the federal litigation purportedly filed on the customers' behalf. As noted above, New Cingular was not in fact a named defendant. (See RJN Exh. D, [Complaint in *Simon et al. v. AT&T Mobility LLC*, U.S. Dist. Ct. Central Dist., Case No. CV 10-0791].) But even if it was, neither relationship ensures that New Cingular will effectively present the customers' rights –

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especially since it has no skin in this game. The possibly collusive settlement between class representatives and AT&T does not change this fact. Indeed, New Cingular's lack of an injury in fact necessarily means it lacks incentive to effectively present its customers' rights.

Finally, there is no obstacle that prevents New Cingular's customers from asserting their own rights. Nothing precluded individual customers from filing their own refund claims or from joining this litigation. If the would-be plaintiffs here do not wish to subject themselves to the mandatory class action requirements, they may stay home or they may satisfy the requirements of California law for representative standing. No amount of artful pleading can conceal their failure to do so.

Similarly, the "Settlement Subclass" lacks representative standing here. The FAC does not allege the "Settlement Subclass" has suffered any injury in fact. Given that it only exists as a creation of a federal court settlement, and that it did not exist until that settlement was approved, it is not clear what injury it could suffer. It also is not clear the "Settlement Subclass" can effectively present customers' rights, since its obligations stem from the federal settlement, which involved lawsuits against AT&T Mobility LLC, rather than from the underlying tax refund claims. (See, e.g., *id.*) Finally, no obstacles prevented the individual customers from asserting their own rights. The FAC alleges that it would be inconvenient for **plaintiffs** to file individual claims, but inconvenience for voluntary litigants does not amount to impossibility for those they wish to represent.

Furthermore, characterizing the "Settlement Class" as a legal actor capable of independently asserting rights of individual customers violates the principles of class action litigation, which is the only basis for a "settlement class" of any type. Class action litigation requires a representative plaintiff who meets the requirements to act as the class representative. This individual must satisfy all the standing requirements and prove his or her case in court before the other, unnamed members of the class can have a right to their own recovery. Plaintiffs here seek to avoid these requirements because none of the individual "Settlement Subclass Representatives" (Messrs. Sipple, Simon, Simonsen, and Jacobs) can satisfy them with respect to **each of the named defendants** as required. But because the FAC fails to establish these self-declared "Settlement Subclass Representatives" have standing to bring this lawsuit and because the "Settlement Subclass" has no independent existence, it fails to state facts sufficient to constitute a cause of action.

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IX. Common Law Claims Cannot be Brought Against the City Defendants

Even if one of the plaintiffs had standing to maintain this lawsuit, the second and third causes of action for common law restitution based upon unjust enrichment and money had and received would fail because: "[T]here is no common law tort liability for public entities in California; such liability is wholly statutory." *In re Groundwater Cases* (2007) 154 Cal. App. 4th 659, 688. This principle is well settled, as common law claims against government entities have been abolished by the Legislature. California Government Code § 815 states: "Except as otherwise provided by statute: (a) A public entity is not liable for any injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Cal. Gov. Code, § 815.) The associated Legislative Comment explains:

> This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution. . . . The practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts.

(See also *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179 [noting that the Government Claims Act immunizes public entities from liability except as provided by statute].)

Every fact essential to claimed statutory liability against a public agency must be pleaded with particularity, including the existence of the statutory duty. "[S]ince the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal. App. 3d 792, 802.

Both the second and third causes of action fail to articulate a statutory basis for the claims. To the extent these causes of action rely entirely on the customers' right to a tax refund (which stems from municipal ordinances), they are subject to each of the challenges discussed above. To the extent these causes of action are intended to articulate a **different** basis for recovery, they lack the necessary statutory basis and are not reflected in a timely administrative claim. (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 844 [variance between administrative claim and first amended complaint was basis for granting demurrer].) Nor can this fundamental legal obstacle to

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these common law claims be cured. Accordingly, the demurrer should be granted as to the second and third causes of action without leave to amend.

X. The Due Process Claims Fail As Well

The FAC's fourth and fifth causes of action allege that failure to provide tax refunds violates federal and state due process respectively. (See, e.g., FAC, ¶ 172.) Both claims are subject to demurrer for uncertainty and for failure to state facts sufficient to constitute a cause of action. (*Coffman Specialties Inc. v. Dept. of Transp.* (2009) 176 Cal.App.4th 1135, 1144 [facial and as-applied constitutional challenges may be decided on demurrer].) These causes of action are uncertain for several reasons: they do not clarify whether they refer to substantive or procedural due process rights, or whether they are intended as facial or as-applied challenges, they fail to identify specific municipal ordinances that allegedly violate due process, and they do not identify a due process violation other than the cities' failure to grant the remedy they seek.

The fourth and fifth causes of action also fail as a matter of law. Because they do not identify the municipal ordinances at issue, there is no basis for the Court to evaluate a facial challenge. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [in evaluating a facial challenge, the court considers only the text of the measure, not a particular application].) But Plaintiffs also fail to plead the specific facts that give rise to the alleged constitutional violation as required for an as-applied challenge. (*Coffman Specialties, Inc.*, 176 Cal.App.4th at p. 1144].) Thus, the FAC fails to satisfy the most basic requirements for asserting constitutional due process claims.

But perhaps more importantly, Plaintiffs do not have a constitutional right to a refund of mistakenly paid taxes. Nor do they have a constitutional right to a particular remedy. A right to a tax refund is purely statutory. (*S. Serv. Co. v. Los Angeles County* (1940) 15 Cal.2d 1, 11-12.) Similarly, class action remedies are essentially equitable in nature and "the common law features of class action administration are subject to legislative displacement." (*Farrar v. Franchise Tax Bd.* (1993) 15 Cal.App.4th 10, 17.) Thus, governments may enact procedural protections of the public fisc without offending our constitutions. (*Id.*, at p. 21.) California's courts have upheld administrative claim requirements similar to those challenged here. (See, e.g., *Decorative Carpets,*

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Inc. v. State Bd. of Equalization (1962) 58 Cal.2d 252, 255 [the State may require those seeking tax refunds to refund their customers first]; *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, 961-962 [upholding statutes limiting the right to file a tax refund to the taxpayer, and his or her guardian, executor, or administrator].)

Due process concerns do not require a government to provide a basis for class action tax refund claims. (*Neecke*, 39 Cal.App.4th at 965.) Due process requires "only that government provide a procedure which, at some point, provides the taxpayer a meaningful opportunity to contest the legality of the exaction." (*Batt*, 155 Cal.App.4th at p. 72 [construing state and federal law].) Thus, as long as governments provide a clear and certain remedy, they "are afforded great flexibility in satisfying the requirements of due process in the field of taxation." (*Id.*, at p. 73.)

The FAC does not allege that any of the cities have claiming procedures that are not clear and certain or that do not provide for ultimate access to the courts. The FAC also does not allege that any of the cities fail to provide a meaningful refund process. As a result, it fails to state facts sufficient to constitute a cause of action for a due process violation and the fourth and fifth causes of action should be dismissed.

XI. Amendment Would Be Futile Because Plaintiffs' Claims Are Improperly Joined

Had plaintiffs properly alleged claims by parties with standing – assuming arguendo such plaintiffs exist – another defect in the complaint would be even more apparent: improper joinder. This law is well settled, too: A party may demur to a complaint for misjoinder of parties. (Code Civ. Proc., § 430.10(d).) As noted above, a properly pled complaint must identify plaintiffs with standing as to each defendant city and identify to which jurisdiction those plaintiffs paid tax. The FAC does not do so. Plaintiffs' allege that the claims "arise from the same series of transactions or occurrences," but this is a legal conclusion that need not be considered. (*Ellenberger*, 30 Cal.App.4th at p. 947.) Because Plaintiffs have not alleged any **facts** that would sufficiently link all of the claims, joinder is inappropriate. (*Writers Guild of Am., Inc., supra*, 77 Cal.App.4th at p. 477 [demurrer accepts as true all **facts** properly pled or subject to judicial notice].)

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A. The Complaint Does Not Allege Facts to Support Joinder of the Claims of Four Individuals and One Entity Against 117 Defendants

Multiple parties may join as plaintiffs in one action if:

> They assert any right to relief jointly, severally, or in the alternative, ... arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.[5]

(Code Civ. Proc., § 378(a).) Similarly, multiple parties may be joined as defendants where a right to relief jointly, severally, or in the alternative is asserted against them that arises out of "the same transaction, occurrence, or series of transactions or occurrences," if there are questions of law or fact that are common to all defendants.[6] (*Id.*, § 379(a).) In either case, however, the right to relief must arise out of "the same transaction, occurrence, or series of transactions or occurrences."

Joinder of plaintiffs is appropriate in a tax refund action by multiple plaintiffs who paid the same tax to a single taxing entity (in differing amounts) where the same question of law will determine whether the parties are entitled to the same relief (differing only as to the amount of the refund). (*People's Federal Savings & Loan Assn. v. State Franchise Tax Board* (1952) 110 Cal.App.2d 696, 699.) Thus, joinder was appropriate in *People's Federal Savings & Loan Assn.*, where each plaintiff sought a refund from the same defendant, only one question of law common to all of the plaintiffs was involved, and decision of that legal question would necessarily determine the rights of all plaintiffs. (*Id.*)

By contrast, no authority whatsoever suggests that claims of two or more taxpayers seeking refunds of different taxes under different tax laws against different jurisdictions may be joined. Unlike *People's Federal Savings & Loan Assn.*, multiple legal questions, multiple defendants, and differing factual scenarios are present here. Each city has its own tax imposed by its own ordinance, stated in unique terms. The fact that all are utility users' taxes does not make their imposition and

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[5] Joinder is also appropriate if the plaintiffs have a claim, right, or interest in the property that is the subject of the action that is adverse to the defendant's. (Code Civ. Proc., § 378(a)(2).) That subdivision is not relevant here.

[6] Joinder is also appropriate if the defendants have a claim, right, or interest in the property that is the subject of the action that is adverse to the plaintiff's. (Code Civ. Proc., § 379(a)(2).) That subdivision is not relevant here

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collection the "same transaction" any more than the fact that all car accidents involve cars makes multiple accidents a single occurrence. Each city also has its own unique claiming ordinance and the legal issues that arise regarding the sufficiency of each of the claims with respect to the applicable ordinances will necessarily differ. Additionally, the tax payments made to each city were for different customers, in different amounts and at different tax rates. The claim against each city arises from different transactions, occurrences, or series of transactions or occurrences. (Code Civ. Proc., §§ 378(a)(1), 379(a)(1).)

Thus, the FAC wholly fails to allege facts to justify joinder. Again, if plaintiffs want a plaintiff or defendant class action (and are entitled to one under applicable claiming ordinances), they must subject themselves to the discipline of the class action statutes, which serve to protect the rights of all affected by such cases. They cannot make up their own procedure to wrest control of myriad disputes involving strangers merely because they and their counsel desire to represent them.

Although courts may liberally construe California's joinder statutes, neither statute nor case law permits unlimited joinder. (*Hoag v. Superior Court* (1962) 207 Cal.App.2d 611, 618.) While defendants may be joined even if they are not all parties to, or affected by, every count pleaded, there must still be a factual nexus connecting the claims pleaded against the several defendants. (*Id.*) Even where claims are brought by a single plaintiff, where there was no allegation that the defendants conspired, acted in concert, or had a community of interest, joinder is inappropriate. (*Id.*, at pp. 618-619.) In *Hoag,* there was no implication the defendants' actions contributed to the same injury and "no one cause in which all defendants [were] interested or affected;" hence, joinder was improper. (*Id.* at p. 619.) The existence of possible common questions of law and fact was not alone sufficient for joinder. (*Id.*, at p. 620.)

In this case, there is no alleged overlap between the individual plaintiffs and defendants as to a given transaction alleged by the FAC. There is no allegation that multiple defendants contributed to a single injury to a common plaintiff. The named individuals do not have claims against any city other than the one (or, perhaps, a few) to which their taxes were paid. (*TracFone, supra,* 163 Cal.App.4th at p. 1364.) The plaintiffs' respective claims therefore have few if any common facts and do not lie against all, or even very many, of the named defendants. The gravamen of the claims

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against any particular city is necessarily based upon its, unique tax ordinance. The propriety of such claims will turn on the requirements of each city's claiming ordinances (and, in some cases, charter provisions) which are similarly varied. Accordingly, joinder is inappropriate and this demurrer should be granted. More importantly, leave to amend should not be granted as it would be futile; plaintiffs cannot allege sufficient overlap of claims and legal questions among all 117 telephone tax jurisdictions in California.

B. Plaintiffs Have Not Pleaded a Class Action Against Any Defendant

Moreover, Plaintiffs cannot rely on class certification principles to establish standing for the simple reason that they have not pled a class action. Though Plaintiffs allege they could satisfy class action pleading requirements if required to do so and assert that this Court should respect the federal court's decision to certify a settlement class, they make no effort to actually plead a class action here. And for the reasons noted below, Plaintiffs cannot cure the defects identified above by amending the FAC to plead a class action now. As a result, amendment would be futile and leave to amend should not be granted. (*Flying Dutchman Park, Inc., supra*, 93 Cal.App.4th at 1134.)

C. Had Plaintiffs Pled a Class Action, the Claim Would Fail

1. Some Cities' Codes Prohibit Class Refund Claims

The FAC acknowledges that only one refund claim was filed with each city, purportedly on behalf of New Cingular and joined by the "Settlement Class." But five Alhambra Coalition cities' codes expressly prohibit class claims, as follows:

Defendant City	Municipal Code Provision
1. Burbank	Burbank Municipal Code § 2-4-1119 [See RJN Exh. G.]
2. Chula Vista	Chula Vista Municipal Code § 3.44.120(B) [See RJN Exh. J.]
3. Culver City	Culver City Municipal Code § 3.08.275 [See RJN Exh. K.]
4. Huntington Park	Huntington Park Municipal Code § 3-9.15 (a) and (b) [See RJN Exh. V.]
5. Tulare	Tulare Municipal Code § 5.76.150 [See RJN Exh. MM.]

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For each of these cities, the FAC fails to allege compliance with local claiming requirements. Without such allegations, the FAC is deficient as to these cities and subject to demurrer. (See *Steinhart, supra*, 47 Cal.4th at p. 1313 [failure to exhaust administrative remedies is grounds for a demurrer].)

2. Certain Defendant Cities' Codes Require Each Class Member to Sign the Claim

The FAC fails to allege compliance with local claiming requirements even for some cities that do allow class claims. These cities require a class claim be verified by each member of the class:

Defendant City	Municipal Code Provision
1. Calabasas	Calabasas Municipal Code § 3.28.030 [See RJN Exh. H.]
2. Chico	Chico Municipal Code § 3.24.020 [See RJN Exh. I.]
3. Cupertino	Cupertino Municipal Code § 3.35.150 [See RJN Exh. L.]
4. East Palo Alto	East Palo Alto Municipal Code § 3.72.030 [See RJN Exh. N.]
5. El Monte	El Monte Municipal Code § 3.22.150(A) [See RJN Exh. O.]
6. Gardena	Gardena Municipal Code § 3.24.010 [See RJN Exh. Q.]
7. Gilroy	Gilroy Municipal Code §§ 1.10 and 26C.15 [See RJN Exh. R.]
8. Glendale	Glendale Municipal Code § 4.38.150 [See RJN Exh. S.]
9. Guadalupe	Guadalupe Municipal Code § 1.10.20 [See RJN Exh. T.]
10. Huntington Beach	Huntington Beach Municipal Code § 3.38.140(a) [See RJN Exh. U.]

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Defendant City		Municipal Code Provision
11.	Los Altos	Los Altos Municipal Code §§ 1.40.020 and 3.42.116 [See RJN Exh. W.]
12.	Montclair	Montclair Municipal Code § 1.16.010 [See RJN Exh. Y.]
13.	Monterey	Monterey Municipal Code § 1-8.2 [See RJN Exh. Z.]
14.	Moreno Valley	Moreno Valley Municipal Code § 3.16.010 [See RJN Exh. AA.]
15.	Mountain View	Mountain View Municipal Code § 1.35 [See RJN Exh. BB.]
16.	Pacific Grove	Pacific Grove Municipal Code § 6.06.025 [See RJN Exh. CC.]
17.	Pomona	Pomona Municipal Code § 2-847 [See RJN Exh. DD.]
18.	Porterville	Porterville Municipal Code § 1-19 [See RJN Exh. EE.]
19.	Richmond	Richmond Municipal Code § 13.54.150 [See RJN Exh. FF.]
20.	San Bernardino	San Bernardino Municipal Code § 3.46.140 [See RJN Exh. GG.]
21.	San Jose	San Jose Municipal Code § 4.82.310 [See RJN Exh. HH.]
22.	Santa Cruz	Santa Cruz Municipal Code § 3.29.230 [See RJN Exh. II.]
23.	Sierra Madre	Sierra Madre Municipal Code § 3.40.020 [See RJN Exh. JJ.]
24.	Stockton	Stockton Municipal Code § 3.100.140 [See RJN Exh. KK.]
25.	Torrance	Torrance Municipal Code § 225.1.15 [See RJN Exh. LL.]
26.	Winters	Winters Municipal Code § 3.22.140 [See RJN Exh. OO.]

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Additionally, only enumerated agents may submit and/or verify a claim in lieu of a claimant against other cities. These cities specify who may verify a claim on a claimant's behalf:

Defendant City	Municipal Code Provision
1. Alhambra	Alhambra Municipal Code § 3.16.060 ("guardian or conservator or the executor or administrator") [See RJN Exh. E.]
2. Berkeley	Berkeley Municipal Code §7.20.040 ("taxpayer's guardian, executor, conservator or administrator") [See RJN Exh. F.]
3. Burbank	Burbank Municipal Code § 2-4-1119 ("claimant or his or her guardian, conservator, executor, or administrator") [See RJN Exh. G.]
4. Calabasas	Calabasas Municipal Code § 3.28.030 ("claimant or by his or her guardian, conservator, executor or administrator") [See RJN Exh. H.]
5. Chico	Chico Municipal Code § 3.24.020 (C) ("...by the claimant personally; ...by the claimant's guardian conservator, executor or administrator; ...by the receiver or trustee...") [See RJN Exh. I.]
6. Culver City	Culver City Municipal Code § 3.08.275 ("claimant, or his or her guardian, conservator, executor or administrator") [See RJN Exh. K.]
7. Cupertino	Cupertino Municipal Code § 1.18.020 ("claimant or by his or her guardian, conservator, executor or administrator") [See RJN Exh. L.]
8. Daly City	Daly City Municipal Code § 2.56.030 ("claimant or by his or her guardian, conservator, executor or administrator") [See RJN Exh. M.]
9. East Palo Alto	East Palo Alto Municipal Code § 3.72.030 ("claimant or by his/her guardian, conservator, executor or administrator") [See RJN Exh. N.]
10. El Monte	El Monte Municipal Code § 3.22.150(A) ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. O.]

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Defendant City		Municipal Code Provision
11.	Gardena	Gardena Municipal Code § 3.20.180(B) ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. Q.]
12.	Gilroy	Gilroy Municipal Code § 1.10 ("claimant or by his or her guardian, conservator, executor or administrator") [See RJN Exh. R.]
13.	Glendale	Glendale Municipal Code § 1.04.100 ("claimant or by the claimant's guardian, conservator, executor or administrator of the claimant's will or estate") [See RJN Exh. S.]
14.	Huntington Beach	Huntington Beach Municipal Code § 3.38.140(a) ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. U.]
15.	Huntington Park	Huntington Park Municipal Code § 3-9.15 (a) ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. V.]
16.	Los Altos	Los Altos Municipal Code § 1.40.020 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. W.]
17.	Los Angeles	Los Angeles Municipal Code § 21.07(a) ("the person claiming the overpayment, or his authorized agent on his behalf") [See RJN Exh. X.]
18.	Montclair	Montclair Municipal Code § 1.16.010 ("claimant or by his/her guardian, conservator, executor or administrator [See RJN Exh. Y.]
19.	Monterey	Monterey Municipal Code § 1-8.2 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. Z.]
20.	Moreno Valley	Moreno Valley Municipal Code § 3.16.010 ("claimant or his or her guardian, conservator, exeutor or administrator") [See RJN Exh. AA.]
21.	Mountain View	Mountain View Municipal Code § 1.35(c) ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. BB.]

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Defendant City		Municipal Code Provision
22.	Pacific Grove	Pacific Grove Municipal Code § 6.06.020 ("claimant or by claimant's guardian, conservator, executor or administrator") [See RJN Exh. CC.]
23.	Pomona	Pomona Municipal Code § 2-847 ("claimant, or by his guardian, conservator, executor or administrator") [See RJN Exh. DD.]
24.	Porterville	Porterville Municipal Code §1-19 ("claimant, or by his or her guardian, conservator, executor or administrator") [See RJN Exh. EE.]
25.	San Bernardino	San Bernardino Municipal Code § 3.46.140 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. GG.]
26.	San Jose	San Jose Municipal Code § 4.82.310 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. HH.]
27.	Santa Cruz	Santa Cruz Municipal Code § 3.29.230 ("claimant, or his or her guardian, conservator, executor or administrator") [See RJN Exh. II.]
28.	Sierra Madre	Sierra Madre Municipal Code § 3.40.020 ("claimant or by his/her guardian, conservator, executor or administrator [See RJN Exh. JJ.]
29.	Stockton	Stockton Municipal Code §3.100.140 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. KK.]
30.	Torrance	Torrance Municipal Code § 225.1.15 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. LL.]
31.	Tulare	Tulare Municipal Code § 5.76.150 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. MM.]
32.	Winters	Winters Municipal Code § 3.22.140 ("claimant or his or her guardian, conservator, executor or administrator") [See RJN Exh. OO.]

The FAC does not acknowledge these verification requirements much less allege their

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satisfaction. Without such allegations, the FAC is deficient and subject to demurrer by the defendant cities that have adopted such requirements. (See *Steinhart, supra*, 47 Cal.4th at p. 1313 [failure to exhaust administrative remedies supports demurrer].)

3. Representative Plaintiffs in a Multi-Defendant Class Action Must Assert Claims Against Each Defendant

The individual plaintiffs could not have standing to pursue a class action against 117 defendant cities unless each had a claim against each city:

> In the absence of a conspiracy between all of the defendants, California has adopted the rule that a class action may only be maintained against defendants as to whom the class representative has a cause of action.

(*Baltimore Football Club, Inc. v. Superior Court* (1985) 171 Cal.App.3d 352, 359.) "A plaintiff cannot use the procedure of a class action to establish standing to sue a class or group of defendants unless the plaintiff has actually been injured by **each** of the defendants in the class." (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 845.) A plaintiff may represent a class of individuals who have similar causes of action against the same defendant or defendants, but cannot represent individuals who have causes of action against different defendants. (*Id.*)

As noted above, the individual plaintiffs do not allege they have claims against **any** particular city must less all of them. Moreover, it is implausible that any of them has 117 telephone accounts billed to addresses in each of 117 jurisdictions. As a result, they lack standing to maintain the lawsuit, even if it had been pled as a class action.

4. The Individual Plaintiffs Did Not Satisfy Claim Requirements for a Class Action

Finally, the individual plaintiffs cannot maintain a class action because the administrative claims filed by New Cingular are insufficient to support such an action. The Court of Appeal has held that, in some circumstances, a claim filed by a class representative can satisfy governmental claim requirements as a prerequisite to filing a putative class action lawsuit. (See *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1592.) But the claim must be filed by a class representative. (See *id.* [claim by the class representative for himself and others similarly situated can be sufficient in some circumstances].) The FAC does not allege

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that any individual plaintiff filed a refund claim. It alleges that New Cingular filed the various refund claims. But New Cingular does not purport to be a class representative. Nor could it be – its legal interests are entirely distinct from its customers'. The individual plaintiffs cannot rely on New Cingular's claim to satisfy a requirement they file their own claim. (See *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 733-734.)

Public policy supports this result. Strict standing requirements free the taxing authority from the obligation to untangle a "web of agreements and/or accounts in order to ascertain who is the proper recipient of any refund due." (*IBM Personal Pension Plan v. City & County of San Francisco* (2005) 131 Cal.App.4th 1291, 1305.) Such requirements help the taxing authorities avoid double payment. (*Id.*) The individual plaintiffs' failure to satisfy local claiming requirements precludes a class action here.

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XII. Conclusion

For the foregoing reasons, the Alhambra Coalition defendants request that the Court grant this demurrer without leave to amend.

DATED: January 31, 2012

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: AT&T MOBILITY WIRELESS DATA SERVICES SALES TAX LITIGATION	MDL No: 2147 Case No. 10 C 2278
This Document Relates To: All Actions	Judge Amy J. St. Eve

Defendant AT&T Mobility LLC's Memorandum in Support of Motion for Final Approval of Settlement

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I. INTRODUCTION

The settlement agreement that the Court preliminarily approved constitutes a fair resolution of these lawsuits. The plaintiffs are wireless customers of defendant AT&T Mobility LLC ("AT&T") who contend that the collection of more than 2,000 separate state and local taxes on wireless data service is preempted by a federal moratorium on such taxes and/or violates the laws of various states. To continue this mammoth consolidated litigation—which includes more than 32 million class members nationwide—would strain the resources of the parties and the Court. In the absence of a settlement, class members likely could not obtain any benefits without overcoming numerous—and almost certainly insuperable—hurdles. That is so for many reasons. AT&T's defenses on the merits of plaintiffs' claims are substantial. Moreover, AT&T is entitled to compel each of its customers to resolve his or her dispute through arbitration on an individual basis. Without this settlement, plaintiffs could not proceed on a class-wide basis, and very likely would recover nothing if they sought to litigate their disputes in court.

With this settlement, however, the members of the class stand to achieve substantial benefits. Most significant, plaintiffs have requested that AT&T cease further collection of the challenged taxes until 2014 (when the federal moratorium under the Internet Tax Freedom Act is set to expire). Under the settlement, as we discuss below, AT&T has done so in virtually all jurisdictions, and intends to do so in the remaining jurisdictions. The value to the class of this prospective relief is immense.

Plaintiffs also seek a refund of taxes that already have been paid into the coffers of state and local treasuries. Unlike a typical consumer class action, in which plaintiffs demand the return of allegedly ill-gotten gains reaped by a defendant, in this case AT&T does not have the taxes. They were remitted to state and local taxing authorities. AT&T did not benefit from collecting these taxes; to the contrary, such taxes effectively raised the price of AT&T service

and thus placed AT&T at a competitive disadvantage. As we have acknowledged, some jurisdictions gave AT&T a small fraction of the collected amounts as "vendor's compensation" to defray the administrative costs of collecting the taxes. But under the settlement, AT&T has committed to pay out the "vendor's compensation" related to the taxes at issue. Moreover, AT&T is undertaking and will continue to undertake significant (and costly) efforts to help secure refunds from the taxing authorities who have received the class members' tax payments. Specifically, the settlement requires AT&T to provide critical assistance to Class Counsel in pursuing refund claims in hundreds of taxing jurisdictions. The proceeds of these refund actions will go directly to the class, without the need for class members to complete claims forms. And AT&T also has relieved the class of the usual burden of providing notice of the settlement to the millions of class members by paying that considerable expense itself.

In short, the settlement is exceptionally fair and warrants this Court's approval.

* * * *

The parties do request that the settlement class definition and approved settlement be modified in two respects. First, as we explain below, we have learned that, due to a programming error in how AT&T billing data for Nevada were received and processed, Nevada customers who paid taxes to 16 or fewer local Nevada jurisdictions were not identified as class members. Thus, some Nevada customers may not have been informed of the proposed settlement, and as a result would not have known of their right to opt out of the class or object to the settlement. The parties—including counsel for the Nevada subclass—therefore believe that members of the Nevada subclass cannot be included in the settlement agreement currently before the Court. Once the members of the Nevada subclass have received notice, the parties will separately seek approval of a settlement of the Nevada subclass's claims that is consistent with

the terms of the settlement currently under consideration.

Second, the parties agree that no Idaho customers were in fact charged the challenged taxes. Because AT&T and Class Counsel agree that these customers would not have any claims in the litigation (or benefits from the settlement), the parties respectfully request that the Idaho subclass be excluded from the settlement class as well.

II. BACKGROUND

A. The Underlying Class Action

Like all retailers and other consumer businesses, AT&T collects sales and use taxes and remits them to the applicable state or local taxing authorities across the country. Many states and localities impose taxes on wireless data subscription plans. The plaintiffs in these consolidated class actions assert that many such taxes are forbidden in whole or in part by state law or are preempted by the Internet Tax Freedom Act ("ITFA"). Master Compl. ¶¶ 85-88. ITFA, enacted by Congress in 1998, imposes a moratorium on any new state and local taxes on Internet access services, from October 1, 1998 until November 1, 2014. ITFA § 1101(a), (b) (47 U.S.C. § 151 note). Taxing authorities that had begun levying such taxes before ITFA was enacted are "grandfathered" and excluded from the moratorium. *Id.* § 1104. Plaintiffs assert that by collecting the challenged taxes, AT&T breached its contracts and the covenant of good faith and fair dealing, violated various state consumer-protection laws, and unjustly enriched itself. Master Compl. ¶¶ 112-125. On behalf of a nationwide class and state subclasses, plaintiffs seek an injunction against further collection of the challenged taxes, along with restitution, damages, and attorneys' fees and costs. *Id.* ¶¶ 126-131.

B. Material Terms Of The Proposed Settlement

After lengthy negotiations—spanning a half-year—on June 24, 2010, 57 plaintiffs and AT&T moved to certify a settlement class and for preliminary approval of a settlement resolving

these class actions. *See* Dkt. No. 50. On August 11, 2010, the Court certified a settlement class and granted preliminary approval of the settlement. Dkt. No. 97.

We discuss some of the key terms of the settlement below.

1. Abandonment of AT&T's Defenses

Were this case to be litigated further, AT&T would have asserted numerous defenses to the claims raised by the Master Complaint. But AT&T has agreed to waive those defenses if (but only if) the settlement receives final approval. Settlement Agreement ("Settlement") § 3. These defenses include (but are not limited to):

- invoking AT&T's contractual right to compel plaintiffs or class members to arbitrate their disputes on an individual basis;
- arguing that, if the case were to be litigated on the merits, the class is not certifiable under Federal Rule of Civil Procedure 23;
- contending that neither ITFA nor state law forbids the challenged taxes;
- asserting that plaintiffs lack standing to challenge AT&T's collection of the taxes under ITFA or relevant state laws; and
- invoking the voluntary payment doctrine to bar plaintiffs' right to recover charges.

2. Voluntary Cessation of Collection of Challenged Taxes

Under the settlement, AT&T agreed to stop collecting the challenged taxes within thirty days of the Court's order granting preliminary approval of the settlement, until the November 2014 expiration of ITFA's moratorium (unless "federal, state or local laws, statutes, regulations, administrative decisions or pronouncements, or the interpretation of any of the foregoing specifically requires, authorizes, or permits" collection of these taxes). Settlement § 8.2(b).

3. Cash Recovery for Class Members

The settlement ensures that class members automatically will receive a proportional

recovery of jurisdiction-specific refunds or credits obtained by AT&T and Class Counsel.

State and local laws vary as to who may seek refunds of taxes collected by a vendor. Most jurisdictions permit only AT&T to seek a refund; they expressly deny standing to the consumer. *See* Settlement Ex. K. Many of these jurisdictions require that AT&T first issue a credit or make a refund to the consumer before AT&T may receive a refund of taxes collected or a credit for those taxes. Some jurisdictions permit either AT&T or the consumer to seek a refund. *Id.* Ex. L. Finally, some jurisdictions permit only the consumer to seek a refund. *Id.* Ex. M. Because of these differing tax rules, the settlement agreement envisions a subclass for each state, with a separate escrow account dedicated to class members in that state.

In jurisdictions where AT&T alone may seek a refund or credit, AT&T has filed or is filing the necessary applications. In jurisdictions where either AT&T or class members may seek a refund or credit, AT&T has similarly filed or is filing applications; the settlement class (through Class Counsel) is joining in AT&T's applications. *See* Settlement §§ 8.3-8.4. Under the settlement terms, AT&T will fund the relevant escrow account upon obtaining a refund or credit—commensurate with the amount of refund or credit—if the taxing authority does not deposit the refund directly in the escrow account in the first place. *Id.* § 8.10. Where a jurisdiction requires the taxpayer (AT&T) to make refunds or credits to class members before it issues a refund or credit to AT&T, the company will place those refunds or credits in the relevant escrow account as required.[1] *Id.* § 8.7. In jurisdictions where only the customer may seek a refund, AT&T has provided the necessary information—including templates for filing a claim—

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[1] If a jurisdiction issues a refund in the form of a future tax credit to AT&T, AT&T will immediately remit the full amount of that credit to the applicable escrow account if the credit is spread over a period of three years or less. Settlement § 8.11(a). If the credit is spread over a longer period, AT&T will immediately remit the total future credit for the first three years, along with the calculated net present value of the future credit over succeeding years. *Id.* § 8.11(b).

to allow class members to seek to obtain those refunds easily and efficiently. *Id.* § 8.5.

In the event that a jurisdiction disputes the refund claim, AT&T and Class Counsel must work together to pursue the refund through administrative and legal remedies permitted under state law, including any necessary appeals. *See* Settlement § 8.9.

In addition, in some taxing jurisdictions, AT&T is entitled to keep a small portion of taxes collected to recoup its costs. Under the settlement, however, class members will receive this "vendor's compensation" along with the refunds (or dollar equivalent of tax credits) obtained from taxing jurisdictions. *See* Settlement § 8.13.

The settlement agreement includes a Distribution Plan governing the allocation of recovered funds to class members. *See id.* Ex. O. Broadly speaking, once each state-specific escrow account is fully funded, the funds will be distributed to the state-specific subclass in the most cost-effective manner available, so as to maximize the return to the members of the class by reducing the administrative costs of the settlement. The Distribution Plan provides for each class member to receive a *pro rata* share of net proceeds from refunds made by the jurisdictions that received his or her tax payments.

4. Costs of Settlement, Attorneys' Fees, and Class Representative Compensation

The long-standing rule in federal court is that "the plaintiff must pay for the cost of notice [to a class] as part of the ordinary burden of financing his own suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974); *see also* 7AA CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1788 (Supp. 2011) ("Lower courts since *Eisen* have complied, and it is now clear that all notice costs must be borne by the [class action] plaintiffs."). When a class

action is settled, those costs often are deducted from the fund distributed to class members.[2] But in this case, AT&T agreed to bear the full costs of notice to the class. Settlement § 15. In addition, AT&T has made a substantial contribution by covering the costs (including legal work) of preparing the refund or credit applications for the hundreds of taxing jurisdictions implicated by these cases. *Id.*

As Class Counsel have explained, they seek to be compensated through court-approved attorneys' fees and reimbursement for reasonable expenses; those payments would come from the applicable state-specific subclass escrow account. (Settlement administration costs would also be paid from those accounts.) The settlement places limits on Class Counsel's attorneys' fees, which will be capped at the lesser of ten percent of the aggregate value of the settlement or twenty-five percent of the aggregate value of amounts actually recovered by refund or credit from the taxing authorities. Dkt. No. 125. The settlement agreement also specifies that the amount of compensation awarded to the 57 class representatives shall not exceed $5,000 each. *See* Settlement § 12.

C. Steps Taken Since Preliminary Approval Of The Settlement

1. Class Notice

In preliminarily approving the settlement, the Court also approved the plan to provide notice to class members. Dkt. No. 97, Mem. Op., at 28-34. Specifically, the Court approved the form of the proposed class notice, consisting of a message on the bills of class members who are current customers and text message sent to those class members (Dkt. No. 50-2, Exs. B-C); an e-

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[2] *See, e.g., Mirfasihi v. Fleet Mort. Corp.*, 2007 WL 2066503, at *2 (N.D. Ill. July 17, 2007), *aff'd*, 551 F.3d 682 (7th Cir. 2008); *see also, e.g., Hunt v. Imperial Merchant Servs.*, 2010 WL 3958726, at *1 (N.D. Cal. Oct. 7, 2010); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 810 (E.D. Wis. 2009); *Schoenbaum v. E.I. Dupont De Nemours & Co.*, 2009 WL 4782082, at *1 (E.D. Mo. Dec. 8, 2009).

mail notice or a postcard notice sent to the last known e-mail or mailing addresses of class members who are former customers (*id.* Exs. E-F); publication notice in *USA Today* (*id.* Ex. E); and establishment of a settlement website for the long-form notice (*id.* Ex. D) and toll-free number. *See* Dkt. No. 97, Mem. Op., at 28-34.[3]

The class notice program has been carried out in a timely manner, and at AT&T's expense, in accordance with the settlement—with the exception that some members of the Nevada subclass (and members of the Idaho subclass, for whom challenged taxes were never paid) did not receive notice via text message, e-mail, and/or postcard.[4] In particular, in October 2010, AT&T mailed the direct-bill message (including a Spanish translation for those who elect to receive Spanish language bills) to approximately 22.5 million customer accounts that were current as of September 14, 2010. Dkt. No. 119-3, Decl. of John Throckmorton, ¶ 2c. That mailing included all members of the Nevada subclass who were AT&T customers at that time.

In November 2010, AT&T sent the text message notice to the over 32 million class members who were current customers as of September 14, 2010. Dkt. No. 119-3, Throckmorton Decl. ¶ 2d. AT&T has recently determined, however, that this text message notice was not sent to members of the Nevada subclass. That is because, due to a programming error in how AT&T billing data for Nevada were received and processed, Nevada customers who paid taxes to 16 or fewer local Nevada jurisdictions were not identified as class members and therefore did not receive the text message notice.[5]

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[3] In a supplemental order, the Court directed that: (1) the class notices be sent by December 15, 2010 and (2) the publication notice be published twice in the *USA Today* by December 15, 2010. Dkt. No. 108, at 1.

[4] Of course, many such individuals may have received notice via publication in the *USA Today*.

[5] AT&T only identified this oversight within the past few days.

AT&T also provided notice of the settlement to all former customers who are class members, with the exception of the former customers who are part of the Nevada subclass. By December 15, 2010, the notice administrator—Analysis Research Planning Corporation ("ARPC")—sent the e-mail notice to over one million former customers. Dkt. No. 119-1, Decl. of B. Thomas Florence ¶ 2. At the same time, ARPC also sent the postcard notice to over 9 million former customers. *Id.* AT&T had provided ARPC with the contact information of these former customers. But in assembling that information, AT&T had excluded former Nevada customers for the reasons described above. Thus, these former Nevada customers did not receive either the e-mail notice or postcard notice.

Finally, class members were provided with information about the settlement in other ways. Pursuant to the Court's preliminary approval order, ARPC established and maintains a website (www.attmsettlement.com) providing information in both English and Spanish, and has made an automated toll-free number available (877-905-8928) for class members to obtain further information.[6] In addition, notice was published in the national edition of *USA Today* on November 16 and 23, 2010. Dkt. No. 119-2, Decl. of Debra L. Loveless, ¶ 3 & Ex. A.

2. Cessation of Tax Collection and Filing of Refund Claims

Since the Court granted preliminary approval, the parties have begun implementing the settlement, as the agreement and preliminary approval order require. AT&T has ceased charging virtually all of the relevant Internet taxes, with two exceptions of which we are aware. First, due to the programming error previously described, the results of the data collection and analysis undertaken after the Court granted preliminary approval did not reveal that any relevant Internet

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[6] In addition, as required by 28 U.S.C. § 1715, on July 2, 2010, AT&T served the United States Attorney General and the Attorneys General of the relevant states with notice of the settlement. *See* Decl. of Robert Wagner ¶¶ 2-5 (attached as Ex. A).

taxes had been paid to either state or local jurisdictions in Nevada. AT&T has recently determined, however, that, while no taxes on Internet services were paid to the state of Nevada, in fact challenged taxes ***were*** paid to 16 or fewer ***local*** Nevada jurisdictions. AT&T has further determined that, due to the peculiar manner in which these local jurisdictions impose telecommunications taxes, the methodology employed by the company to halt collection of the challenged taxes did not capture these jurisdictions Accordingly, collection of the challenged taxes in these Nevada jurisdictions has not yet ceased.[7] Second, and for similar reasons, AT&T has not yet been able to cease charging the challenged taxes in a single Missouri jurisdiction (Joplin, Missouri).

The settlement agreement also called for AT&T and Class Counsel to commence filing refund claims with the hundreds of taxing jurisdictions listed in Exhibits K, L and M of the agreement. *See* Settlement §§ 8.3-8.5. Following preliminary approval of the settlement, AT&T personnel began compiling and analyzing the necessary data to determine class membership and the amounts that would be subject to the refund claims. As noted above, that process erroneously excluded Nevada customers from whom taxes had been collected for particular Nevada local taxing jurisdictions. *See* page 8, *supra.* (Refund claims have been filed, however, on behalf of Joplin, Missouri customers.[8])

AT&T hired an outside law firm to prepare and process the refund claims, respond to inquiries, meet with taxing jurisdictions, and assist in processing refund claims. Decl. of

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[7] The parties expect that they will reach a new settlement as to the Nevada subclass, and anticipate that under any such settlement, AT&T will agree to cease charging challenged taxes to customers in those Nevada local jurisdictions where the challenged taxes are paid if this Court grants preliminary approval of that settlement.

[8] AT&T and Class Counsel agree that there is no need to exclude Joplin, Missouri customers from the class, because they have received the appropriate notice. In addition AT&T notes that it intends to cease collection of these taxes as soon as technically feasible.

Margaret C. Wilson ¶ 2 (attached as Ex. B). AT&T also hired an outside company (Threaded Logic) to download tax-collection data to hundreds of computer disks in order to support the refund claims. *Id.* ¶ 3.

During the fourth quarter of 2010 and January 2011, AT&T and its outside counsel prepared and filed 992 refund claims in 844 state and local taxing jurisdictions. Wilson Decl. ¶ 4.[9] The pending claims exceed $1 billion in the aggregate. *Id.* ¶ 6. In 686 taxing jurisdictions, the amount of the refund claim was for $500 or less. Because the cost to AT&T of preparing and filing these refund claims would have exceeded $500, AT&T requested and Class Counsel agreed that AT&T could simply remit the amount of those refund claims to the escrow account as a way to reduce cost and increase certainty. *Id.* ¶ 7.

Meanwhile, AT&T personnel and outside counsel have been assisting Class Counsel in responding to inquiries from different jurisdictions, providing additional support on legal issues, and participating in teleconferences and in-person meetings with representatives of various jurisdictions. A number of jurisdictions have commenced audit proceedings. The audits generally involve data verification and assessments of whether any other tax payment/collection issues should be addressed. AT&T is incurring and will incur substantial costs responding to these audits. Wilson Decl. ¶ 8. Some jurisdictions have required AT&T to submit amended tax returns that incorporate the claimed refund. AT&T has been preparing and filing amended returns at its expense. *Id.* ¶ 9.

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[9] AT&T and Class Counsel determined that no refund claims needed to be filed with certain taxing jurisdictions—including the state of Idaho and the state of Nevada—because after preliminary approval, it was determined that no relevant Internet tax was paid to these jurisdictions. Wilson Decl. ¶ 5. AT&T and Class Counsel have agreed that, if the Court grants preliminary approval of a settlement of the claims of the Nevada subclass, refund claims will be filed in the Nevada local taxing jurisdictions.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: AT&T MOBILITY WIRELESS DATA SERVICES SALES TAX LITIGATION	)	Case No. 1:10-cv-02278
	)	Judge Amy J. St. Eve
This Document Relates To: All Actions	)	

GLOBAL CLASS ACTION SETTLEMENT AGREEMENT

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GLOBAL CLASS ACTION SETTLEMENT AGREEMENT

This Global Class Action Settlement Agreement ("Agreement" or "Settlement Agreement") is entered into as of July 9, 2010, and is between and among AT&T Mobility LLC ("AT&T Mobility") (as defined in paragraph 1.2) and the Class Plaintiffs (as defined in paragraph 1.4) on behalf of themselves and the Settlement Class (as defined in paragraph 1.26), by and through the undersigned for AT&T Mobility and the undersigned Class Plaintiffs and Interim Settlement Class Counsel (as defined in paragraph 1.16) for the Settlement Class. This Agreement is intended by the Settling Parties to fully, finally and forever resolve, discharge and settle all released rights and claims, as set forth below, subject to the terms and conditions set forth herein.

RECITALS

WHEREAS, the following cases were filed by plaintiffs in, or were removed to, various United States District Courts and were subsequently transferred to the United States District Court for the Northern District of Illinois for all pretrial purposes pursuant to transfer orders from the Judicial Panel on Multidistrict Litigation:

	Abbreviated Case Name	N.D. Illinois Case Number	Filed In/ Transferred From
1.	*Armstrong v. AT&T Mobility, LLC*	1:10-cv-02943	D. District of Columbia
2.	*Abel v. AT&T Mobility, LLC*	1:10-cv-03369	S.D. Florida
3.	*Bendian v. AT&T Mobility, LLC, et al.*		D. New Jersey
4.	*Bosarge v. AT&T Mobility, LLC*	1:10-cv-02306	S.D. Mississippi
5.	*Bosse v. AT&T Mobility, et al.*	1:10-cv-02324	D. South Carolina (Charleston Division)
6.	*Buchar v. AT&T Mobility, LLC*	1:10-cv-00842	N.D. Illinois (Eastern Division)
7.	*Bulzone v. AT&T Mobility, LLC*	1:10-cv-02673	S.D. Florida (Ft. Lauderdale Division)
8.	*Cooper v. AT&T Mobility, LLC*		D. Delaware
9.	*Corn v. AT&T Mobility, LLC*	1:10-cv-02326	W.D. Texas
10.	*Cranford v. AT&T Mobility, LLC, et al.*	1:10-cv-02309	D. Nebraska

11.	*Crose v. AT&T Mobility, LLC*	1:10-cv-02674	E.D. Louisiana
12.	*Devore v. AT&T Mobility, LLC, et al.*	1:10-cv-02683	D. Utah
13.	*Diethelm v. AT&T Mobility, LLC*	1:10-cv-02279	N.D. Alabama
14.	*Dow v. AT&T Mobility, LLC*	1:10-cv-02678	D. Maryland
15.	*Edmonds v. AT&T Mobility, LLC*	1:10-cv-02321	W.D. Oklahoma
16.	*Erie, et al. v. AT&T Mobility, LLC, et al.*		M.D. Louisiana
17.	*Fox v. AT&T Mobility, LLC*	1:10-cv-02316	E.D. North Carolina (Western Division)
18.	*Girard v. AT&T Mobility, LLC*	1:10-cv-02682	W.D. North Carolina (Charlotte Division)
19.	*Havron v. AT&T Mobility, LLC, et al.*	1:10-cv-02290	S.D. Illinois
20.	*Hendrix v. AT&T Mobility, LLC*	1:10-cv-02298	D. Kansas
21.	*Herst v. AT&T Mobility, LLC, et al.*		N.D. Illinois
22.	*Hoke v. AT&T Mobility, LLC*	1:10-cv-02291	N.D. Indiana
23.	*Howell v. AT&T Mobility, LLC*	1:10-cv-02668	N.D. California
24.	*Iannetti v. AT&T Mobility, LLC*	1:10-cv-02322	W.D. Pennsylvania
25.	*Johnson v. AT&T Mobility, LLC*	1:10-cv-02305	E.D. Michigan
26.	*Krein v. AT&T Mobility, LLC*	1:10-cv-03370	D. New Jersey
27.	*Kyle v. AT&T Mobility, LLC*	1:10-cv-02667	C.D. California
28.	*Leisman v. AT&T Mobility, LLC, et al.*	1:10-cv-02681	W.D. Missouri (Western Division)
29.	*Macy v. AT&T Mobility, LLC, et al.*		S.D. New York
30.	*Mazeitis v. AT&T Mobility, LLC*	1:10-cv-02301	W.D. Louisiana
31.	*Meshulam v. AT&T Mobility, LLC*	1:10-cv-02679	D. Maryland
32.	*Munson v. AT&T Mobility, LLC*	1:10-cv-02288	S.D. Florida
33.	*Novick v. AT&T Mobility, LLC*		M.D. Florida
34.	*Pauley v. AT&T Mobility, LLC, et al.*	1:10-cv-02308	W.D. Missouri (Central Division)
35.	*Rahn v. AT&T Mobility, LLC*	1:10-cv-02300	E.D. Kentucky
36.	*Rock v. AT&T Mobility, LLC*	1:10-cv-02302	D. Connecticut
37.	*Rock v. AT&T Mobility, LLC*	1:10-cv-02671	D. Massachusetts
38.	*Rogers v. AT&T Mobility, LLC*	1:10-cv-02685	D. Vermont
39.	*Shirley v. AT&T Mobility, LLC*		D. Rhode Island
40.	*Shuptrine v. AT&T Mobility, LLC*	1:10-cv-02325	E.D. Tennessee
41.	*Simon v. AT&T Mobility, LLC*	1:10-cv-02666	C.D. California
42.	*Sipple v. AT&T Mobility, LLC, et al.*	1:10-cv-02669	S.D. California
43.	*Stanczak v. AT&T Mobility, LLC*	1:10-cv-02687	E.D. Wisconsin
44.	*Stewart v. AT&T Mobility, LLC*	1:10-cv-02684	E.D. Virginia
45.	*Taylor v. AT&T Mobility, LLC, et al.*	1:10-cv-02282	E.D. Arkansas
46.	*Tushaus v. AT&T Mobility, LLC*	1:10-cv-02665	D. Arizona
47.	*Vickery v. AT&T Mobility, LLC*	1:10-cv-02686	W.D. Washington
48.	*Wallace v. AT&T Mobility, LLC*	1:10-cv-02320	S.D. Ohio
49.	*White v. AT&T Mobility, LLC*	1:10-cv-02680	D. Minnesota
50.	*Wiand v. AT&T Mobility, LLC*	1:10-cv-02303	E.D. Michigan
51.	*Wieland v. AT&T Mobility, LLC*		D. Colorado

52.	*Wilhite v. AT&T Mobility, LLC*	1:10-cv-02289	N.D. Georgia
53.	*Wood v. AT&T Mobility, LLC*	1:10-cv-02297	S.D. Iowa
54.	*Wright v. AT&T Mobility LLC*	1:10-cv-02670	S.D. California

WHEREAS, Class Plaintiffs allege in the Actions that AT&T Mobility charges customers for taxes, fees and surcharges on internet access through certain services including iPhone data plans, Blackberry data plans, other smart phone data plans, laptop connect cards and pay-per-use data services in violation of the Internet Tax Freedom Act, 47 U.S.C. § 151 (1998) (as amended) and other state laws;

WHEREAS, AT&T Mobility has denied, and continues to deny, inter alia, any wrongdoing, and any and all allegations that Class Plaintiffs or Settlement Class Members have suffered any damage whatsoever, have been harmed in any way, or are entitled to any relief as a result of any conduct on the part of AT&T Mobility as alleged by Class Plaintiffs in the Actions.

WHEREAS, Interim Settlement Class Counsel and various co-counsel have conducted a thorough investigation and evaluation of the facts and law relating to the matters set forth in the Actions; and

WHEREAS, Class Plaintiffs and AT&T Mobility desire to avoid the further expense of litigation and to settle and voluntarily compromise any and all claims or causes of action between them that have arisen or that may arise in the future which in any way relate to Class Plaintiffs' claims or the facts alleged in the Actions individually and on behalf of the Settlement Class;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and conditions contained herein, and with the intention of being legally bound thereby, each of the above parties hereto do covenant and agree as follows:

DEFINITIONS

1. **Definitions.** The following definitions apply to this Agreement and the exhibits hereto:

1.1 **"Actions"** means the MDL Actions and the Related Actions.

1.2 **"AT&T Mobility"** means AT&T Mobility LLC, AT&T Inc. and all of their predecessors in interest, successors in interest and any of their parents, subsidiaries, divisions or affiliates, and their officers, directors, employees, trustees, principals, attorneys, agents, representatives, vendors, shareholders, partners, limited partners, as well as any person acting or purporting to act on their behalf or on behalf of those in privity with AT&T Mobility or AT&T Inc. and the Settlement Class Members. This shall include but not be limited to the list of affiliates attached as Exhibit A.

1.3 **"Class Notice"** which shall be in substantially the same form as Exhibits B, C, D, E and F hereto, shall mean the Court-approved form of notice to the Settlement Class of (i) certification of the Settlement Class, (ii) preliminary approval of the Settlement Agreement, (iii) scheduling of the Final Approval Hearing, and (iv) options available to Settlement Class Members.

1.4 **"Class Plaintiffs"** means Andy Armstrong, Ronald Bendian, Michael Bosarge, Eric Bosse, Vicki L. Campbell, Harvey Corn, Pam Corn, Matthew Cranford, Steven A. DeVore, Jane F. Edmonds, Heather Feenstra-Kretschmar, Adrienne M. Fox, Richard Garner, Stephen S. Girard, David Guerrero, Christopher R. Havron, Christopher Hendrix, Martin Hoke, Meri Iannetti, Christopher Jacobs, Kathy J. Johnson, Jamie Kilbreth, Bert Kimble, Vickie C. Leyja, Jonathan Macy, Rick Manrique, Heather Mazeitis, Bonnae Meshulam, Miracles Meyer, Audrey J. Mitchell, Adrienne D. Munson, Jill Murphy, Gira L. Osorio, Sara Parker Pauley,

Joseph Phillips, Heather Rahn, David Rock, Lesley Rock, William J. Rogers, James Marc Ruggerio, Ann Marie Ruggerio, James Shirley, Randall Shuptrine, John W. Simon, Karl Simonsen, Donald Sipple, James K.S. Stewart, Dorothy Taylor, Kirk Tushaus, Matthew Vickery, John W. Wallace, Eleanor T. Wallace, Craig Wellhouser, Aaron White, William A. Wieland, Robert Wilhite, and Penny Annette Wood, who are some of the named Plaintiffs in the Actions and who have executed this Agreement in their individual capacity and as representatives of the Settlement Class as defined in this Agreement.

1.5 **"Costs of Settlement Administration"** shall mean all actual costs associated with or arising from Settlement Administration.

1.6 **"Court"** means the United States District Court for the Northern District of Illinois in which the MDL Actions are pending pursuant to transfer orders of the Judicial Panel on Multidistrict Litigation, and to which presentation of this Agreement for judicial review and approval will be made.

1.7 **"Current Customers"** means those Settlement Class Members who are customers of AT&T Mobility at the time notice is sent to the Settlement Class pursuant to the Preliminary Approval Order.

1.8 **"Depository Bank"** means the financial institution holding the Escrow Funds in the Escrow Accounts, or its successor.

1.9 **"Effective Date"** means the date when the order finally approving the Settlement becomes a "Final Order" (as defined in paragraph 1.14).

1.10 **"Escrow Accounts"** means the escrow account and sub-accounts established pursuant to this Settlement Agreement and Exhibit G hereto.

1.11 **"Escrow Agent"** means the financial institution selected by Interim Settlement Class Counsel and approved by AT&T Mobility to hold the Settlement Fund.

1.12 **"Escrow Agreement"** means the escrow agreement executed by the Escrow Agent, Interim Settlement Class Counsel and Counsel for AT&T Mobility, substantially in the form attached as Exhibit G.

1.13 **"Escrow Funds"** means the funds in the Escrow Accounts.

1.14 **"Final Order"** or **"Final Judgment"** means the termination of the Actions after the occurrence of each of the following events:

1.14.1 This Global Class Action Settlement Agreement is approved in all respects by the Court without material modification unless expressly agreed to by AT&T Mobility and the Class Plaintiffs; and

1.14.2 An order and final judgment of dismissal with prejudice is entered by the Court against the Class Plaintiffs and all of the Settlement Class Members who do not opt out as provided in Rule 23 of the Federal Rules of Civil Procedure and the time for the filing of any appeals has expired or, if there are appeals, approval of the settlement and judgment has been affirmed in all respects by the appellate court of last resort to which such appeals have been taken and such affirmances are no longer subject to further appeal or review.

1.15 **"Former Customers"** means those Settlement Class Members who are not Current Customers (as defined in paragraph 1.7).

1.16 **"Interim Settlement Class Counsel"** or **"Settlement Class Counsel"** means the law firms: Bartimus, Frickleton, Robertson & Gorny, P.C. and The Huge Law Firm PLLC.

1.17 **"Internet Taxes"** shall mean each and every "tax on Internet access," as that term is defined in the ITFA, collected by AT&T Mobility from its customers and paid to the Taxing Jurisdictions (as defined in paragraph 1.31) listed and as limited on Exhibit H hereto with respect to charges for those services listed on Exhibit I that the Class Plaintiffs agree are for Internet access, including iPhone data plans, Blackberry data plans, other smart phone data plans, laptop connect card plans and pay-per-use data services.

1.18 **"ITFA"** means the Internet Tax Freedom Act, 47 U.S.C. § 151 (1998) as amended.

1.19 **"MDL Actions"** means MDL No. 2147 including cases identified in the Recitals of this Agreement and all cases transferred or pending transfer to MDL No. 2147 through the Effective Date of the Final Order.

1.20 **"Net Settlement Fund"** means the amount remaining in the Settlement Fund for distribution to Settlement Class Members, after payment of or reserve for escrow expenses, taxes on escrow earnings or tax-related fees and expenses, estimated taxes, Costs of Settlement Administration, all other related costs, incentive awards to Class Representatives and such attorneys' fees and litigation expenses as may be awarded by the Court.

1.21 **"Preliminary Approval Order"** shall mean the order of the Court preliminarily approving this Settlement Agreement, in substantially the same form as Exhibit J hereto.

1.22 **"Publication Notice"** which shall be in substantially the same form as Exhibit E hereto, shall mean the Court approved form of publication notice to the Settlement Class.

1.23 **"Related Actions"** means *Stephen T. Johnson, et al. v. AT&T Mobility, LLC*, Case No. 4:09-4104, now pending before the United States District Court for the Southern District of Texas; and *John Gaffigan, et al. v. AT&T Mobility, LLC,* Case No. 4:10-cv-00503-ERW, now pending before the United States District Court for the Eastern District of Missouri.

1.24 **"Settlement Administration"** shall mean the distribution of proceeds of the Settlement Fund to members of the Settlement Class and other tasks as set forth in this Agreement.

1.25 **"Settlement Administrator"** means Analysis Research Planning Corporation or such other qualified and competent entity chosen by the Class Plaintiffs and Interim Settlement Class Counsel, and authorized by the Court to distribute the Settlement Fund and to undertake other tasks as set forth in this Agreement.

1.26 **"Settlement Class"** means the class defined in paragraph 7 of this Agreement, which the Settling Parties have agreed herein to seek to have certified by the Court solely for purposes of this Settlement Agreement, and their heirs, agents, executors, administrators, successors, and assigns.

1.27 **"Settlement Class Member"** means any person falling within the definition of the Settlement Class defined in paragraph 7 herein (collectively referred to herein as "Settlement Class Members").

1.28 **"Settlement Fund"** means the monies remitted pursuant to paragraph 8 herein by AT&T Mobility or Class Plaintiffs, or otherwise remitted directly by a Taxing Jurisdiction to the Escrow Account, and any interest or other amount earned or accrued on such remittances.

1.29 **"Settling Parties"** means the Class Plaintiffs and AT&T Mobility.

1.30 **"Subsequent Action"** means any action brought in any state or federal court or arbitral proceeding advancing any claims involving or relating to AT&T Mobility's alleged charging of Internet Taxes under any theory of liability, by, or on behalf of, any member of the Settlement Class.

1.31 **"Taxing Jurisdictions"** means the state and local jurisdictions set forth on Exhibit H which include some jurisdictions that collect taxes on behalf of other taxing authorities within the same state.

1.32 **"Vendor's Compensation" "Vendor's Compensation"** shall mean any amounts specifically related to the Internet Taxes that AT&T Mobility was allowed by certain Taxing Jurisdictions in the form of a credit against taxes owing to the Taxing Jurisdiction, which is generally considered to be compensation for the vendor's collecting and remitting taxes to the Taxing Jurisdiction; provided, however that, for purposes of this Settlement Agreement, vendor's compensation shall not include amounts to which AT&T would have been entitled independent of the collection of Internet Taxes based on limitations on the amount of credit allowed pursuant to applicable law.

TERMS AND CONDITIONS OF SETTLEMENT

2. **Plaintiffs' Allegations.** The Class Plaintiffs have brought their Actions as class actions under Rule 23 of the Federal Rules of Civil Procedure or under similar state rules of civil procedure, the latter of which have been properly removed to federal court. They allege, among other things, that AT&T Mobility charged certain Internet Taxes to its customers in violation of ITFA and/or various other state statutes and common law doctrines such as breach of contract. Class Plaintiffs allege that AT&T Mobility is liable for damages to the Settlement Class.

3. **Denial of Liability.** AT&T Mobility believes that the Class Plaintiffs' factual and legal allegations in the Actions are incorrect and specifically denies all liability to the Class Plaintiffs and the Settlement Class. In the Actions, AT&T Mobility generally denies Plaintiffs' allegations and possesses a number of defenses to the claims asserted as well as defenses to certification of a class or classes including arbitration agreements, which by their terms preclude class treatment and compel each plaintiff and putative class member to submit his or her claim to arbitration on an individual basis. For purposes of settlement only, and as part of this Agreement, AT&T Mobility agrees not to assert these defenses to Class Plaintiffs' claims.

4. **Negotiations.** Settlement negotiations have taken place between Interim Settlement Class Counsel and several other Plaintiffs' counsel, on the one hand, and AT&T Mobility's counsel, on the other hand. This Settlement Agreement, subject to the approval of the Court, contains all the terms of the Settlement agreed to between AT&T Mobility and the Class Plaintiffs individually and on behalf of the Settlement Class.

5. **Benefits of Settling the Actions.** Class Plaintiffs believe that the claims asserted by them in the Actions have merit and that there is evidence to support their claims. Class Plaintiffs, however, recognize and acknowledge the expense and length of continued litigation

and legal proceedings necessary to prosecute the Actions against AT&T Mobility through trial and through any appeals. Class Plaintiffs also recognize and have taken into account the uncertain outcome and risks associated with litigation and class actions in general, and the Actions in particular, as well as the difficulties and delays inherent in any such litigation.

The Class Plaintiffs are also mindful of the potential problems of proof and the possible defenses to class certification, as well as to the remedies they seek. As a result, the Class Plaintiffs believe that the Settlement set forth in this Agreement provides substantial benefits to Settlement Class Members. The Class Plaintiffs and Interim Settlement Class Counsel have therefore determined that the Settlement, as set forth in this Agreement, is fair, reasonable, adequate and in the best interests of the Settlement Class.

6. **No Admission of Liability.** By entering into this Agreement, the Settling Parties agree that AT&T Mobility is not admitting any liability to the Class Plaintiffs, the Settlement Class, or any other person or entity, and AT&T Mobility expressly denies all such liability. AT&T Mobility's sole motivation for entering into this Settlement Agreement is to dispose expeditiously of the claims that have been asserted against it in the Actions by settlement and compromise rather than incur the expense and uncertainty of protracted litigation. No portion of this Agreement may be admitted into evidence in any action, except as required to enforce this Agreement and/or to cease or enjoin other litigation pursuant to paragraph 9 of this Agreement.

7. **Settlement Class Definition.** The Master Class Action Complaint filed in the MDL Actions seeks relief for a class of Plaintiffs described as follows, which class is agreed to for purposes of settlement only and for no other purpose:

> All persons or entities who are or were customers of AT&T Mobility and who were charged Internet Taxes on bills issued from November 1, 2005 through September 7, 2010.

Excluded from the Settlement Class are: (i) AT&T Mobility, any entity in which AT&T Mobility has a controlling interest or which has a controlling interest in AT&T Mobility, and AT&T Mobility's legal representatives, predecessors, successors and assigns; (ii) governmental entities; (iii) AT&T Mobility's officers, directors, agents and representatives; and (iv) the Court presiding over any motion to approve this Settlement Agreement.

8. **Settlement Consideration and AT&T Mobility's Obligations.** Subject to the provisions herein, and in full, complete and final Settlement of the Actions, the Settling Parties agree:

AT&T Mobility To Cease Challenged Practice

8.1 Subject to paragraph 8.2 below, and upon entry of the Preliminary Approval Order, AT&T Mobility agrees to cease charging the challenged Internet Taxes on those services set forth on Exhibit I in the Taxing Jurisdictions set forth on Exhibit H hereto as soon as practicable and no later than thirty (30) days after the date of the Preliminary Approval Order.

8.2 AT&T Mobility reserves the right to reinstate charging for Internet Taxes in the Taxing Jurisdictions set forth in Exhibit H if:

(a) The Settlement provided herein is not approved by the Court in accordance with the terms of this Agreement and does not become subject to a Final Order; or

(b) federal, state or local laws, statutes, regulations, administrative decisions or pronouncements, or the interpretation of any of the foregoing specifically requires, authorizes or permits the collection and payment of Internet Taxes on, or on the charges for, any services or products set forth on Exhibit I.

AT&T Mobility To Process And Assist In Processing Refund Claims

8.3 In those Taxing Jurisdictions, as set forth in Exhibit K hereto, in which only AT&T Mobility has standing to seek a refund of the Internet Taxes collected and paid by

AT&T Mobility, AT&T Mobility, on behalf of the Settlement Class but at AT&T Mobility's expense, shall file claims with the Taxing Jurisdictions for refunds of the Internet Taxes for the available period or periods for which refund claims may be filed under each jurisdiction's laws.

8.4 In those Taxing Jurisdictions, as set forth in Exhibit L hereto, in which AT&T Mobility and Class Plaintiffs have standing to seek a refund of the Internet Taxes collected and paid by AT&T Mobility, AT&T Mobility, on behalf of the Settlement Class but at AT&T Mobility's expense, shall file claims joined in by the Settlement Class with the Taxing Jurisdictions for refunds of the Internet Taxes for the period or periods for which refund claims may be filed under each jurisdiction's laws.

8.5 In those Taxing Jurisdictions, as set forth in Exhibit M hereto, in which only the Settlement Class Members have standing to seek a refund of the Internet Taxes collected and paid by AT&T Mobility, AT&T Mobility, on behalf of the Settlement Class but at AT&T Mobility's expense, shall prepare and provide: (i) a template for filing a claim for refund of Internet Taxes, (ii) documentation showing the aggregate Internet Taxes paid to each such jurisdiction for the period or periods for which refund claims may be filed under each jurisdiction's laws, and (iii) such other information reasonably necessary to prepare, file and process the refund claims as is requested by the Settlement Class and is available in AT&T Mobility's records, in a format determined by AT&T Mobility.

8.6 **Interest**

Where permitted by statute, AT&T Mobility and/or Class Plaintiffs will seek interest from the Taxing Jurisdictions with respect to the refund claims.

8.7 **Escrow of AT&T Mobility Payments Required By Taxing Jurisdictions**

To the extent that any Taxing Jurisdiction requires that, prior to the Taxing Jurisdiction's grant and/or payment of a claimed refund of Internet Taxes, AT&T Mobility refund those amounts to the affected customers in the Settlement Class, the Settling Parties agree that such payment shall be made by AT&T Mobility in escrow to a fund (the "Pre-Refund Escrow Fund") that is independent of the Escrow Funds and Escrow Accounts separately provided for in paragraph 8.14 of this Settlement Agreement. Such payment shall be made contemporaneously with the filing of the refund claim, if such requirement is known at such time, or within 15 days after receiving notice of such requirement by the Taxing Jurisdiction. In order to effectuate the provisions of this Settlement Agreement, each Settlement Class Member agrees that, for purposes of satisfying the requirement of any Taxing Jurisdiction, that AT&T Mobility refund taxes to the affected customers prior to granting or paying a refund claim, the payment by AT&T of an amount representing Internet Taxes paid by that Settlement Class Member into the Pre-Refund Escrow Fund will be considered the payment by AT&T of such taxes to such Settlement Class Member. Interim Settlement Class Counsel further agree to take any action reasonably necessary on behalf of the Settlement Class to satisfy a Taxing Jurisdiction that such amounts have been refunded to the affected customers in satisfaction of the Taxing Jurisdiction's requirement, in order to facilitate a refund or credit of the Internet Taxes to AT&T Mobility. Amounts paid to the Pre-Refund Escrow Fund shall be held in a mutually agreeable account maintained by a party unrelated to the Settling Parties, until the occurrence of one of the following "Pre-Refund Escrow Release Events":

(a) the Taxing Jurisdiction in question pays monies to AT&T Mobility or provides tax credits in full or partial satisfaction of the refund claims filed with the Taxing Jurisdiction, at which time AT&T Mobility shall become subject to the provisions of sections 8.10 or 8.11 with respect thereto, or

(b) a final determination has been issued, for which further appeal is either not available or not pursued, by either the Taxing Jurisdiction in question denying all or any portion of the refund claims for Internet Taxes filed with that Taxing Jurisdiction or by a court of competent jurisdiction in an action initiated to compel the Taxing Jurisdiction to act on the refund claim, which action results in no refund or credit being received by AT&T Mobility.

Upon the occurrence of a Pre-Refund Escrow Release Event, all amounts previously paid by AT&T Mobility to the Pre-Refund Escrow Fund, and any interest earned thereon, that are attributable to the refund claims filed with the particular Taxing Jurisdiction at issue shall be paid to AT&T Mobility. In the event of a disagreement that prevents the occurrence of a Pre-Refund Escrow Release Event, the Settling Parties will submit the dispute to the Court under its continuing jurisdiction pursuant to paragraph 29 hereof.

8.8 **Settlement Class' Consent to AT&T Mobility's Filing of Claims**

Each Settlement Class Member hereby consents to: (a) AT&T Mobility's filing of the claims for refund of Internet Taxes contemplated by this Settlement Agreement; (b) the payment of refunds or issuance of tax credits by the Taxing Jurisdictions to AT&T Mobility in accordance with the terms of the Settlement Agreement; and (c) the distribution of the Net Settlement Fund in accordance with paragraph 8.19. In light of AT&T Mobility's obligation to pay the refunded or credited Internet Taxes received by AT&T Mobility to the Escrow Accounts, the Settling Parties agree that AT&T Mobility has assigned and refunded to the Settlement Class

all Internet Tax refunds to be sought pursuant to the Settlement Agreement as they related to members of the Settlement Class. To the extent required by the law of any state or local jurisdiction at issue, the Settlement Class assigns AT&T Mobility all rights of the Settlement Class Members to file the refund claims for Internet Taxes contemplated by this Settlement Agreement.

8.9 **Procedures For Filing And Prosecuting Refund Claims**

The procedures for filing refund claims as set forth in the foregoing paragraphs shall be governed by the provisions and subject to the time frames set forth in the Refund Procedures Protocol attached hereto as Exhibit N. AT&T Mobility will respond to inquiries from the Taxing Jurisdictions regarding the claims for refunds. If a Taxing Jurisdiction notifies AT&T Mobility of its denial, in whole or in part, of a refund claim, AT&T Mobility will promptly notify Interim Settlement Class Counsel. Interim Settlement Class Counsel shall notify AT&T Mobility as to whether the Settlement Class wants to appeal or otherwise contest the adverse ruling or decision of the Taxing Jurisdiction on the refund claim. If Interim Settlement Class Counsel determines to appeal the adverse ruling or decision of the Taxing Jurisdiction, AT&T Mobility shall cooperate in the appeal. AT&T Mobility and Interim Settlement Class Counsel shall select independent counsel to prosecute the appeal. Independent counsel shall work at the direction of Interim Settlement Class Counsel. AT&T Mobility shall have the right to review and comment on any filings or positions taken with the Taxing Jurisdiction and the right to prohibit the assertion of any positions in such filings that are made in the name of AT&T Mobility and deemed by AT&T Mobility to be inconsistent with the facts, contrary to law, or damaging to AT&T Mobility. Any fees and expenses payable to the independent counsel shall be paid from any funds generated as a result of the appeal or, if the appeal is unsuccessful, by

Interim Settlement Class Counsel. If the Settling Parties disagree on any aspect on the prosecution of an appeal, they will submit the dispute to the Court under its continuing jurisdiction pursuant to paragraph 29 hereof. Notwithstanding the foregoing, AT&T Mobility shall retain the right but not the obligation to appeal, otherwise contest, or further prosecute an appeal of any adverse ruling or decision in the event that Settlement Class Counsel declines to do so for any reason.

8.10 **AT&T Mobility's Assignment Of Refunds**

With respect to those refund claims filed in the name of AT&T Mobility, to the extent that the Taxing Jurisdiction grants AT&T Mobility a refund, AT&T Mobility shall assign all of its rights, title and interest in the refund related to the members of the Settlement Class, subject to any claims or conditions that may be imposed on such refund by the Taxing Jurisdiction. In accordance with this assignment, AT&T Mobility shall seek to have the refunded monies paid directly to the Escrow Accounts by the Taxing Jurisdictions. All monies that are nonetheless received by AT&T Mobility relating to the refund claims filed with the Taxing Jurisdictions that relate to members of the Settlement Class shall be transferred by AT&T Mobility to the Escrow Accounts established at the Depository Bank within seven (7) business days of receipt. The monies transferred by AT&T Mobility to the Escrow Accounts for refunds from a Taxing Jurisdiction shall be segregated by the Escrow Agent pursuant to the Escrow Agreement into separate accounts, each designated as originating from the specific jurisdiction for which the monies in question were received and each for the benefit of those Settlement Class Members who remitted Internet Taxes to AT&T Mobility for payment to such Taxing Jurisdiction making the refund.

8.11 **Payments By AT&T Mobility Relating To Tax Credits**

To the extent a Taxing Jurisdiction issues future tax credits to AT&T Mobility in lieu of a refund of monies sought on a refund claim for Internet Taxes, AT&T Mobility shall remit monies in the amount of the credit as they relate to members of the Settlement Class to the Escrow Accounts established at the Depository Bank as quickly as possible but within fourteen (14) business days of receipt of notification of the future tax credits as follows:

(a) If, in the judgment of AT&T Mobility, the use of the future tax credit will be spread over a three (3) year period or less, AT&T Mobility shall remit monies to the Escrow Accounts equal to the total future tax credits as they related to members of the Settlement Class; or

(b) If, in the judgment of AT&T Mobility, the use of the future tax credit will be spread over a period longer than three (3) years, AT&T Mobility shall remit monies to the Escrow Accounts equal to the net present value of such future tax credits as they relate to members of the Settlement Class for the fourth and succeeding years using a 5% discount rate to compute the net present value. The amount of the first three (3) years shall be paid with no discount.

The monies paid by AT&T to the Escrow Accounts as a result of credits issued by a tax jurisdiction in lieu of a refund shall be segregated by the Escrow Agent pursuant to the Escrow Agreement into separate accounts, each designated as originating from the specific jurisdiction issuing the future tax credits in question and each for the benefit of those Settlement Class Members who remitted taxes to AT&T Mobility for payment to such Taxing Jurisdiction issuing the credit.

8.12 **Refunds On Claims Filed By Class Plaintiffs**

With respect to those refund claims filed by Class Plaintiffs on behalf of certain members of the Settlement Class, Class Plaintiffs and Interim Settlement Class Counsel shall direct the Taxing Jurisdiction to pay all monies received on any refund claim which relates to members of the Settlement Class to the Escrow Accounts established at the Depository Bank.

The monies received by Class Plaintiffs and Interim Settlement Class Counsel and paid to the Escrow Accounts and monies that are paid directly to the Escrow Accounts by a Taxing Jurisdiction as a result of a refund of Internet Taxes granted by a Taxing Jurisdiction shall be segregated by the Escrow Agent pursuant to the Escrow Agreement into separate accounts, each designated as originated from the specific jurisdiction from which monies in question were received and each for the benefits of those Settlement Class Members who remitted taxes to AT&T Mobility for payment to such Taxing Jurisdiction making the refund.

8.13 **AT&T Mobility's Payment Of Vendor's Compensation**

Except to the extent a Taxing Jurisdiction's refund on a claim filed by Class Plaintiffs under paragraph 8.12 includes some or all of the Vendor's Compensation related to the Internet Taxes paid to such Taxing Jurisdiction, AT&T Mobility shall remit the Vendor's Compensation collected from Settlement Class Members to the Escrow Accounts established at the Depository Bank within seven (7) business days of receipt of the final disposition of the refund request for each Taxing Jurisdiction. The monies paid by AT&T Mobility to the Escrow Accounts shall be segregated by the Escrow Agent pursuant to the Escrow Agreement into separate accounts, each designated as originating from the specific jurisdiction authorizing the

Vendor's Compensation and each for the benefit of those Settlement Class Members who were charged Internet Taxes from which the Vendor's Compensation at issue was deducted.

8.14 **Escrow Agreement**

The Escrow Accounts shall be established at the Depository Bank and administered by the Escrow Agent under the Court's continuing supervision and control pursuant to the Escrow Agreement executed by the Escrow Agent and Settling Parties

8.15 **Jurisdiction Of Court**

All Settlement Funds transmitted to and held by the Escrow Agent as required by this Agreement shall be deemed and considered to be in custodia legis of the Court, and shall remain subject to the exclusive jurisdiction of the Court, until such time as the Settlement Fund has been completely distributed pursuant to the terms of this Agreement, and/or any further order(s) of the Court.

8.16 **Settlement Fund Tax Status**

Settling Parties agree to treat the Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1 (or any successor regulation). In addition, the Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1) (or any successor regulation) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

8.17 **Tax Returns**

For the purpose of Treas. Reg. § 1.468B (or any successor regulation) of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Escrow Agent. The Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including, without limitation, the returns described in Treas. Reg. § 1.468B-2(k)) (or any successor regulation). Such returns (as well as the election described in paragraph 8.16 above) shall be consistent with this subparagraph and in all events shall reflect that all taxes (including any estimated taxes, interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in paragraph 8.18 hereof.

8.18 **Tax Payments**

All (a) taxes (including any estimated taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed upon AT&T Mobility with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for federal or state income tax purposes, and (b) expenses and costs incurred in connection with the operation and implementation of this paragraph (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in paragraph 8.17) shall be paid out of the Settlement Fund. In no event shall AT&T Mobility have any responsibility for or liability with respect to the taxes or tax related expenses. The Escrow Agent shall indemnify and hold AT&T Mobility harmless for taxes and tax related expenses (including, without limitation, taxes payable by reason of any such indemnification). Further, taxes and tax related expenses shall be treated

as, and considered to be, a cost of administration of the Settlement fund and shall be timely paid by the Escrow Agent out of the Settlement Fund without prior order from the Court, and the Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution any funds necessary to pay such amounts, including the establishment of adequate reserves for any taxes and tax related expenses (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468.B-2(1)(2)) (or any successor regulation). AT&T Mobility is not responsible therefore nor shall it have any liability with respect thereto. The Settling Parties hereto agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this paragraph.

8.19 **Distribution Of Net Settlement Fund**

The Net Settlement Fund shall be distributed to Settlement Class Members in accordance with the procedures set forth in the Plan of Distribution attached hereto as Exhibit O.

9. **Cessation of Litigation Activity.** Immediately upon execution of this Agreement, Class Plaintiffs, Interim Settlement Class Counsel, and AT&T Mobility agree to cease all litigation activity in the MDL Actions (other than any activity to implement this Settlement Agreement), and to request the Court to stay all motions or other pre-trial matters and to continue any hearing or trial settings until each of the conditions precedent to the Settling Parties' obligations to proceed to consummate the settlement provided for herein has been satisfied or waived.

10. **Class Certification for Settlement Purposes Only.** If the settlement provided for herein is not approved by the Court in complete accordance with the terms of this Agreement

and does not become subject to a Final Order following preliminary approval, no class will be deemed certified by or as a result of this Agreement, and any order certifying a settlement class will be void for all purposes. In such event, AT&T Mobility will not be deemed to have consented to certification of any class.

11. **Class Notification.** For purposes of Court-approved class notices and establishing that the best practicable notice has been given, membership in the Settlement Class shall be determined exclusively from the records of AT&T Mobility.

12. **Application for Attorneys' Fees, Expenses and Class Representative Compensation.** Interim Settlement Class Counsel agree that they will seek an order approving attorneys' fees that will reflect the results obtained and the work and effort required finally to obtain recoveries for the Settlement Class, and will seek such recovery from the funds obtained for the Settlement Class. Interim Settlement Class Counsel agree that they will seek a fee no greater than the lesser of ten percent (10%) of the aggregate value of the settlement or twenty-five percent (25%) of the amounts refunded by Taxing Jurisdictions to the Settlement Class. Interim Settlement Class Counsel will also seek reimbursement for their reasonable out-of-pocket expenses incurred in pursuing this litigation on behalf of the Settlement Class from funds obtained for the Settlement Class under this Settlement Agreement. Finally, Interim Settlement Class Counsel will seek compensation to the Class Representatives in an amount not to exceed $5,000 for each state-specific subclass representative from the funds obtained for the Settlement Class.

13. **Dismissal.** Upon the final approval of this Agreement by the Court, Class Plaintiffs and Interim Settlement Class Counsel shall move to dismiss the Actions. Class Plaintiffs and Interim Settlement Class Counsel will seek dismissal without prejudice for the

limited purpose of allowing the Court to retain jurisdiction to enforce the terms of the Agreement. The Settling Parties stipulate that the dismissal will be treated for all purposes as a dismissal with prejudice, except when an enforcement action is pending.

14. **Release of AT&T Mobility.** Subject to and effective upon entry of a Final Order, Class Plaintiffs on their own behalf and on behalf of all Settlement Class Members who do not opt out of the Settlement Class, for and in consideration of the terms and undertakings herein, the sufficiency and fairness of which are acknowledged, hereby release and forever discharge AT&T Mobility (as defined in paragraph 1.2) from any and all claims, demands, debts, liabilities, actions, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, direct or indirect, contingent or fixed, that were or could have been asserted or sought in the Actions, relating in any way or arising out of (a) AT&T Mobility's charging of the Internet Taxes (as defined in paragraph 1.17) and (b) any and all claims that were asserted or could have been asserted by the Settlement Class in the Actions with respect to AT&T Mobility's charging of taxes, fees or surcharges on internet access allegedly in violation of ITFA, state and local laws.

"Unknown" claims as released herein means any and all claims that any member of the Settlement Class does not know to exist against AT&T Mobility which, if known, might have affected his or her decision to enter into or to be bound by the terms of this Settlement. The Class Plaintiffs and the members of the Settlement Class acknowledge that they may hereafter discover facts in addition to or different from those that they now know or believe to be true concerning the subject matter of this release, but nevertheless fully, finally, and forever settle and release any and all claims, known or unknown, derivative or direct, suspected or unsuspected, accrued or unaccrued, asserted or unasserted, in law or equity, including, without limitation,

claims that have been asserted or could have been asserted in the Actions against AT&T Mobility with respect to AT&T Mobility's charging of taxes, fees or surcharges on internet access allegedly in violation of ITFA, state and local laws, that they now have, ever had, or may have had as of the date the Final Order becomes final. The foregoing waiver includes, without limitation, an express waiver to the fullest extent permitted by law, by the Class Plaintiffs and the Settlement Class Members of any and all rights under California Civil Code § 1542 or any similar law of any other state or of the United States, which provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MIGHT HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

The Settling Parties acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Order to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

15. **Administration and Cost of Settlement.** AT&T Mobility will bear the responsibility for implementing the Class Notice and for paying the costs of mailing, publication, and printing the notices detailed in paragraph 16 hereof to be given to the Settlement Class pursuant to this Agreement.

The Settlement Administrator shall establish a website with the particulars of the Settlement. The Settlement Administrator also shall establish an automated 1-800 number for Settlement Class Members to obtain further information on the Settlement. The Settlement Administrator shall distribute the Net Settlement Fund to the Settlement Class Members. AT&T Mobility, at its expense, shall provide to the Settlement Administrator a database from its records

of the names and addresses of the Settlement Class Members, including the total amount of Internet Taxes actually paid by each Settlement Class Member with respect to each of the Taxing Jurisdictions for which a refund claim was filed pursuant to this Settlement Agreement. The Costs of Administration shall be paid from the Settlement Fund prior to distribution of the Net Settlement Fund.

16. **Form of Notice to Settlement Class Members.** Class Plaintiffs and AT&T Mobility agree that, if the Court authorizes Class Notice to be disseminated to the Settlement Class Members as provided for in this Agreement, AT&T Mobility will issue a bill message and text message in the forms of Exhibits B and C attached hereto to each Settlement Class Member who is a Current Customer at the time notice is disseminated as identified from AT&T Mobility's records. Any Settlement Class Members who request a long-form notice will receive the document attached hereto as Exhibit D. It is agreed, subject to approval of the Court, that there shall be a single issuance of notice to the Current Customers in the Settlement Class.

In addition to mailing, it is agreed, subject to approval of the Court, that AT&T Mobility will provide for the publication of the Publication Notice twice in the *USA Today*. The form of the Publication Notice is contained in Exhibit E attached hereto. To the extent AT&T Mobility has e-mail addresses of Former Customers, AT&T Mobility will provide Notice in the form of Exhibit E by e-mail to such Former Customers. AT&T Mobility shall use the last known e-mail address of the Former Customers. With respect to those Former Customers who AT&T Mobility does not have e-mail addresses, AT&T Mobility agrees, subject to approval of the Court, to serve a postcard notice in substantially the form attached hereto as Exhibit F to the last known address of such Former Customers as reflected in AT&T Mobility's records.

It is stipulated and agreed that the foregoing terms with respect to the Class Notice are material conditions precedent to AT&T Mobility's obligations under this Agreement. If the extent of Class Notice provided for in this Agreement is not approved by the Court in all material respects, it is understood that AT&T Mobility will not be obligated to proceed with the settlement provided for herein.

17. **Receipt of Requests for Exclusion.** Interim Settlement Class Counsel shall be responsible for obtaining a United States Post Office Box, for the purpose of receiving requests for exclusion that are submitted in accordance with Class Notice. Interim Settlement Class Counsel shall also be responsible for promptly giving notice of the receipt of any such requests for exclusion by providing complete copies thereof to counsel for AT&T Mobility.

18. **Court Submission.** Interim Settlement Class Counsel and AT&T Mobility's counsel will submit this Agreement and the exhibits hereto, along with such other supporting papers as may be appropriate, to the Court for preliminary approval of this Agreement pursuant to Rule 23 of the Federal Rules of Civil Procedure. If the Court declines to grant preliminary approval of this Settlement Agreement and to order notice of hearing with respect to the proposed Settlement Class, or if the Court declines to grant final approval to the foregoing after such notice and hearing, this Agreement will terminate as soon as the Court enters an order unconditionally and finally adjudicating that this Settlement Agreement will not be approved.

19. **Final Judgment.** The Settling Parties agree that the settlement provided herein is expressly conditioned upon dismissal with prejudice of the Actions and, upon final distribution of the Net Settlement Fund, entry of a Final Order dismissing the Actions with prejudice.

20. **AT&T Mobility's Right to Set Aside Settlement.** AT&T Mobility shall have the right to set aside or rescind this Agreement, in the good faith exercise of its discretion, if any of the following events occur.

20.1 Opt-Outs. Opt-outs from Settlement Class Members represent more than five percent (5%) of the dollar amount of the Internet Taxes;

20.2 Objection(s) to Settlement Sustained. If any objections to the proposed settlement are sustained;

20.3 Modification(s) by the Court. If there are any material modifications to this Agreement, including exhibits, by the Court, by any other court, or by any tribunal, agency, entity, or person.

20.4 The Settling Parties agree that pursuant to settled law and under this Agreement, no Settlement Class Member possesses the right to opt-out a class of others from the Settlement. If the Court nevertheless affords this right to any Settlement Class Member, AT&T Mobility shall have the right to set aside or rescind this Agreement.

In the event AT&T Mobility exercises its discretion to set aside the Settlement, this Agreement and all negotiations, proceedings, documents prepared, and statements made in connection herewith shall be without prejudice to the Settling Parties, shall not be deemed or construed to be an admission or confession by the Settling Parties of any fact, matter, or proposition of law, and shall not be used in any manner for any purpose, and all parties to the Actions shall stand in the same position as if this Agreement had not been negotiated, made, or filed with the Court. In such event, the parties to the Actions shall move the Court to vacate any and all orders entered by the Court pursuant to the provisions of this Agreement.

21. **Integration Clause.** This Settlement Agreement contains a full, complete, and integrated statement of each and every term and provision agreed to by and among the Settling Parties and supersedes any prior writings or agreements (written or oral) between or among the Settling Parties, which prior agreements may no longer be relied upon for any purpose. This Settlement Agreement shall not be orally modified in any respect and can be modified only by the written agreement of the Settling Parties supported by acknowledged written consideration. In the event a dispute arises between the Settling Parties over the meaning or intent of this Agreement, the Settling Parties agree that prior drafts, notes, memoranda, discussions or any other oral communications or documents regarding the negotiations, meaning or intent of this Agreement shall not be offered or admitted into evidence. Class Plaintiffs and Interim Settlement Class Counsel acknowledge that, in entering into this Settlement Agreement, they have not relied upon any representations, statements, actions, or inaction by AT&T Mobility or its counsel that are not expressly set forth herein.

22. **Headings.** Headings contained in this Agreement are for convenience of reference only and are not intended to alter or vary the construction and meaning of this Agreement.

23. **Governing Law.** To the extent not governed by the Federal Rules of Civil Procedure, the contractual terms of this Agreement shall be interpreted and enforced in accordance with the substantive law of the State of Georgia.

24. **Mutual Interpretation.** The Settling Parties agree and stipulate that this Agreement was negotiated on an "arms-length" basis between parties of equal bargaining power. Also, the Agreement has been drafted jointly by Interim Settlement Class Counsel and counsel

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Plaintiffs John E. Borst, Brooke G. Mayo, William Taylor, Teresa St. Clair and The Class of Similarly Situated Individuals and Businesses

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN LUIS OBISPO - Paso Robles Branch

JOHN E. BORST, BROOKE G. MAYO, WILLIAM TAYLOR, TERESA ST. CLAIR and THE CLASS OF SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES

Plaintiffs,

vs.

THE CITY OF El PASO DE ROBLES, and DOES 1-1000 inclusive,

Defendants.

Case No.: CV 09-8117

FIRST AMENDED INDIVIDUAL AND CLASS ACTION COMPLAINT AGAINST THE CITY OF EL PASO DE ROBLES FOR:

1. VIOLATION OF CALIFORNIA CONSTITUTION ARTICLES XIII C and D [Commonly known as Proposition 218],

~~**2. WRIT OF MANDATE and APPLICATION OF STAY OF COLLECTIONS OF FEES IMPOSED WITHOUT PUBLIC VOTE AND PUBLIC HEARINGS REQUIRED BY LAW**~~

~~**3. FOR CONVERSION AND MONEY HAD AND RECEIVED (COMMON COUNTS);**~~

4. DECLARATORY RELIEF/INJUNCTIVE RELIEF [Code of Civil Procedure Sections 1085 et.seq., and 1060 et. seq.]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

COME NOW, plaintiffs, JOHN E. BORST, BROOKE G. MAYO, WILLIAM

TAYLOR, and TERESA ST. CLAIR [hereinafter "the Representative Plaintiffs" or the "named Plaintiffs"], for themselves and on behalf of all other similarly situated individuals and businesses who pay or paid water fees and sewer fees to the City of El Paso de Robles from the enactment of City Ordinance 882 and its predecessor (regarding water fees/charges) and City Ordinance 875 and its predecessor, Ordinance 841, (regarding sewer fees/charges), Paso Robles City Code chapters 14.04.020 and 14.16.020, for causes of action against Defendants, and each of them.

The Representative Plaintiffs and/or the legal representatives for JOHN E. BORST, BROOKE G. MAYO, WILLIAM TAYLOR, and TERESA ST. CLAIR and all similarly situated payers of the Utility taxes/fees/charges imposed by Paso Robles City Code sections 14.04.020 and 14.16.020 allege the following based upon the belief in the truth of these allegations and the expectation that, after further investigation and discovery, the following allegations and facts will have evidentiary support:

PRELIMINARY STATEMENT

1. This action is brought as a Class Action to recover as damages tax and fee refunds and the disgorgement of all of the illegally collected moneys imposed, assessed and collected pursuant to Paso Robles City Code sections 14.04.020 and 14.16.020 that have been and are being collected by the Defendants in violation of California Constitution Articles XIII C and D ["Proposition 218" or "Prop 218"].

2. As provided below, this action also seeks Declaratory Relief seeking a Court order to determine and state the rights/duties of the parties and to stop the collection of these Utility Taxes based upon the Defendants' failure to satisfy the administrative, procedural and legislative requirements of Proposition 218 prior to the enactment of the laws [i.e. Paso Robles City Code sections 14.04.020 and 14.16.020] imposing the subject Taxes.

3. The failure of the defendant City of El Paso de Robles [hereinafter "Paso Robles" or the "City" or "Defendant"] to obtain voter approval for the enactment of these

taxes and the failure to hold the proper public hearings and to provide the citizens their State Constitutional participatory rights concerning these taxes and tax increases, was wrongful.

4. This action seeks Declaratory Relief, including expedited trial setting as provided by Code of Civil Procedure sections 1060 et seq,. The Declaratory Relief that is sought herein is as follows: (1) for a Declaration that the subject fees imposed by City Ordinances 14.16.020 and 14.04.020 and that were and are assessed and collected by the defendants, violated State Law, the State Constitution, and are illegal taxes, (2) for a Court Declaration that the subject Taxes violate Proposition 218, California Constitution, Articles XIII C and/or D, (3) for a Court Declaration that the City of El Paso De Robles cease and desist the assessment and collection Taxes collected pursuant to Paso Robles City Code sections 14.16.020 and 14.04.020, (4) for a Refund of all of these illegally collected Taxes, with interest, (5) for Attorney Fees as authorized by Code of Civil Procedure section 1021.5, and (6) for all other relief as authorized by law.

CLASS ACTION ALLEGATIONS

5. The lead plaintiffs, JOHN E. BORST, BROOKE G. MAYO, WILLIAM TAYLOR, and TERESA ST. CLAIR (hereinafter the "representative plaintiffs" or "lead plaintiffs") are residents of the City of El Paso De Robles in the State of California.

6. Any reference in this First Amended Complaint to "the Taxes", "the *unlawful Taxes*", *the "Assessments"*, *the "Tax"*, *"the Water and Sewer Fees"*, *the "illegal* Utility User Taxes", the "Utility User Taxes", the "Utility Taxes", the "Charges", the "Fees", the "subject Fees", the "subject "Taxes" or the "Illegal Taxes" shall refer to the Taxes imposed, assessed and collected from the class members by the City of El Paso De Robles pursuant to Paso Robles City Code Sections 14.16.020 and 14.04.020 as alleged in this Complaint. These terms shall refer collectively to both the water and sewer "charges" that have been collected from the Class members by the City of El Paso de Robles beginning in 2002 and continuing as alleged in more detail herein.

7. The representative plaintiffs and all of the class members had and/or have water and/or sewer services which are subject to billing by the City. Each representative plaintiff and each class member has actually paid the Tax.

8. The representative plaintiffs and all other similarly situated individuals and businesses seek various remedies concerning the City's Taxes and Tax increases that were imposed beginning March 1, 2002 by Ordinance No. 841 N.S. and beginning on or about July 2004 as imposed by Ordinance No. 875 §2, 2004 (Chapter 14.16, section 14.16.020 of the Paso Robles City Code) and the Tax increases that were imposed by Ordinance 882 N.S. §1. 2004 (Chapter 14.04, section 14.04.020 of the Paso Robles City Code) and its predecessor.

9. Plaintiffs JOHN E. BORST, BROOKE G. MAYO, WILLIAM TAYLOR, and TERESA ST. CLAIR bring this action on their own behalf and on behalf of any other payers (whether business or individual) of the Illegal Taxes imposed by Paso Robles City Code sections 14.16.020 and 14.04.020 [hereinafter these taxpayers are referred to as "the Taxpayers", the "Class", or "the Class of Taxpayers"]. The Class consists of the following individuals and businesses:

> All individuals and businesses who, since January 1, 2002, pay or paid the "taxes", "charges" or "fees" imposed by the City of El Paso De Robles pursuant each version of Paso Robles City Code Sections 14.16.020 and 14.04.020.

10. The Class of Taxpayers is alleged to include thousands of residents of the City of Paso Robles and businesses that are located in the City of Paso Robles.

11. Unless otherwise clearly delineated, reference to the phrase "at all times mentioned herein" shall include and refer to the occurrence of the events and facts, including but not limited to, the Taxes described herein that were imposed by the City of El Paso De Robles pursuant to Paso Robles City Code Sections 14.16.020 and *14.04.020 against the class member as alleged in this complaint.*

12. The "charges" that were imposed or increased by the City by Paso Robles City Code sections 14.16.020 and 14.04.020 since January of 2002 (1) are Utility Users

Taxes and are not water or sewer charges and (2) were enacted by the City without the City's compliance with the requirements of Proposition 218. For purposes of these Taxes, the requirements of Proposition 218 include voter approval.

13. The determination as to whether a "charge" is a tax or is not a tax must be analyzed pursuant to the provisions Proper 218 (Article XIII D, section 6b of the State Constitution) which provides that these charges ***shall not*** be extended, imposed or increased unless ***all*** of the following 5 requirements are satisfied:

a. Revenues derived **shall not** exceed the funds required to provide the property related service;

b. Revenues derived **shall not** be used for any purpose other than that for which the fee or charge was imposed;

c. The amount of a fee/charge/tax imposed upon any parcel or person as an incident of property ownership **shall not** exceed the proportional cost of the service attributable to the parcel;

d. No fee or charge may be imposed for a service **unless** that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or ***future use of a service are not permitted***; and

e. No fee or charge may be imposed for **general governmental services** including, but not limited to, police, fire, ambulance or library services, where *the service is available to the public at large in substantially the same manner as it is to* property owners.

14. Based upon the law, including but not limited to Proposition 218, the subject taxes are Utility Users Taxes and are not water or sewer charges or fees as those terms are used for purposes of Proposition 218 and Health and Safety sections 5470 et.seq (i.e. California Health and Safety Code, Division 5. Sanitation, Part 3. Community Facilities, Chapter 6. General Provisions with Respect to Sewers, Article 4. Sanitation and Sewerage Systems). Therefore, the factual predicate that must exist

and be established to trigger the use of Revenue and Taxation Code sections 5097 and/or 5140 for purposes of the claim procedures applicable to this action are not and cannot be met.

15. Additionally, it is alleged that water and sewer charges that are imposed to pay for the water and/or sewer services that have been provided (as opposed to the collection of taxes for future projects), Proposition 218 precludes enactment and assessment of new fees or fee increases until after (a) the mailing of legal notice to each affected property owner, (b) public hearing no sooner than 45 days after the mailing of the notice, (c) the opportunity of those who are to be charged the new fees to file protests, and (d) total objectors being less than 50% of those who are to be assessed the new or increased fees.

16. The illegal Taxes that were and are imposed by the Defendant and have been assessed and collected by the City pursuant to Paso Robles City Code sections 14.16.020 and 14.04.020 were first enacted in or about 2002.

17. To be explicit, this lawsuit is about Utility Taxes assessed by the defendant with the taxpayer's water and sewer bills. These taxes are, in fact, Utility Users Taxes rather than water and/or sewer charges.

18. Because these Taxes are UUTs, the claims procedures/issues and the right to class action status are not provided by Revenue and Taxation Code sections 5097 and 5140 or Health and Safety sections 5471 or 5472. The subject claim procedures for these type of taxes are created by the Government Claims Act. See, Los Angeles County v. Superior Court (2008) 159 Cal.App.4th 353.

19. The City's so-called Water and Sewer "charges" were imposed and collected by the City after the voters of the State passed Proposition 218 in 1996 which precluded any new (1) local taxes, assessments or fees, including water fees, sewer fees, (2) general taxes imposed to raise funds for the City's General Fund or (3) special taxes imposed to raise funds for specific projects, such as for the construction of new

water delivery systems and water or sewer treatment systems, UNLESS the taxes, fees or assessments are enacted ***after full*** compliance with all of the Proposition 218 requirements.

20. Utility User Taxes must be enacted in compliance with Proposition 218. See e.g., Howard Jarvis Taxpayer Association v. City of La Habra (2001) 25 Cal.4th 809 and Howard Jarvis Taxpayers Association v. City of Roseville (2003) 106 Cal.App.4th 1178..

21. The increases to the City's Water and Sewer Charges were enacted by the Defendant for the stated purposes, not to pay the costs for the water and sewer services that were consumed by the taxpayers, but as a revenue enhancement device to raise money for the future construction of water delivery systems, treatment system and sewer infrastructure improvements. Of course, the uses of these monies for the proposed purposes is not guaranteed and it will not be know with any certainty how the funds will be used until they are actually spent by the City.

22. However, as these Taxes were not charged to pay for services that were consumed by the taxpayers and as the Illegal Taxes were imposed, raised, assessed and collected for the stated purpose of being a revenue enhancement device for the future construction of water and sewer delivery and treatment systems, which have no relationship to the present costs of City water and sewer usage/consumption, the items which are identified on the bills as "Charges"[1] are neither "assessments" nor "fees" as those terms are used in Proposition 218 but are, in fact, Taxes for which voter approval is required.

23. The representative plaintiffs and the class members will not and do not

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[1]As used throughout this First Amended Complaint, whether they are called "fees", "taxes", "charges" or "assessments" by the City or by anyone else, the "charges" imposed by the City by the enactments of Paso Robles City Code sections 14.04.020 and 14.16.020 cannot be collected without the voter approval requirements imposed by Proposition 218.

receive any "privilege" or "special benefit" from the project(s) that the City has contended are to be or may be financed by these Taxes and Tax increases. In fact, as has been expressed by the City and its representatives, the water systems that presently exist exceed the water needs of the Class. Any incremental benefit to the class members for the potential, future construction is, at best, incidental to the class members. Further, it is specifically alleged herein that the benefits to be derived from the future capital project(s) that the City contends will be funded by these Utility Taxes are actually intended to provide water and sewer services, not for the class members, but for future developments, construction and/or agriculture. To repeat, the proposed project will not provide special benefits for the present property owners and businesses.

24. The City identifies the subject taxes on the billing statements as "charges". This may be intended, in part, to try to avoid the Proposition 218 requirements or to avoid the analysis of the class action procedures based upon a consideration of the issues for a Utility Tax.

25. "The argument in favor of Proposition 218 stated: "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees'. . . . [¶] . . . [¶] Proposition 218 will significantly tighten the kind of benefit assessments that can be levied." (Ballot Pamphlet, Gen. Elec., *supra*, Argument in Favor of Prop. 218, p. 76.) It also declared that "Proposition 218 simply give taxpayers the right to vote on taxes and stops politicians' end-runs around Proposition 13." (Ballot Pamp., Gen. Elec., *supra*, rebuttal to argument against Prop. 218, p. 77.)" Silicon Valley Taxpayers Assn at fn5.

26. It is anticipated that during this litigation the Defendant City will contend that the class members may receive a "special benefit" from the project(s) that are *presently intended to be funded by the enactment and collection of these Taxes.*

27. It is further anticipated that the Defendant will contend that if a "special benefit" may be received by the taxpayers that its use of the term "charges" is sufficient

to avoid consideration of the class action claim procedures and issues under a Utility Users Tax analysis. However, at best, the benefits to the taxpayers from the proposed future construction will be at most nominal benefits. The project(s) that the City contends will be constructed based upon the use of the funds raised by these Taxes were initially described by the City as being for the intended benefits for ***future development*** and/or large landowners who may come to the area to establish housing tracts, vineyards or other farm, ranch, agricultural or business uses.

28. The subject Taxes are being imposed, assessed and collected by the City broadly from the citizens and businesses, to be used for what has been stated as a particular or specific purpose, i.e. for the future construction for water delivery systems and treatment systems as well as wastewater collection and treatment infrastructure improvements. Such systems will not be limited to and for the use by or benefit of the class members, but are intended by the Defendants primarily to provide broad based "benefits" for future persons, for the County generally, and for new developments and new businesses both within and beyond the City limits of Paso Robles.

29. The lack of a special benefit to the particular land, persons and businesses who have been assessed the Utility User Taxes precludes defining these section 14.04.020 and 14.16.020 "charges" as "fees", "property related fees" or "assessments". As such, these Taxes are, as a matter of law and as provided by Proposition 218, Special Taxes for which the voter approval of the Tax was required under Article XIII C before enactment, assessment or collection are allowed.

30. Further, these Taxes are not "property related fees" under terms of Proposition 218, because such "fees" require that the services for which the fees are assessed must be, among other things, immediately available to the property owner. These Utility User Taxes, according to the written and oral statements by the City and its officers and Council members, are revenue enhancement devices (i.e. taxes) that

are intended to be used for the future construction of County wide projects, and are not for the present water or sewer services for the City's citizenry.

31. As the water and sewer services and systems that are allegedly, but not certainly, to be created from the use of these Utility User Taxes are not needed by or for the Class members, the construction of the water delivery and treatment systems funded by the Illegal Taxes are intended to provide future water supplies both in the City *and county wide* for future development and future property owners for agricultural uses, including vineyards, and for office buildings and for homes that do not presently exist. These projects and developments are for "anticipated" growth and not for the Class Members whose needs (both present and reasonably calculated future needs) are completely met by the present systems and ground water sources.

32. These Utility User Taxes were enacted and are being imposed by the defendants for the alleged purpose of providing water and sewer systems for a significantly greater population and agricultural community than presently exists in the City. These Taxes are being imposed upon the present business community and residents, not for their benefit, but based upon potential demands, requests, needs, requirements, and hopes of the developers and raw land owners who desire to protect or increase their incomes, assets, and wealth. The planned increase in the wealth and income of the land owners and developers is being created through the construction of water and treatment systems that are being paid for by the Illegal Taxes imposed upon the present citizenry and present business community. This added tax burden and the stated governmental use of these tax dollars can only be authorized, pursuant to Proposition 218, by a voter approval of these broad revenue creating Taxes.

33. Importantly, the ***future*** use of the subject illegal Utility Taxes is uncertain. In other words, these taxes, which (as provided in more detail below) are to be deposited into the City's general funds (and earmarked for a stated purpose) ***may***

never be used for the stated purpose. Because the Taxes are not to pay for the consumption of water and sewer services by the class members, because the time frame for which the moneys are to be utilized is so great, and because needs, goals and political promises change with election cycles, droughts, development, community growth, etc., any present contention by the City that the money is a water charge, ***because it will be used*** to fund improvements, development or construction of water or sewer systems, is presently unprovable speculation.

34. The subject illegal Taxes are not "charges", "fees", "tolls", "rentals", "rates", or "other charges" as those terms are used in Article 4, section 5471 or 5472 of the Health and Safety Code and were enacted and are collected by Defendant Paso Robles in violation of Proposition 218. These Taxes have not received voter approval.

35. The named representative plaintiffs and all class members have paid and continue to pay these Illegal Taxes as a part of the billings by the Defendant for water and sewer services. In fact, as proof that the matters are taxes, Chapters 14.04 and 14.16 of the Paso Robles City Code includes penalties that are to be assessed upon the class members for any failure to pay the illegal Taxes and Tax increases. For example, See, Paso Robles City Code sections 14.040.170, 14.16.050 and 14.16.100.

36. Defendant The City of El Paso de Robles has not repaid or reimbursed the representative Plaintiffs or any of the class members for the wrongful collection of the unauthorized, illegal Taxes that have been assessed and collected pursuant to Paso Robles City Code sections 14.16.020 and 14.04.020.

37. The representative plaintiffs bring this action for declaratory relief and for reimbursement/disgorgement of the Illegal Taxes that were, and continue to be, illegally and wrongfully imposed, assessed and collected by the City.

38. The Class of "taxpayers" is so numerous that joinder of each taxpayer/class member is very impracticable. It is believed that there are thousands of

Taxpayer Class members and that each taxpayer's actual monetary damages are likely to be less than $10,000.00 to date. Because the amounts involved for each taxpayer/taxpayer are small, but the number of persons damaged by the Defendant is very large, this case is particularly suited to be a class action.

39. There are common questions of law and fact amongst and between the entire group of Class members. These common questions of law and fact include those related to the legality of the Utility User Taxes imposed by the City of Paso Robles pursuant to Paso Robles City Code Sections 14.16.020 and 14.04.020. The common questions of law and fact predominate over legal or factual questions, if any, that affect, or may affect, the individual class members.

40. The claims of the named representative plaintiffs are typical of the claims of all of the Class members. The named representative plaintiffs will fairly and adequately protect the interests of all of the Class members and will properly raise and address the legality of the subject Tax as enacted by the City.

41. The plaintiffs herein allege that it was the Defendants' intentions, desire and plan to treat each taxpayer and each class member, including the Representative Plaintiffs, equally, identically, commonly, and typically with regard to the Utility User Taxes and with regard to all aspects of Paso Robles City Code Sections 14.16.020 and 14.04.020.

42. The legal issues raised herein concerning the fact that prior to enactment of these Utility User Taxes the City was required to fully comply with Article XIII C and D of the State constitution have essentially been previously resolved in favor of taxpayers by the Courts. See, Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal.4th 205 and Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.45h 1364. These Courts held that cities and counties are required to comply with the requirements of Proposition 218 prior to enacting or increasing taxes, even those that

are called water and sewer fees.

43. A Class Action is the appropriate and optimum procedure and method for the fair and efficient adjudication of these controversies for all of the taxpayers. Because the individual claims are small, absent the utilization of class action procedures, the vast majority of the class members will be without a meaningful remedy.

GENERAL ALLEGATIONS

44. Defendant THE CITY OF EL PASO DE ROBLES is a governmental entity that was established under the laws of the State of California and the United States of America.

45. Defendants Does 1-500 inclusive, acting individually, jointly, and severally, are individuals living in, or maintaining offices and/or transacting business within California.

46. *Defendants Does 501-750 inclusive, acting individually, jointly, and* severally, are business entities conducting business in the CITY OF EL PASO DE ROBLES who are involved in the activities as set forth in more detail below concerning the illegal taxation related to the water and sewer services.

47. Defendants Does 751-1000 inclusive, acting individually, jointly, and severally, are governmental entities or the employees and agents for such entities within CITY OF PASO DE ROBLES who are involved in the activities as set forth in more detail herein concerning the illegal taxation and tax collection by the CITY OF EL PASO ED ROBLES pursuant to Paso Robles City Code Sections 14.16.020 and 14.04.020.

48. The true names and capacities, whether individual, corporate, associate, partnership, governmental or otherwise, of the Defendants herein referred to as Does 1 to 1000 inclusive, acting individually, jointly, and severally are presently unknown to the

Plaintiff, who, therefore, sues said Defendants by such fictitious names. The Representative Plaintiffs are informed and believe, and thereupon allege, that each of the Defendants designated herein as a "Doe" is legally responsible in some way for the events and happenings hereinafter referred to, and proximately caused or contributed to the wrongs, damages and injuries as herein described. Plaintiffs will seek leave of the Court to amend this Complaint, if necessary, to set forth the true and names and capacities of such parties when the same have been ascertained.

(Agency)

49. At all times herein mentioned, each of the Defendants, including the CITY OF PASO DE ROBLES and Defendants Does 1-1000, inclusive, acting individually, jointly, and severally, were the agents, partners, joint venturers, employers and employees, officers, directors, counsel members, managing agents, owners, subsidiaries, masters and servants, ostensible agents, principals, co-conspirators and/or partners with one another.

50. Furthermore, in engaging in the conduct that is generally described herein, the Defendants, and each of them, were at all times acting with the knowledge, consent, approval, and/or subsequent ratification of each of the remaining co-Defendants.

(Government Tort Claim)

51. On December 22, 2008 written Government Claims were served by Certified Mail by the named representative plaintiffs Brooke G. Mayo, John Borst and William Taylor, on behalf of themselves and the entire Class of Plaintiffs/taxpayers, upon the City of El Paso De Robles. The December 22, 2008 Government claims included both the City's requested claim form and an additional 7 page letter that provided Supplemental Information to the City concerning the general nature of the claims. This addendum was provided to the City to make certain that the claims were

unambiguous and were sufficiently complete to notify and place the City on notice of the nature and import of the claims. True and correct copies of these form claims and the 7 page Supplemental Information were attached to the Original Complaint as Exhibits A, B, C and D.

52. These Claims complied with all the administrative claim requirements imposed by Government Code sections 900 et.seq. in order to allow these representative plaintiffs to bring a taxpayer class action refund suit on behalf of themselves and all taxpayers against the City of El Paso De Robles concerning the Illegal Utility Tax.

53. The submitted claims forms, including the seven page Supplemental Information provided with the City of Paso Robles claim forms, informed the City of the monetary claims that were being pursued and raised by the Representative taxpayers on their own behalf and on behalf of all of the Taxpayers regarding the imposition and collection of the Illegal water and sewer Fees, and the City's failure to obtain voter approval as required by Proposition 218 for enactment of these new water and sewer "Charges" and increases of water and sewer "Charges".

54. The Government Tort Claims were served on the Office of the City Clerk for the City of El Paso De Robles as provided by the City Code.

55. On December 31, 2008 a written Government Claim was served by Certified Mail by the named representative plaintiff Teresa St. Clair, on behalf of herself and the entire Class of Plaintiffs/taxpayers, upon the City of El Paso De Robles. The December 31, 2008 Government claim included both the City form and a seven page supplement identified as an "Amended Claim" applicable to the claims of Ms. St Clair and Brooke G. Mayo, John Borst and William Taylor. The "Amended Claim" provided supplemental information to the City concerning the general nature of all of the representative plaintiffs' claims. True and correct copies of Ms. St Clair's form claim and

the 7 page Amended, Supplemental Information were attached to the original Complaint as Exhibits E and F.

56. The December 31, 2008 Government Code sections 905 and 910 Government Tort Claims were served on the Office of the City Clerk for the City of El Paso De Robles as provided by the City Code.

57. The Claims and Amended Claims filed by the named plaintiffs complied with each of the administrative claim requirements imposed by the state laws to bring a representative taxpayer class action refund suit against the City of El Paso De Robles concerning the Illegal Taxes.

58. The claims as described above fully advised the City that the representative plaintiffs for themselves and, in their representative capacities, for all taxpayers, sought a refund for all class members for all of the fees that were assessed and collected by the City pursuant to Chapters 14.04 and 14.16 of the City Code since those fees were increased by Sewer Ordinances 875 and 841 and Water Ordinances 882 and its predecessor.

59. Each of the above described Claims both substantially and strictly complied with all of the claim requirements imposed by local[2] and state law for each individual and for the entire class of claimants including providing the information to the City of the legal, equitable and monetary claims that were being pursued and raised by the Representative taxpayers on their own behalf and on behalf of all of the taxpayers regarding the imposition and collection of the Illegal water and sewer fees and the City's failure to comply with Proposition 218.

60. **A special tax is "any tax imposed for specific purposes . . . ." (Art.**

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[2]Claims for refunds of local Utility taxes and fees are not excluded by the GCA claim requirements imposed by Section 905 of the Government Code. County of Los Angeles v. Superior Court (2008) 159 Cal.App.4th 353. Therefore, the GCA, rather than any local claim provisions, applies to this claim and a Section 910 representative class action claim for all taxpayers is authorized.

XIII C, §1, subd. (d).)

61. As the subject Utility Taxes are intended to be (1) the revenue source (2) used by the City (3) for a specific purpose (4) that is for the general benefit of all citizens and for future development, (5) these Taxes are, as a matter of law, Special Taxes and not water or sewer charges or fees.

62. As the Utility Tax is a Special Tax, and are not water or sewer charges or fees, the claim provisions for Utility taxes applies to the Claim, the GCA, rather than any claim provisions for water or sewer "charges".

63. Pursuant to Government Code section 905, City of San Jose v. Superior Court (1974) 12 Cal.3d 447 and County of Los Angeles v. Superior Court (2008) 159 Cal.App.4th 353, a government claim for Tax Refund for a Utility Tax that is pursued against a local entity, such as the City, must comply with Government Code section 910 which authorizes representative class action claims. These claims, Exhibits A to F of the original Complaint, satisfied the administrative requirements to allow the representative plaintiffs to pursue their individual and all class claims in this lawsuit.

64. Neither the Health and Safety Code nor the Revenue and Taxation Code provide the claim provisions applicable to the subject representative tax refund claims concerning the illegal Utility User Taxes. The "facts" required to impose, utilize or trigger the Health and Safety Code sections 5470 et.seq (which reference the Revenue and Taxation Code claim provisions) do not exist for various reasons including the following:

- The eventual uses of the Utility Tax revenues is unknown at this time and may, based upon both political and economic considerations, drastically change.
- The Utility Taxes do not pay for the present use of water or sewer services.
- The alleged services that are to be provided, ***if the funds are eventually used for the Nacimiento Project***, are not intended to benefit the class member taxpayers but to benefit developers and future residents and businesses in the

City.

- The alleged services to be provided by the project that may be funded by the Utility Taxes are intended to benefit the entire County and not only the taxpayers.
- The alleged services to be constructed through use of the Utility Taxes are not for "improvements" of water systems but are, according to the Defendants' statements are for the creation of ***new*** water and sewer systems that are primarily intended to benefit of persons and businesses other than the taxpayers.
- The actual use of the Utility Taxes will depend on future political, economic, agricultural, etc. factors such as drought, el Nino rains, water conservation measures, population growth or stagnation, political changes, tax shortfalls or surpluses, property valuations affecting tax revenues, the economic demand for water and wine, etc.

65. During the time period provided at law, the City of El Paso De Robles did not accept or reject the administrative claims presented by the named representative plaintiffs on behalf of themselves and the entire Class of taxpayers.

66. The Claims for refunds filed by and for the Representative Plaintiffs were denied by function of law on or before February 14, 2009 when the Defendant City of Paso Robles ***did not respond*** to the claims as provided by the GCA.

67. By letter dated March 4, 2009, the City acknowledged that the denial of the claim was "by operation of law."

68. By failing to respond to the claims, pursuant to law including but not limited to the GCA and section 911 of the Government Code specifically, the ***defendants waived*** any and all objections to the sufficiency of these taxpayer claims.

(Facts Common to All Causes of Action)

69. Beginning prior to June of 1978 the citizens and taxpayers of the State of California became sufficiently concerned about the local governments' practices

concerning revenue raising practices including taxation, assessment and fees, and the local elected bodies' use, overuse, and abuse of the taxing powers that they sought to regain control over their money and to limit the powers that were available to the elected officials and governmental bodies/entities.

70. Members of the State's citizenry proceeded with the enactment of laws and Constitutional amendments to control and limit the taxing powers of local governments while (1) transferring back to the taxpayers and voters essentially all of the powers, rights and authority over the enactment of new local taxes, fees, and assessments and the imposition of increases to existing local taxes, fees and assessments and (2) eliminating the right and power of the local governmental bodies, including the defendant City of El Paso de Robles, to enact new taxes or fees or to increase taxes or fees without voter approval.

71. This taxing revolution began most earnestly in 1978 when the voters of the State approved a proposition commonly known as Proposition 13, which limited the taxing rights and authority of the State legislature and local governing bodies to impose or increase taxes. Proposition 13 amended Article XIII of the California State Constitution.

72. Following 1978, various additional propositions were placed before California voters seeking to provide additional control and to limit the taxing powers of the elected officials, City Council members, cities, counties, and all public agencies with taxing authority.

73. In November of 1986, the voters of the State of California enacted Proposition 62 to enact statutes to further limit the power of local entities to impose, enact or raise taxes and fees.

74. In 1996, by general election, the voters of the State of California enacted Proposition 218 to extend Proposition 62 and thereby provided further, express

limitations upon the taxing powers of the elected officials and governing bodies, including Charter Cities, in California, by amending the State Constitution to add Articles XIII C and D.

75. Proposition 218 applies to the Paso Robles Water and Sewer Fees, City Code Sections 14.04.020 and 14.16.020 and thereby creates burdens upon the City that must be satisfied prior to the lawful enactment of the provisions creating and imposing those Utility Taxes.

76. "The Proposition [218], entitled the "Right to Vote on Taxes Act," included this statement of purpose: " 'The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also **threaten** the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' " [emphasis added] Bay Area Cellular Telephone Company v. City of Union City (2008) 162 Cal.App.4th 686, 692-93.

77. Since passage of Proposition 218, the Paso Robles has repeatedly increased the Utility Taxes without compliance with Proposition 218. Since 2002, the increases identified in this Amended Complaint were imposed for the express purpose of raising money for ***future*** capital improvement projects to benefit developers and future businesses and residents for their water and sewer services.

78. Section 14.04.020 and 14.16.020 impose Taxes and Tax increases, not to pay for present water and sewer services (as is typical of a "fee"), but as a broad revenue raising device, Utility User Taxes. Therefore, the so called Water and Sewer Fees and Fee increases are, for purposes of Proposition 218, patently **special taxes**

which **required** voter approval.

79. **In Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority the Supreme Court held that assessments and charges to pay for future capital improvements that provide only a *general benefit* are "special taxes" which must comply with the super majority voter approval requirements of Proposition 218.**

80. The City has stated that the Utility Taxes and the Utility Tax increases are intended to be used to provide a general public benefit, i.e. to defray the costs of capital improvements to help pay for (1) a Nacimiento Water Pipeline Project and associated City and county water system improvements, and (2) the wastewater collection and treatment infrastructure improvements.

81. The class members presently receive their water, not from Lake Nacimiento, but from ground water that is treated at the wellhead.

82. According to the SLO LAFCO's September 2004 Municipal Service Review (MSR), the City has annual rights to eight cubic feet of water per second from the water wells that are situated adjacent to the Salinas River.

83. The Water Assessment Plan that was completed pursuant to Water Code section 10910 concluded that the City has adequate water supply to accommodate the present citizenry and business community plus the 20 years of growth that is estimated to occur and is expressed in the update of the General Plan (MSR, p. 3-9, *City of Paso Robles, Sphere of Influence Update Municipal Service Review*. San Luis Obispo Local Agency Formation Commission, September 2004.) Therefore, the services that are alleged to be provided from the subject Utility Taxes are not needed by or for current City taxpayers/utility users.

84. According to Public Works Director Doug Monn, "[T]hese [ground] water supplies are expected to meet all future water demands through 2025." (City Staff

report, p.41, August 7, 2007 [City Council meeting Agenda Item no. 25]) Therefore, the services that are alleged to be provided from the subject Utility Taxes are not needed by or for the current City taxpayers/utility users.

85. The City's *proposal* and alleged plan for use of the revenues raised by the Utility Tax is for "system improvements" would change the source of the water provided to the class members so that "blended water (a mix of groundwater and "Nacimiento water") would be the new supply. This "blended water" system is not presently available and is not providing water for the representative plaintiffs or the class members. As such, the "Fees" that are being assessed upon the representative plaintiffs and class members are not charges for present services.

86. The plan for the system improvements to be paid for, if at all, by the Utility Tax, is intended by the Defendant to provide water supply "to benefit only growth," according to the HF&H Consultants report.[3]

87. On September 6, 2005, the City entered into the Paso Robles Groundwater Basin Agreement with the County of San Luis Obispo and a number of overlying landowners including PRIOR and its members.

88. The class members who are being assessed these Taxes do not need or require the proposed water from Lake Nacimiento. Only land owners and potential developers have a future need for these proposed services. Therefore, the services that are alleged to be provided from the subject Utility Taxes are or were not needed by or for the current City taxpayers/utility users.

89. The proposed use of the Utility Taxes were originally estimated for use for a 10 year long capital improvement plan. This plan has been increased to a 17 year long project [the "Nacimiento Project"] that provides ***no present privilege or special benefit*** to the representative plaintiffs or to the class. Once again, therefore the services that

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[3]Paso Robles City staff report/memo dated July 1, 2008 (Agenda item no. 4, page 54).

are alleged to be provided from the subject Utility Taxes are not needed by or for the City's present taxpayers.

90. The Nacimiento Project is a capital improvement project undertaken by the San Luis Obispo County Flood Control and Water Conservation District, the City of Paso Robles, and a group of private landowners called "PRIOR" (the Paso Robles Imperiled Overlying Rights group). It is alleged herein that the project is intended to be for the County's benefit and the benefit of the PRIOR and not solely the City's taxpayers.

91. The Utility Taxes are collected by the City to fund the Nacimiento Project which is ***intended to provide benefit for the entire county of San Luis Obispo*** and/or, more specifically, users of the Paso Robles Groundwater Basin. The capital costs for the City of the project have been estimated at over $189 million. The project does not provide present benefits or privileges for the class members or representative plaintiffs and is not needed for future uses for the class members.

92. In other words, the Illegal Utility User Taxes that were imposed by the Defendants upon the class members are intended to fund a Project whose purpose is to benefit the citizens of the entire ***County of San Luis Obispo*** and ***all*** future property owners and developers in the water basin.

93. The Taxes enacted to pay for the Nacimiento water project are earmarked for a specific, future capital improvement Project. Because non-City water customers will receive benefits from these Charges, the Charges cannot be enacted without the voter approval (i.e. a 2/3 super majority) required by Prop 218.

94. While the funds raised by this revenue enhancement device, the Utility Taxes, are *presently* stated as being for identified future projects, ***whether the money will actually be used as intended, rather than being diverted for other politically hot issue or event, is unknown and unknowable at this time.***

95. The City has agreed to an annual City debt obligation for the Nacimiento

pipeline project of $4.23 million. This is a "capital cost" as that term is used in Proposition 218. ("Capital cost" means the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement by an Agency. Article XIII D sec 2(c).)

96. Taxes, fees and charges for "capital costs" are "special taxes" or "assessments" for which voter approval is required under the terms of Proposition 218.

97. These Illegal Taxes that were imposed upon the class members to fund future capital improvements and projects create a financial burden upon the citizenry that is intended to be for the benefit developers, PRIOR, and future water and sewer service users.

98. When, like this situation, property that is assessed fees for which it receives no special benefit beyond that received by the general public, the fee is a special tax. City of Los Angeles v. Offner (1961) 55 Cal.2d 103, Knox v. City of Orland.

99. The City's sewer "fee" increases that were imposed beginning March 1, 2002 (by Ordinance No. 841 N.S.) and beginning on or about July 2004 (by Ordinance No. 875 §2, 2004 (Chapter 14.16, section 14.16.020 of the Paso Robles City Code) and the City's water "fee" increases that were imposed by Ordinance 882 N.S. §1. 2004 (Chapter 14.04, section 14.04.020 of the Paso Robles City Code) and its predecessor were wrongfully imposed in violation of Proposition 218.

100. The City contends, "The increases [of water and sewer fees] are needed to help pay for the City's share of the Nacimiento Water Pipeline Project and associated City water system improvements." [October 2008 Notice of Public Hearing.]

101. The City's June 2007 water mailer provided, "The sole purpose of the proposed rate increases is to provide adequate revenues to meet debt and operating expense obligations for the [Nacimiento] pipeline and treatment facility."

102. The City requires payment of the Taxes, Paso Robles City Code Chapters

14.14 and 14.04, and the Ordinances enacting these Taxes impose penalties upon persons and businesses who do not pay these Illegal Taxes. As such, these payments are Taxes and not mere "contributions" or gratuities to the City.

103. The voters have the right to determine whether they intend and desire the imposition of new Taxes and whether, as an entire City, they desire to create such over capacity which will be for the benefit, not of the tax payers, but for developers and future development and all users of the Paso Robles Groundwater Basin.

104. At all relevant times, the Defendants and each of them, by and through the City Council members generally and also by the City Attorney and City Manager, attempted to induce the trust of the named representative plaintiffs and each member of the Plaintiff Class by repeatedly and publicly expressing that the City had a lawful right to enact and increase the Tax without a vote and without compliance with any provisions of Proposition 218 (Article XIII C, Sec 2d and Article XIII D sec 4). In this regard, for example on October 21, 2008 City Attorney Iris Yang stated: "We believe the City has the legal authority to finance capital improvements to its water system through water user fees rather than an assessment or special tax." Further, on June 16, 2008 the City Manager, Jim App stated: "The actions of the Council current and past are entirely consistent with their duty and voter vested authority. Further, capital project decisions are **not** subject to Proposition 218 provisions."

105. The defendants and the City council members and City Attorney, who were acting on behalf of the City at all relevant times, in expressing and indicating their integrity, competence, lawful conduct, legal right, and ability to accurately and lawfully enact, assess, calculate, collect, and/or charge these Taxes, and in expressing their compliance with all State laws, the State Constitutions, and proper taxation practices and procedures of the State of California induced the representative plaintiffs and the class members to pay the Illegal Fees and Taxes imposed by Paso Robles City Code

Chapters 14.04 and 14.14.

106. Each Defendant, through the imposition of water and sewer bills, which were legally the same as Tax bills and assessments, attempted to induce and require the representative Plaintiffs and each member of the Class, through statements concerning their integrity and lawful conduct (as well as by the inclusion of penalties in the City Code), intended to induce the actions of the taxpayers to pay the Taxes.

107. The Defendants and each of them knew or should have known that the Taxes, which had not been approved by requirements of Proposition 218, were enacted in violation of State law.

108. The written and oral statements by the Defendant City and the City Attorney, City Manager and City Council members described above concerning the Utility Taxes were made as part of the Defendant City's routine taxation practices and were made uniformly and consistently to each member of the Class. These statements, included those set forth in the water and sewer bills submitted to the class members and in advisory statements and opinions concerning the Taxes, were made to and/or made available to each of the Class members and were intended to induce affirmative conduct by the taxpayers.

109. Each class member and each representative plaintiff relied upon the statements of the Defendants to pay such Tax.

110. Payments of the Tax were made to the City based upon the potential for imposition of penalties as provided in the City laws which created a legal obligation upon the class members and representative plaintiffs to pay these tax assessments.

111. The City of Paso Robles does not have unlimited power to impose taxes or fees. Local governments have no inherent power to tax. (*In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 73; *County of Mariposa v. Merced Irr. Dist.* (1948) 32 Cal.2d 467, 474; *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1454;

and *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 501-502.) " 'Municipal corporations have no inherent power of taxation. On the contrary, municipal corporations possess with respect to taxation only such power as has been granted to them by the constitution or statutes.' " Santa Clara Local Transit Authority v. Guardino (1995) 11 Cal.4th 220.

112. By failing to comply with Proposition 218 and to obtain voter approval of the Utility Taxes and Tax increases, the City exceeded its authority and enacted Illegal Fees and/or Taxes.

113. While the City has contended that its right to impose Taxes should be broadly interpreted, it is the Proposition 218 protections that were enacted for the citizens, not the cities and counties, that are intended to be interpreted broadly. Proposition 218 was intended and drafted to provide the ***maximum protections for the taxpayers*** and to impose **strict limits** on the powers of local governments to impose or enact new taxes or fees and the powers of the taxing bodies to increase "taxes", "fees", "assessments" and "charges".

114. Section 5 of Proposition 218 required that the provisions of the act be "liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 5, p. 109, reprinted at Historical Notes, 2A West's Ann. Cal. Const. (2008 supp.) foil. art. XIII C, §1, p. 85 (Historical Notes).)

115. Proper 218 (Article XIII D, section 6b of the State Constitution) provides that the subject water and sewer charges ***shall not*** be extended, imposed or increased unless ***all*** of the following 5 requirements are satisfied:

a. Revenues derived from the fee or charge **shall not** exceed the funds required to provide the property related service;

b. Revenues derived from the fee or charge **shall not** be used for any

purpose other than that for which the fee or charge was imposed;

c. The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership **shall not** exceed the proportional cost of the service attributable to the parcel;

d. No fee or charge may be imposed for a service **unless** that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or ***future use of a service are not permitted***; and

e. No fee or charge may be imposed for **general governmental services** including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

116. The Tax was not enacted in compliance with each of the above five requirements as the Utility Taxes are collected "to finance future capital improvements to the water system". [See, Kennedy/Jenks Consultants, City of Paso Robles Water Rate and Revenue Analysis Final Report dated August 7, 2008.] The Taxes are allegedly to be used for capital improvements for future services, are not related to the proportional costs of each class member for the services provided, are not for services that are actually used or immediately available, and, with respect to water in particular, are for a general governmental service. In fact, the City revenues that are derived from this tax ***exceed the funds*** that are required to provide the property related service.

117. As was established and expressly stated by the City as part of City Resolution No. 97-83 (wherein Proposition 218 was identified as a prerequisite to raising "property related fees" and to raising and imposing "sewer and water fees"), the City is aware of these legal obligations and the illegality of imposing or raising such Utility Taxes without full compliance with the requirements imposed by Proposition 218.

118. "The courts have also recognized that certain "user fees" are not taxes.

(See *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 596-597.) In *Isaac*, the court described user fees as "those which are charged only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided." (*Id.* at p. 597.) Thus, a user fee is "payment for a specific commodity purchased." (*Ibid.*; see also *Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 957 [5 Cal.Rptr.3d 520] [sewer service fees].)" [emphasis added] Bay Area Cellular Telephone Company v. City of Union City (2008) 162 Cal.App.4th 686, 694.

119. The subject water and sewer fees and fee increases are not for the payment for present water or sewer services. In fact, what these funds will be employed for remains purely speculative and solely the subject to politicians promises at this time.

120. Pursuant to the State laws, statutes and the Constitution of the State of California that are presently in affect at all relevant times, the City, its governing bodies and elected officials that implement, establish, impose, and collect any new Special or General tax, are required to obtain voter approval of the laws, provisions, and statutes that form the basis for imposition of the new tax.

121. The City's current water customers have sufficient quantity and quality of water to last though 2020 or later. They do not have present needs for additional water or additional water capacity. [See, MSR, p. 3-9, *City of Paso Robles, Sphere of Influence Update Municipal Service Review.* San Luis Obispo Local Agency Formation Commission, September 2004.]

122. New development should bear the burden for paying the capital cost of the proposed water improvement projects since they, not the Class members, are the most significant, if not sole, beneficiaries of the pipeline and water treatment plant.

123. California Constitution Article XIII D section 6 provides that no fee or charge may be imposed for general governmental service where the service is available

to the public at large in the substantially the same manner as it is to property owners.

124. Any recent attempts by the City to comply with portions of Proposition 218 to increase water and sewer taxes failed for the following reasons:

a. No assessment or special tax vote was held for the increases of the water and sewer fees proposed by the City to raise money for future capital improvements of the water and sewer systems;

b. The underlying water and sewer charges were illegal based upon the prior procedural and substantive failures to comply with Proposition 218;

c. **Proposition 218 does not include provisions to allow for retroactive corrections of illegal taxes i.e. illegally collected taxes cannot be retroactively rendered as lawfully collected**; and

d. A "compliant" or partially "compliant" increase in a fee (pursuant to Prop 218) does not render the underlying illegal fee(s) legal.

FIRST CAUSE OF ACTION FOR VIOLATION OF PROPOSITION 218
BY ALL PLAINTIFFS AGAINST DEFENDANT
THE CITY OF EL PASO DE ROBLES
and DOES 1 to 100, 501 to 550, and 750-800 ONLY

125. The named representative Plaintiffs re-allege paragraphs 1 to 124, inclusive, of this First Amended Complaint as though fully set forth in their entirety in this cause of action.

126. The named representative Plaintiffs on behalf of themselves and the entire Class allege that beginning in 2002, Defendant the City of El Paso de Robles enacted, imposed, assessed, collected and/or increased the Utility Taxes pursuant to Paso Robles City Code chapters 14.04 and 14.14 against and from each of the Class members.

127. The Taxes, as imposed by Chapters 14.04 and 14.14 of the City Code, were illegally initiated after the passage of California State Proposition 218 and without compliance with the requirements of Proposition 218, Constitution Articles XIII C and D.

128. The Illegal Utility User Taxes that were imposed by the City as alleged herein began March 1, 2002 (Ordinance No. 841 N.S.) and began on or about July 2004 (Ordinance No. 875 §2, 2004) (See, Chapter 14.16, section 14.16.020 of the Paso Robles City Code).

129. Illegal Utility User Taxes were imposed by the City by enactment of Ordinance 882 N.S. §1. 2004 and its predecessor (Chapter 14.04, section 14.04.020 of the Paso Robles City Code).

130. The representative Plaintiffs, on behalf of themselves and the class members, further allege that, pursuant to Chapters 14.04 and 14.16 of the Paso Robles City Code, the City (1) wrongfully enacted new Utility Taxes after passage of Proposition 218 and/or (2) wrongfully increased Utility User Taxes by failing to comply with Proposition 218.

131. It is alleged that the City may have recently attempted to comply with portions of Proposition 218 for water taxes only. However, regardless of the alleged compliance with Proposition 218, the subject Water and Sewer Fees collected by the City pursuant to Chapters 14.04 and 14.16 of the Paso Robles City Code were illegal because the underlying Taxes were themselves illegal.

132. Absent compliance with Proposition 218 for enactment of the original Fees and/or Taxes and for each increase of the Taxes, subsequent attempts to enact "legal" increases are ineffective because of the patent illegality of the underlying charges, fees and/or taxes.

133. The City was not lawfully able to comply retroactively with the State Constitution, Article XIII C or D, by attempting to enact increases of the Taxes in compliance with the Constitution. Only by complying with the Constitution as to the enactment of the Tax and as to **each** increase thereto, may any of the collected taxes be legal and proper.

134. The Illegal Taxes are "a set" because both water and sewer Utility Taxes are charged to all persons receiving water and sewer bills in the City. These fees are charged solely for revenue enhancement purposes (i.e. to fund capital improvements), not to pay for the services provided, but allegedly to pay for future water and/or sewer systems to benefit future businesses, development and residents of the City and County.

135. The Illegal Utility User Taxes are not based upon the taxpayer's actual or proportional use of water or sewer services.

136. The Class members paid the Illegally enacted and assessed Taxes to the Defendant.

137. Prior to and since taking affect, Ordinance No. 841 N.S. and Ordinance No. 875 §2, 2004 (Chapter 14.16, section 14.16.020 of the Paso Robles City Code) and Ordinance 882 N.S. §1. 2004 (Chapter 14.04, section 14.04.020 of the Paso Robles City Code) and its predecessor were not approved by the voters of the City either by simple majority or by two thirds super majority.

138. Prior to and since taking affect, the taxes imposed by Ordinance No. 841 N.S. and Ordinance No. 875 §2, 2004 (Chapter 14.16, section 14.16.020 of the Paso Robles City Code) and Ordinance 882 N.S. §1. 2004 (Chapter 14.04, section 14.04.020 of the Paso Robles City Code) and its predecessor were not enacted or increased in compliance with Proposition 218.

139. Requiring local entities to comply with Proposition 218 is not unfair and does not create a recognizable hardship upon the City. Propositions 13, 62 and 218 setting limitations upon the powers of local entities to impose taxes are Constitutional.

140. A refund is sought by representative claimants, John E. Borst, Brooke G. Mayo, William Taylor and Teresa St. Clair, for themselves and for each payer of the Sewer and Water Fees imposed by Sections 14.04.020 and 14.16.020 of the City Code from the inception of the Taxes and continuing until the assessments of the Illegal Taxes

are stopped.

141. Based on the City's ongoing violations of Proposition 218, the plaintiffs seek recovery, reimbursement, and disgorgement of all of the water and sewer taxes wrongfully and illegally assessed and collected by the City including all of the continuing Illegal Taxes collected by the City up to the date of final judgment in this action.

142. The imposition and collection of the Illegal Taxes from the class members after passage of Proposition 218 was, and is, improper and has caused the named representative plaintiff and all members of the Class to suffer monetary damages in amounts according to proof at trial. The City, as the tax assessor and collector, has the information as to the amount of these Taxes and as to the identity of the Taxpayers.

~~**SECOND CAUSE OF ACTION**~~
~~**FOR WRIT OF MANDATE**~~
~~**BY ALL PLAINTIFFS AGAINST DEFENDANT**~~
~~**CITY OF EL PASO DE ROBLES**~~
~~**and DOES 101 to 200, 551 to 600 and 801-900 ONLY**~~

~~123. The named representative plaintiffs repeat, re-plead, and re-allege each and every allegation contained in paragraphs 1-122, inclusive, of this Complaint as though fully set forth herein.~~

~~124. City Ordinance 882 and its predecessor (regarding water fees) and City Ordinance 875 and its predecessor Ordinance 841 (regarding sewer fees), Paso Robles City Code sections 14.04.020 and 14.16.020, were approved by the City Council, and not by the voters, in spite of the preclusion imposed by Proposition 218 and Articles XIII C and D of the California Constitution.~~

~~125. Paso Robles City Code sections 14.16.020 and 14.04.020 are illegal taxes.~~

~~126. The imposition and collection of the Illegal Taxes from the representative plaintiffs and the Class members was, and is, improper because it is a violation of the State Constitution, Article XIII C and D and the imposition of the Illegal Tax has caused the named representative plaintiffs and all members of the Class to suffer monetary~~

damages in amounts according to proof at trial.

127. Because the Taxes are illegal, issuance of a Writ of Mandate to cease and desist such taxation is necessary and proper.

THIRD CAUSE OF ACTION
FOR CONVERSION AND MONEY HAD AND RECEIVED
(COMMON COUNTS)
BY ALL PLAINTIFFS AGAINST DEFENDANT
CITY OF EL PASO DE ROBLES
and DOES 101 to 200, 551 to 600 and 801-900 ONLY

128. The named representative plaintiffs repeat, re-plead, and re-allege each and every allegation contained in paragraphs 1-127, inclusive, of this Complaint as though fully set forth herein.

129. City Ordinance 882 and its predecessor (re: water fees) and City Ordinance 875 and its predecessor Ordinance 841 (re: sewer fees), Paso Robles City Code sections 14.16.020 and 14.04.020 were approved by the City Council, and not by the voters, in spite of the preclusion imposed by Proposition 218 and Article XIII C and D of the California Constitution which required ***voter*** approval of the tax, or, at a minimum, Proposition 218 precludes enacted and assessment of the legitimate fees until after (a) the mailing of legal notice provided to each affected property owner, (b) public hearing no sooner than 45 days after the mailing of the legal notice, (c) the opportunity of those who are to be charged the new or increased fees to file written protests of the fees, and (d) total objectors being less than 50% of those who are to be assessed the new or increased fees.

130. Paso Robles City Code sections 14.16.020 and 14.04.020 are Illegal Taxes and all moneys collected by the City pursuant to such illegal taxation must be returned to the Class Members.

131. The imposition and collection of the Illegal Taxes from the representative plaintiffs and the Class members was, and is, improper and has caused the named representative plaintiffs and all members of the Class to suffer monetary damages in

~~amounts that have been wrongfully converted by the defendants in an amount according to proof at trial. The City, as the tax assessor and tax collector of these Taxes, has all of the information as to the amount of the moneys that were converted and received by the defendants.~~

FOURTH CAUSE OF ACTION
DECLARATORY RELIEF
(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)

143. The named representative plaintiff repeats, re-pleads and re-alleges each and every allegation contained in paragraphs 1-142, inclusive, of this Complaint as though fully set forth herein.

144. Pursuant to Code of Civil Procedure sections 1060 et seq., the representative Plaintiffs and the Class herein seek a Court Order by this cause of action and hereby request a Declaration of the taxpayers' Rights and the Defendants' duties regarding the subject taxes and the moneys collected.

145. This issue is entitled to receive priority and proceed promptly to trial as to these claims for Declaratory Relief.

146. Based upon the CITY's violations of Proposition 218 and California Constitution Article XIII as set forth in more detail above, the named representative plaintiff, individually and as the representative party, Request Orders of this Court (1) finding that the subject TAX in fact violates these provisions of State Law and the State Constitution and (2) requiring that the Defendant City cease and desist the collection of the subject Illegal Tax.

PRAYER FOR DAMAGES AND REMEDIES

WHEREFORE, plaintiff and the members of the Class hereby pray for judgment against defendant THE CITY OF EL PASO DE ROBLES and DOES 1 to 1000, inclusive, and each of them, as follows:

1. For Damages for disgorgement and reimbursement of all illegal Taxes and

Fees imposed and collected by Defendants against the entire Class of Plaintiffs in an amount to be proven at time of trial. This amount exceeds $25,000 and will likely exceed millions per year of the illegal tax;

2. For prejudgment and post judgment interest of this liquidated amount of damages, the illegally assessed and collected taxes;

3. For restitution in the amount of the all of the fees and taxes paid;

4. For costs of this suit and attorney's fees pursuant to the provisions of the Code of Civil Procedure, including, but not limited to, section 1021.5;

5. For a Declaration and Order that the Taxes as imposed and collected by defendant the City violates Proposition 218;

6. For an Order for Payment of Interest as provided by law for the wrongful taxation of the Class Members

7. For an Order Declaring that the Defendant City cease and desist assessment and collection of the Illegal Taxes, and,

8. All other relief Plaintiffs and the Class may be entitled to at equity or at law, including, but not limited to, the funding of a monitoring program to make certain that the City does not engage in any additional, illegal taxation.

DATED: July 28, 2009

Huskinson, Brown, Heidenreich & Carlin, LLP

By: _____
Paul E. Heidenreich
Attorneys for Plaintiffs John E. Borst, Brooke G. Mayo, William Taylor, Teresa St. Clair and The Class of Similarly Situated Taxpayers

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PROOF OF SERVICE 1013A (3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **865 Manhattan Beach Boulevard, Suite 200, Manhattan Beach, California 90266.**

On **July 28, 2009,** I served the foregoing documents described as **FIRST AMENDED INDIVIDUAL AND CLASS ACTION COMPLAINT AGAINST THE CITY OF EL PASO DE ROBLES FOR: VIOLATION OF CALIFORNIA CONSTITUTION ARTICLES XIII C AND D; DECLARATORY RELIEF/INJUNCTIVE RELIEF** on the interested parties in this action by placing true copies thereof in sealed envelopes addressed as follows:

McDonough Holland & Allen PC
Iris P. Yang
Kimberly E. Hood
555 Capitol Mall, 18th Floor
Sacramento, CA 95814
TEL: (916) 444-3900
FAX: (916) 444-8334

Attorneys for Defendant City of Paso Robles

[X] (BY MAIL)
I deposited such envelopes in the mail at Manhattan Beach, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[ ] (VIA FACSIMILE)
I sent the contents of such envelopes via facsimile to the aforementioned individual at the above fax number.

[ ] (BY PERSONAL SERVICE)
I caused such envelope(s) to be delivered by hand to the office(s) of the addressee(s).

Executed on **July 28, 2009,** at Manhattan Beach, California.

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

TRACIE A. GRAHAM

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City of San Diego

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

MICHAEL SHAMES, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

THE CITY OF SAN DIEGO; and DOES 1 through 10, inclusive,

Defendant.

Case No. GIC831539

CLASS ACTION

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

[Filed Concurrently Herewith: Declarations of Clay Bingham, Ted Bromfield, Richard Enriquez, and Kelly J. Salt]

Date: June 17, 2005
Time: 10:00 a.m.
Dept.: 71
Judge: Hon. Ronald S. Prager

Action Filed: June 16, 2004

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I. INTRODUCTION

This is not a typical class action lawsuit. Plaintiff Michael Shames seeks a refund (on behalf of potentially tens of tens of thousands of San Diego residents) of purported taxes allegedly improperly charged in violation of Article XIII D of the California Constitution ("Article XIII D") and in breach of supposed contractual obligations that the City allegedly owed to its residents as putative third party beneficiaries under loan contracts between the City and various state and federal agencies. The City used these loans to finance substantial improvements to its wastewater treatment facilities – improvements that benefit all City residents. Plaintiff seeks a refund of the fees, claiming they exceed the proportional costs of providing the services to residents and now asks this Court to certify a class of all San Diego City residents whom the City allegedly overcharged. Plaintiff's reliance on traditional class action concepts ignores the unique nature of this case. This is not a case by a group of similarly situated bank customers seeking a refund of a uniform fee – a case ideally suited to traditional class action concepts. Putative class action cases seeking tax refunds are subject to unique procedures. In such cases, class treatment is improper unless the Legislature expressly authorized submission of class refund claims. The absence of express legislative authorization permitting Plaintiff to proceed on behalf of a putative class dooms this case as a class action and compels this Court to deny Plaintiff's motion.

This Court is not writing on a clean slate when it considers whether to certify a class in an action seeking a refund of taxes based on an alleged violation of the California Constitution. The California Supreme Court established procedures specifically applicable to tax refund cases in *Woosley v. State of California*, 3 Cal.4th 758 (1992). The California Constitution expressly provides that actions for tax refunds must be brought "in such a manner prescribed by the Legislature." Cal. Const., Art XIII, § 32. The Supreme Court interpreted this constitutional language to prohibit class actions in tax refund cases unless the Legislature expressly authorized filing of class refund claims of the specific taxes in dispute. *Woosley*, 3 Cal.4th at 788. The Supreme Court further held that courts must strictly construe the applicable claims procedures in determining whether class claims are permitted. Substantial compliance does not cut it. *Id.* at 789-790. This rule has been extended to cases seeking refund of local taxes. *See Neecke v. City*

of Mill Valley, 39 Cal.App.4th 946 (1996).

This Court must examine the relevant claims statutes to determine whether the Legislature intended to permit the filing of class claims for refund of the sewer fees that Plaintiff alleges were improperly charged. The relevant sections of the Health and Safety Code and the Revenue and Taxation Code, which set forth the claim procedure for seeking a refund of utility fees, limit the filing of a claim to **the individual** seeking the refund and do not permit class claims. *See* Health & Safety Code § 5472; Rev. & Tax Code § 5140. Likewise, the claims procedures in the City's Charter do not authorize filing class claims in tax refund cases. Because neither state law nor the City Charter permits filing class claims, this Court must deny Plaintiff's motion.

Plaintiff predictably cites a litany of customary class action concepts to support his motion. But traditional class action procedures cannot be used to eliminate the requirement of strict compliance with government claim statutes in cases seeking tax refunds. *Neecke*, 39 Cal.App.4th at 963. In these cases, "the common law features of class action administration are subject to legislative displacement." *Farrar v. State Board of Equalization*, 15 Cal.App.4th 10, 17 (1993). Plaintiff's entire class action analysis thus misses the point. Without express legislative authorization to file a class refund claim, this Court cannot certify a class – regardless of whether Plaintiff satisfies the traditional class action requirements of numerosity, typicality and commonality. It is not enough, as Plaintiff argues in his motion, that "the factual and legal issues in this case impact a large class of persons identically." Motion, p. 1.

Plaintiff's purported third party beneficiary claim fares no better. The remedy Plaintiff seeks under this cause of action is the refund of purported taxes. Thus, the rationale enunciated by the Supreme Court in *Woosley* – no class actions unless the Legislature expressly authorizes them – should apply with equal force to Plaintiff's third party beneficiary claim. Unless the Legislature expressly authorized class claims, this Court cannot certify **any** class.

Strong public policy concerns also militate against certifying a class. *Woosley* and its progeny rest on the premise that strict legislative control over how parties can seek tax refunds is necessary to preserve fiscal stability of public entities. The City already has spent the fees that Plaintiff wants refunded. An order requiring a refund of past fees may require the City to raid its

Enterprise Fund (the special fund created for construction of improvements to the City's wastewater facilities) or to dip into the City's general funds at a time of municipal fiscal crisis. In either event, the substantial refund that Plaintiff seeks may result in delayed implementation of needed improvements in the City's wastewater treatment infrastructure or reduced City services in other areas. This Plaintiff should not be permitted to impose his views of appropriate fiscal policy on all City ratepayers. Contrary to Plaintiff's assertions, the putative class members will have different interests, with some members being adversely affected by service cutbacks or increased taxes due to a refund of the alleged overcharge.

Courts also should tread lightly and refrain from using class action procedures to fine-tune complicated legislative and administrative enactments. What Plaintiff characterizes as a simple overcharge is, in reality, the result of a complex rate-setting process involving numerous studies by independent consultants, frequent consultations with the State Water Resources Control Board ("State Board"), review by the San Diego Metropolitan Wastewater Department, and approval both by the City Council and State Board. The Court should not adjudicate a matter that is essentially political and administrative. This likely is one of the reasons why the Legislature has not created a mechanism to obtain class refunds of the fees disputed in this case.

These numerous compelling reasons render class certification manifestly improper. Put simply, class treatment is not even an appropriate method to adjudicate Plaintiff's purported tax refund claim, let alone the superior means of adjudication.

II. FACTUAL BACKGROUND

Plaintiff fails to discuss City's complex rate-setting process in an effort to characterize his claim as a simple consumer refund action. The City did not unilaterally and arbitrarily set the rates that Plaintiff challenges. This rate structure resulted from a complex and protracted regulatory, administrative and legislative process involving the City departments, the City Council, the State Board, federal agencies and outside experts who prepared numerous detailed and complex Cost of Service Studies. At all times, the State Board must approve all changes to the City's rate structure, and it did so. Of course, the legal principles and procedures articulated in *Woosley* and its progeny apply regardless of the process that established the challenged rate

structure. But the protracted process that created the rate structure challenged in this case only confirms the wisdom of applying those same principles to deny Plaintiff's motion.[1]

A. The City's Wastewater System.

The San Diego regional wastewater system serves more than two million people and processes approximately 190 million gallons per day of sewage. The system is owned by the City under the auspices of the Metropolitan Wastewater Department and cost-shared by other cities and sewerage districts in the region.

The system was designed to provide primary treatment of sewage. Under the Clean Water Act ("CWA"), the federal government required all sewage to be treated to secondary levels to achieve increased contaminant removal including, organic components such as biochemical oxygen demand ("BOD"). The CWA standard is intended to provide safe discharge into waterways. Because the City's sewers discharge into the ocean, the City was able to obtain a waiver permitting it to provide advanced primary treatment. The advanced primary treatment method allows the City to meet the CWA standards without converting its whole system to secondary treatment standards, which uses a more costly, separate process to treat organics. Advanced primary treatment utilizes chemical coagulants throughout the existing wastewater treatment system to increase the removal of suspended solids ("SS"), thereby also increasing removal of BOD. The City has the only advanced primary treatment system in the State.

B. The Clean Water Grants and SRF Loans.

Although significantly less costly than the capital cost to convert the City's entire system to secondary treatment, the facilities constructed to meet the modified waiver discharge standards were still costly. These capital costs would have had a major impact on the City's budget, its users and the participating agencies without federal and state government assistance. To minimize the impact of the capital costs, the City pursued and received financial assistance through a series of federal and state Clean Water Grants and State Revolving Fund ("SRF") loans. The SRF loan program is jointly administered by the federal and state government. The State

[1] The facts summarized below are set forth in detail in the declarations of City employees Clay Bingham, Ted Bromfield, Richard Enriquez and Kelly Salt, which are filed concurrently with this brief.

Board is responsible for administering the SRF loan program.

To date, the City has received or is in the process of applying for a total of approximately $230 million in Clean Water Grants and SRF loans. The current 8 loans and fifteen grants are subject to twenty-three separate contracts. Each contract was subject to lengthy negotiations and approval by the City, on the one hand, and the State Board or federal government, on the other hand.

The SRF loans require that the City submit a final Revenue Program that is acceptable to the State Board. If the City fails to enact an acceptable Revenue program, the loan must be repaid immediately. Furthermore, the SRF loans require that the City enact "an acceptable sewer use ordinance and rate ordinance/resolution," which "will be enforced upon completion of the project" "before 90 percent completion of construction." Most of the Clean Water grants do not contain revenue program requirements. Upon approval of each loan, the State Board transmitted letters to the City stating that a draft revenue program had been approved, and upon completion of each loan stating that all of the conditions of the loan contract had been satisfied.

The City periodically commissions Cost of Service Studies by independent engineering firms to ensure that the cost of collecting and treating wastewater is properly apportioned among system users. During the course of each Study (studies were conducted in 1994, 1998 and 2003), the City remains in close contact with the State Board to determine the best method for setting rates. Both the City Council and the State Board must approve any changes recommended by the Studies. The State Board approved all changes to the City's rate structure.

C. The 2004 Changes To The Sewer User Fee.

In 1999, the City commissioned a study to determine whether the user charge system needed to be modified to comply with the Clean Water Act and its grants and loans. Specifically, the issue was whether, the City's cost allocation system had to take into account the costs of removing biological components from wastewater and, if so, how that should be done. The City was in regular contact with the State Board during the study and sent the State Board several proposed fee structures for comment.

The final study was issued in October 2003. The study recommended a fairly proportional

rate structure which included components for treating flow, SS and organics. The City Council approved the recommended rate structure on June 8, 2004, and the State Board approved of the rate structure as fully compliant with the SRF Loan "Revenue Program" and Grant "rate ordinance" provisions.

III. ARGUMENT

A. Class Actions Are Not Permitted In Tax Refund Cases Absent Express Statutory Authority.

Plaintiff has elected to proceed with a claim for violation of Article XIII D. Such a claim can only be valid if the fee at issue (1) is "imposed as an incident of property ownership," and (2) "exceed[s] the proportional costs of the service attributable to the parcel." Cal. Const., Art. XIII D, § 6(b)(3). Of course, the City disputes each of these conclusions. But having elected to proceed under Article XIII D, Plaintiff is bound by the unique procedures that govern putative class claims in tax refund cases. A class action for a tax refund may be brought only if the Legislature expressly authorized class claims.

In *Woosley*, the Court held that "a taxpayer must show strict, rather than substantial, compliance with the administrative procedures established by the Legislature." 3 Cal.4th at 789. *Woosley* overruled a line of cases that had recognized putative class claims in actions seeking tax refunds. The Supreme Court also refused to follow its previous decision in *City of San Jose v. Superior Court*, 12 Cal.3d 447 (1974), which had established that "substantial compliance" with government claim procedures was sufficient in class action cases. *Woosley* carved out a unique niche for tax refund cases and established a strict compliance standard. Strict compliance generally precludes class claims, so each member of a putative class must present his or her own claim. *Id.* at 790 (precluding class action where claim required by "**the person** who has paid the . . . fee, **or his agent on his behalf**" (internal quotations and citation omitted, emphasis in original)); *Neecke*, 39 Cal.App.4th 946, 962 (1996) (barring class action where statute provided that "suit may be brought by '[t]he person who paid the tax, his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate . . .'" and by "'[n]o other person'").

The *Woosley* Court based its decision on language in Section 32 of Article XIII, which provides that "an action may be maintained to recover the tax paid . . . **in such a manner as may be provided by the Legislature**." *Woosley*, 3 Cal.4th at 789 (emphasis added). The Court found that Article XIII, Section 32 "rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues." *Id.* citing *State Bd. of Equalization v. Superior Court (O'Hara & Kendall Aviation, Inc.)*, 39 Cal.3d 633 (1985); *see also McCabe v. Snyder*, 75 Cal.App.4th 337, 345 (1999) (noting the "strong state interest in strict legislative control of tax refund procedures"). That "the Legislature had been silent on the subject of class claims seeking refunds of use taxes . . . did not constitute legislative authorization of such class claims." *Woosley*, 3 Cal.4th at 792.

Numerous courts have held that they "are without authority to alter the statutory procedures for tax refunds enacted by the Legislature pursuant to the . . . command of article XIII, section 32." *Farrar*, 15 Cal.App.4th at 19 citing *Shiseido Cosmetics (America) Ltd. v. Franchise State Bd.*, 235 Cal.App.3d 478, 486-89 (1991); *Masi v. Nagle*, 5 Cal.App.4th 608, 611-12 (1992) and *Patane v. Kiddoo*, 167 Cal.App.3d 1207, 1214 (1985). Following *Woosley*, courts have only permitted class actions in the limited circumstances where the legislature has specifically authorized them. *See, e.g., State ex rel. Department of Motor Vehicles v. Superior Court (Woosley)*, 66 Cal.App.4th 421 (1998) (permitting class certification after the legislature changed the DMV law to allow class claims); *Kuykendall v. State Bd. of Equalization*, 22 Cal.App.4th 1994 (1994) (permitting class treatment after the legislature subsequently enacted a statutory refund scheme).

Although Article XIII, Section 32 relates to actions against the State, subsequent Court of Appeal decisions have extended *Woosley's* rationale to tax refund actions against **all** governmental entities: "Nothing in the language of *Woosley* indicates an intent to limit that case's holding to claims statutes addressed to state, as opposed to local, taxes; indeed, that part of the court's opinion dealing with the class claim issue twice uses the term "governmental entities." *Neecke v. City of Mill Valley*, 39 Cal.App.4th 946, 962 (1996). *See also Howard Jarvis*

Taxpayers Ass'n v. City of Los Angeles, 79 Cal.App.4th 242, 249 (2000) (recognizing that *Woosley* and its progeny apply to local taxes in barring claim involving a dispute over whether taxpayers were owed a refund of the city's business tax).

Woosley and its progeny are directly on point. These cases establish the prerequisites to certify a class in a putative tax refund case, and they trump Plaintiff's reliance on traditional class action procedures. In the absence of express legislative authorization, this Court cannot certify any class seeking a refund of the disputed fees – even if Plaintiff satisfies the traditional class action requirements of numerosity, typicality and commonality.

B. The Legislature Has Not Authorized a Class Refund of the Fees Plaintiff Challenges.

Plaintiff has never indicated the statutory authority that would entitle him to pursue a refund of the disputed fees, let alone the basis for a class refund. The first amended complaint contains the conclusory allegation that Plaintiff's letter seeking a refund on behalf of himself and all residential property owners "met the requirements of Gov[ernment] Code § 910 and § 945.4." FAC, ¶ 6. Neither of these statutes authorizes a class refund of disputed fees or taxes. Code of Civil Procedures section 382 (which generally authorizes class actions) also does not constitute legislative authorization for tax refund class actions. *Neecke*, 39 Cal.App.4th at 963. In fact, it is not even clear that there is any statutory authorization to obtain a refund of the fees at issue in this case, let alone a class refund. Examination of the potentially applicable claim procedures demonstrates that the Legislature did not intend to allow submission of class claims seeking a refund of the fees Plaintiff challenges. Therefore, class certification is improper.

1. Health and Safety Code Provisions Related to Utility Rates Do Not Permit Class Actions.

Health and Safety Code section 5471 ("Section 5471") grants cities the authority to charge utility rates. Health and Safety Code section 5472 ("Section 5472") sets forth the claims procedure for seeking a refund of a utility rate charged pursuant to Section 5471:

> After fees, rates . . . or other charges are fixed pursuant to this article, any person may pay such fees, rates . . . or other charges under protest and bring an action against the city or city and county in the superior court to recover any money which the legislative body refuses to refund. Payments made and actions brought under

> this section, shall be made and brought in the manner provided for payment of taxes under protest and actions for refund thereof . . . Revenue and Taxation Code [Section 5140 et. seq.], insofar as those provisions are applicable.

Health & Safety Code § 5472.

Revenue & Tax Code section 5140 ("Section 5140") provides that:

> The person who paid the tax, his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate may bring an action only in the superior court against a county or a city to recover a tax which the board of supervisors of the county or the city council of the city has refused to refund on a claim filed pursuant to Article 1 (commencing with Section 5096) of this chapter. **No other person may bring such an action; but if another should do so, judgment shall not be rendered for the plaintiff.**

(emphasis added).

Nothing in the Health and Safety Code statutory scheme indicates an intent by the Legislature to allow class actions to seek a refund of alleged utility rate overcharges. Under *Woosley*, this silence does not indicate that the Legislature intended to permit class claims. *Woosley*, 3 Cal.4th at 792. Rather, the claims provisions in the statutory scheme must be strictly construed to determine whether a class claim may be brought.

Section 5140 has been interpreted to prohibit class claims because it does not allow "other person[s] to bring such an action." *Neecke*, 39 Cal.App.4th at 962. Indeed, the court of appeal recognized that Section 5140's language limiting refund claims to individuals is "even more restrictive than the statutory provisions at issue in *Woosley*. Neither of these statutes [Section 5140 and Revenue & Taxation Code Section 5097] provide for a class action claim or suit such as the one Neecke attempted to certify." *Id.* As in *Neecke*, the Court must deny Plaintiff's attempt to certify a class here.

2. **The San Diego City Charter Does Not Permit Class Actions in Tax Refund Cases.**

Additionally, the San Diego City Charter does not expressly permit class claims. Section 110 of the Charter sets for the claims procedure:

> Whenever it is claimed that The City of San Diego is obligated to pay money to any person because of contract or by virtue of operation of law, a demand or claim for such money shall be

> presented in writing and filed with the Auditor and Comptroller of The City of San Diego within one hundred (100) days after the last item of the account or claim has accrued.
>
> . . .
>
> ***Each*** claim or demand for money due because of contract or operation of law shall specify the name and address of ***the claimant***, a brief description of the contract or a brief recital of the facts giving rise to the obligation of the City imposed by law.
>
> . . .
>
> ***No suit shall be brought on any claim for money or damages against The City of San Diego until a demand for the same has been presented, as herein provided.***

(emphasis added).

Under *Woosley* and *Neecke*, this Court must strictly construe the requirements of the claims procedure under the City Charter. The Charter specifies that "**each** claim" specify the name and address of "**the claimant**." This means that each member of the putative class must individually make a claim. Therefore, class treatment of a claim under the City Charter is barred.

C. Certifying A Class Undermines The Strong Public Policy Favoring Fiscal Stability.

Certifying a class would undermine democratic principles and undercut the strong public policy favoring fiscal stability, which was a primary rationale underlying the decisions in *Woosley* and its progeny. The Supreme Court has recognized that strict legislative control over class action tax refund cases is required "so that governmental entities may engage in fiscal planning based on expected tax revenues." *See Woosley*, 3 Cal.4th at 790. This policy means that courts should not permit parties to use class actions to raid municipal government coffers unless the Legislature expressly authorizes such claims. The Legislature knows how to craft appropriate procedures to authorize such suits. *See State ex rel. Department of Motor Vehicles v. Superior Court*, 66 Cal.App.4th 421 (Legislature amended claim procedures to allow class refund of DMV fees). These considered legislative determinations trump the predilections of private litigants seeking to impose their views of fiscal policy through class action lawsuits.

The undisputed factual record clearly reveals that the challenged rates were subject to a

protracted and excruciatingly detailed executive, legislative and administrative review and decision-making process. Ultimately, the elected City Council chose a method to finance needed infrastructure improvements and then adopted the means to finance those improvements. The City did not act alone. Its state loans and federal grants came with significant strings attached – in particular, State Board review and approval of the very rate structure that is the subject of this lawsuit. Plaintiff, by seeking to represent a class of residential customers, is attempting single-handedly to supplant the decisions of the elected City Council, which carefully weighed the infrastructure development options and financing alternatives on behalf of all City residents.

Moreover, Plaintiff's case does not even make sense under traditional class action concepts. Plaintiff cannot possibly represent the diverse interests of the members of the huge class he asks this Court to certify. The City has already spent the proceeds of the sewer fees collected. If ordered to refund these fees, the City would have to make cuts to the services it offers or raise taxes to meet its current budget. Plaintiff's action seeks a judicial referendum prioritizing lower sewer rates over all other City priorities, from schools to policing, many of which may be more important to his fellow San Diegans. Courts should not involve themselves in the administration of intricate economic policies, particularly a municipal rate-setting policy with broad-reaching impact – and particularly where those policy determinations are already being overseen by a state administrative entity. Courts are not equipped to determine how much revenue a municipality should generate and how it should spend it.[2]

D. The City Has Not Violated Article XIII D.

As discussed below, it is the City's position that the fees at issue in this case are "service charges" based on actual use and not imposed as an incident of property ownership. *See Rincon Del Diablo Municipal Water Dist. v. San Diego County Water Auth.*, 121 Cal.App.4th 813, 819

[2] The City's position that no class can be certified in this case should be abundantly clear. No class is proper, regardless of how defined, but Plaintiff's class definition would be improper even if there were a basis for the Court to certify any class. Plaintiff seeks to certify a class of sewer customers during the time period May 23, 1994 through September 30, 2004. This class definition is overbroad and inappropriate. Under Government Code section 911.2, "[a] claim ... shall be presented . . . not later than one year after the accrual of the cause of action." Plaintiff filed a claim against the City on April 30, 2004. Assuming, *arguendo*, that Plaintiff's claim was valid and that he can assert a claim on behalf of the class (which he cannot), the scope of the class should be limited to those with claims accruing no earlier than April 30, 2003.

(2004). Therefore, Article XIII D is irrelevant and inapplicable. If Article XIII D does not apply, Plaintiff has failed to state a cognizable claim, and the Court should not certify a class for this additional reason.

The sewer fees challenged by this action were initially established on October 6, 1992, by Council Resolution No. R-280815. The sewer rates, which are assessed as a function of water consumption, qualify as a "commodity charge" adjusted annually to set rates as closely as possible to the ratepayer's actual usage of sewer facilities. *See Rincon*, 121 Cal.App.4th at 819 citing *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles ("Jarvis v. LA")*, 85 Cal.App.4th 79, 83 (2000). Recent cases have consistently held that such "usage rates" do not fall under Proposition 218.[3] *Jarvis v. LA*, 85 Cal App. 4th at 83 (holding that commodity charges "do not constitute 'fees' as defined by Article XIII D . . . because they are not levies or assessments 'incident of property ownership.' . . . The charges for water service are based primarily on the amount consumed, and are not incident to or directly related to property ownership.")

The Supreme Court has made it clear that "taxes, assessments, fees and charges are subject to the constitutional strictures when they burden landowners as **landowners**. . . . [Article XIII D] applies only to exactions levied solely by virtue of property ownership." *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830, 842 (2001). Consumption-based charges do not burden landowners as landowners, nor are they levied "solely by virtue of property ownership." The City's sewer commodity charges are clearly consumption-based and are not subject to Article XIII D. The challenged sewer fees are not imposed as an incident of property ownership and instead are based on usage.

For this additional reason, the Court should deny Plaintiff's class certification motion. It would result in a monumental waste of resources – of the Court and the parties – for the Court to certify a class under a legal theory that has no merit. That the California Supreme Court granted review in *Bighorn-Desert View Water Agency v. Beringson*, 114 Cal.App.4th 1213 (2004) further counsels caution. This Court should not rush to certify a class claim when the Supreme Court is currently considering a significant case that will define the potential scope of liability under

[3] The voters enacted Article XIII D through Proposition 218.

Article XIII. The questionable legal basis of Plaintiff's constitutional claim provides a further compelling reason – as if *Woosley* and *Neecke* were not enough – to deny Plaintiff's motion for class certification.

E. Plaintiff's Third Party Beneficiary Claim Is Not Appropriate For Class Action Treatment.

Plaintiff's second cause of action alleges breach of contract under a third party beneficiary theory. Of course, this claim is nothing more than a request for a tax refund under another guise. The claims seeks same remedy – a refund of purported taxes – without compliance with the strict statutory requirements for such a claim. It would be contrary to the clear holdings of *Woosley* and its progeny to permit a party to pursue a class action by simply changing the legal label under which it seeks a class-wide tax refund. *See Farrar v. Franchise Tax Board*, 15 Cal.App.4th at 20-21 ("The lesson of *Woosley* we take to be that statutes governing administrative tax refund procedures, backed as they are by a plenary constitutional authority, are to be strictly construed."). The absence of express legislative authorization permitting class-wide refund claims is fatal to Plaintiff's effort to certify a class under his third party beneficiary claim.

1. Plaintiff Is Not A Third Party Beneficiary Of The Grant And Loan Contracts.

Even without *Woosley*, Plaintiff could not meet his burden of demonstrating that class treatment of his third party beneficiary claim is proper. Neither Plaintiff nor any San Diego ratepayer would qualify as a third party beneficiary under well-settled principles of California law. This means that Plaintiff cannot be an adequate class representative because a party that cannot state the claim sought to be certified cannot represent third parties. *See Baltimore Football Club, Inc. v. Superior Court (Ramco, Inc.)*, 171 Cal.App.3d 352, 359 (1985) ("[A] class action may only be maintained against defendants as to whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met.").

Parties that benefit from a government contract are generally assumed to be incidental beneficiaries and may not enforce the contract absent a clear intent to the contrary. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2000); Restatement

(Second) of Contracts, section 313(2) (1979). The contract must establish not only an intent to confer a benefit, but also "an intention . . . to grant [the third party] enforceable rights." *Id.* "If there is any doubt regarding the intent of the contracting parties to benefit a third party, the contract should be construed against such an intent." *American Homes Ins. Co. v. Travelers Indemnity Co.*, 122 Cal.App.3d 951, 967 (1981).

Martinez v. Socoma Companies, Inc., 11 Cal.3d 394 (1974), involved a third party beneficiary class action claim similar to Plaintiff's (although not a tax refund case). In *Martinez*, the federal Economic Opportunity Act instituted Special Impact Programs to make federal funds available for contracts with local private industry for the benefit of hard-core unemployed residents. *Id.* at 398. Plaintiffs claimed they were third party beneficiaries to the contract and brought a class action on behalf of East Los Angeles residents who were certified as disadvantaged and qualified for employment under these contracts. *Id.* at 399. They alleged that, although the government paid out funds to defendant contractors, the latter did not provide the number of jobs authorized. *Id.* The Court held that Congress intended to accomplish a public purpose – alleviation of national unemployment – not to make gifts. *Id.* at 401. The plaintiffs were not intended beneficiaries because the contract did not express a purpose to confer on plaintiffs a right against the promisor by the promisee. *Id.* at 407. The Court stated that beneficiary status could not be inferred simply from the fact that third persons were intended to enjoy the benefits. *Id.* at 406. Furthermore, the contractual dispute-resolution process and the requirement to return of funds to the government in the event of non-compliance indicated a purpose to exclude direct rights against defendants. *Id.* at 402-03, fn. 3. Thus, the Court determined that plaintiffs were merely incidental beneficiaries despite the fact that they would benefit more directly than other members of the public. *Id.* at 406.

Based on *Martinez*, a party cannot be a third party beneficiary to a government contract when: (1) the contracts were designed not to benefit individuals as such but to benefit the public interest or improve the city overall; (2) the provision in the contract did not manifest an intent to make plaintiffs direct, not incidental, beneficiaries of the agreement; (3) the agreement provides governmental administrative procedures for the resolution of disputes arising out of contract

(which indicates a purpose to exclude direct rights against defendants); and (4) a liquidated damages provision obligating the recipient to return the funds to the government is included. *See Marina Tenants Ass'n. v. Deauville Marina Development Co.*, 181 Cal.App.3d 122, 129-30 (1986).

In this case, all of these factors apply. The City entered into the contracts to benefit the public at large by bringing the sewage system into compliance with the CWA at the lowest cost possible to taxpayers. The contracts do not manifest any intent to make plaintiffs direct beneficiaries of the agreement. The contracts all provide a governmental administrative dispute mechanism, which provides that the State Board will resolve any disputes. And, if the City fails to comply with the contract, it is obligated to return the funds to the federal and state government. Therefore, Plaintiff is not a third party beneficiary to the Clean Water loans and SRF grants. As above, the Court should not certify a class when there is no claim.

2. **There Is No Breach Of Contract.**

Furthermore, even if Plaintiff were somehow a third party beneficiary to the contracts, the City has not breached any of the contracts. The contracts vest in the State Board oversight authority to keep rates proportional and fair. They do not vest in ratepayers the private right to enforce what they view are "proportional" rates. In *Marina Tenants Assn. v. Deauville Marina Development Co., supra*, tenants claimed that they were third party beneficiaries who paid rents in excess of what is "fair and reasonable," as required under a contract between the County and developers. In *Marina*, by the terms of the master lease, all rents were subject to the County's approval. The Court held that there was no breach of contract because there was no allegation that *the County* had determined that the rents were in excess of "fair and reasonable." The Court based its decision, in part, on the concept that "[a]lthough a court of equity may employ broad powers in the application of equitable remedies, it cannot create new rights under the guise of doing equity." *Id.*, 181 Cal.App.3d at 134 (internal citations omitted). The contract allowed the County to set rents as it saw fit; it did not grant rights to the tenants to challenge what the County saw as fit.

Similarly, the contracts at issue in this case require generally that the City adopt a rate

structure that is "acceptable" to the State Board and that they be adopted within a reasonable time, with implementation to occur after the completion of the project. The City has complied with the contracts by adopting a rate structure that was acceptable to the State Board, which is the final arbiter as to whether the charge is disproportionate. The State Board, on behalf of the federal grantors and SRF, approved all rates through 2004 and indicated in numerous letters that the City satisfied the relevant conditions of the loan contracts. Therefore, there is no breach of contract by the City. Once again, the Court should not certify a class when there is no claim.

3. **To The Extent Plaintiff Claims Rights As A Third Party Beneficiary, He Should Be Bound By The Dispute Resolution Mechanisms Set Forth In the Contracts.**

Finally, each of the contracts under which Plaintiff claims third party beneficiary rights sets forth an administrative dispute mechanism:

> Any dispute arising under this contract . . . shall be decided by the Division Chief, or his authorized representative. The decision shall be reduced to writing and a copy thereof furnished to the Agency and to the SWRCB's Executive Director.

This contractual mechanism properly vests the authority to resolve disputes in the State Board, which, unlike the courts, has the administrative expertise to evaluate the complex rate-setting mechanism. Of course, Plaintiff never presented his (or anyone else's) purported contractual grievance to the State Board for resolution. Thus, even if this third party beneficiary claim was not a disguised tax refund case, which the Legislature has not authorized, Plaintiff could not proceed with a class action unless and until he availed himself of the mandatory dispute resolution mechanisms in the underlying contracts.

It is well-settled that a third party beneficiary cannot assert greater rights than those of the promisee under the contract. *Marina Tenants Assn.*, 181 Cal.App.3d at 132. Because the foundation of any right the third person may have is the promisor's contract, "[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take that contract as he finds it.... [T]he third party cannot select the parts favorable to him and reject those unfavorable to him." *Id.*

Under this rationale, courts consistently have held that third party beneficiaries are bound

by alternative dispute resolution clauses in contracts. *See, e.g., Mayflower Ins. Co. v. Pellegrino*, 212 Cal.App.3d 1326, 1331 (1989) (claimed third party beneficiaries under insurance policy were bound by the arbitration clause). Failure to exhaust the contractual dispute resolution remedy bars a party from seeking relief in court. *See, e.g., Johnson v. Hydraulic Research and Manufacturing Co.*, 70 Cal.App.3d 675, 679 (1977) (party to a collective bargaining contract which provides grievance and arbitration procedures must exhaust the internal remedies before resorting to the courts). Courts have reasoned that these exhaustion requirements "make possible the settlement of such matters by simple, expeditious and inexpensive procedures, and by persons who, generally are familiar therewith." *Westlake Community Hosp. v. Superior Court*, 17 Cal.3d 465, 475 (1976) (requiring physician to exhaust internal hospital remedies related to staff privileges before bringing a court action).

Similarly, in cases involving contract disputes where an administrative remedy is provided by statute, the administrative relief must first be exhausted. *See Mathew Zaheri Corp. v. Mitsubishi Motor Sales of Am.*, 17 Cal.App.4th 288, 293 (1993). In *White v. State of California*, 195 Cal.App.3d 452, 473 (1987), a case involving closely analogous facts to this case, plaintiff brought a claim as a third party beneficiary of a contract between the State Educational Agency ("SEA") and the federal government seeking to compel the SEA to comply with their contractual duty to spend federal funds granted to it in accordance with the law. *White*, 195 Cal.App.3d at 473. The Court held that plaintiff was barred from bringing a claim in court because he had not yet exhausted his administrative remedy. *Id.* The Court found that "[t]he doctrine of exhaustion of administrative remedies has been applied to bar judicial relief premised on contractual rights where an unexhausted governmental administrative remedy would resolve the contractual dispute). *Id.* at 473-74. Courts have required exhaustion even if the administrative remedy cannot resolve all issues or provide the type of relief that plaintiff desires because the process "facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." *Zaheri*, 17 Cal.App.4th at 293.

In this case, the State Board has the necessary administrative expertise to adjudicate disputes over the complexities of the sewer rate structure. Plaintiff's failure to exhaust the

contractual dispute resolution remedy bars him from seeking class action relief in court.

IV. CONCLUSION

This is not a proper case for class action treatment. Cases seeking a refund of taxes – which is what Plaintiff claims to be doing here – are governed by strict requirements. Because the Legislature has not authorized class claims seeking refund of utility charges, no class is permitted – period – regardless of the legal label that Plaintiff puts on that claim. For the reasons set forth above, Plaintiff's Motion for Class Certification should be denied.

Dated: May 27, 2005

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Individually and On Behalf of Similarly Situated Persons

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF BUTTE

UNLIMITED JURISDICTION

ZACKARY HANNS, Individually and On Behalf of Similarly Situated Persons

Plaintiffs,

v.

CITY OF CHICO AND DOES 1-100

Defendants.

Case No. 149292

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, REPLEVIN, CONSTRUCTIVE TRUST, RESTITUTION, MONEY HAD AND RECEIVED, VIOLATION OF CONSTITUTIONAL RIGHTS

BY FAX

Comes now plaintiff Zackary Hanns on his own behalf, and on behalf of persons similarly situated, and alleges the following:

1. Plaintiff seeks to stop the illegal practice of the City of Chico ("Chico") from collecting money from persons for law enforcement costs pursuant to Chico Municipal Code Chapter 10.50 for those person's "driving under the influence of alcohol or drugs" ("DUI") arrest, transportation, blood alcohol tests, booking and report writing which are all essentially normal law enforcement activities and not emergency responses to an "incident" as that phrase is used in California Government Code section 53150. Government Code section 53150 solely occupies the field of DUI emergency response cost recovery and to the extent that Chico Municipal Code Chapter 10.50 exceeds the authority granted by Government Code section 53150 *et. seq* the Chico Municipal Code is preempted under California Law. California Government Code section 53150 was never intended to authorize the recovery of law enforcement costs associated with DUI arrests resulting from normal traffic stops but instead was intended to authorize the recovery of costs of additional public services necessitated by genuine emergencies relating to automobile accidents.

2. Plaintiff also seeks to stop Chico's illegal practice of adding interest, penalties, overhead, benefits and other indirect costs to DUI emergency response cost bills. California Government Code section 53150 *et seq* only authorizes the inclusion of those costs directly arising from an emergency response to an incident and the salaries of the officers responding to the incident. Chico's practice of including interest, penalties, overhead and other indirect costs in DUI emergency response cost bills exceeds the Government Code and as such violates California law. The City of Chico by enacting Chico Municipal Code Chapter 10.50 illegally attempts to expand the statutory authority granted by Government Code section 53150 and as such Chico violates Article XI of the California Constitution, other constitutional protections, as well as common law rights and entitlements.

3. Plaintiff Zackary Hanns is an individual and a resident of the County of Butte, in the State of California.

4. Defendant Chico is a charter city and political subdivision of the State of California, located in the County of Butte.

5. Plaintiff is informed and believes that defendant Does 1-100 have been directly or indirectly involved in the same illegal conduct herein alleged. Plaintiff is informed and believes that, at all times herein mentioned, each doe defendant was the agent, co-conspirator, joint tortfeasor, partner, joint venturer, joint enterprising partner, independent contractor, and/or alter ego of another defendant(s). In doing the things alleged herein, each doe defendant was acting within the course and scope of said agency, conspiracy, contract, partnership, joint venture, and/or joint enterprise with the direction, advance knowledge, authorization, acquiescence, and/or subsequent ratification of each and every remaining defendant. Each doe defendant was put in a position and so enabled by the remaining defendants to do the things hereinafter alleged. Each doe defendant had the knowledge of and agreed to the objective and course of action hereinafter alleged, and each doe defendant conspired with and aided and abetted other defendant(s) in achieving that objective and pursuing that course of action. Plaintiff is informed and believes and thereon alleges that each of said fictitious defendants was responsible in some way for the matters alleged herein and proximately caused plaintiff's and members of the public the damages complained of herein. Plaintiff will seek leave to amend this complaint to state the true identities of such doe defendants when and if their identities become known and joinder is appropriate.

INDIVIDUAL ALLEGATIONS

6. On or around August of 2008 plaintiff Zackary Hanns was subjected to a normal traffic stop and subsequently investigated and arrested by Chico for DUI. Following his arrest for DUI Chico generated and sent to Mr. Hanns a billing notice for "DUI Cost Recovery Fee" occasioned by his arrest for driving under the influence. The notice to Mr. Hanns demanded

payment in the amount of $355.50 for the police response to the traffic incident that resulted in his arrest and conviction for DUI. The billing notice cited Chico Municipal Code Chapter 10.50 as the authority enabling Chico to recover the costs of responding to the traffic incident that resulted in the arrest and conviction for DUI. Mr. Hanns responded by paying $10.00 to Chico under protest. On or around August 12, 2009 Mr. Hanns received a second notice from Chico for delinquent DUI Cost Recovery Fees demanding payment in the amount of $355.50. On or around October 29, 2009 Mr. Hanns received a notice from Butte County Credit Bureau demanding payment in the amount of $586.27 citing the City of Chico DUI as the creditor. California Government Code sections 53150 *et seq* preempt Chico Municipal Code Chapter 10.50 to the extent the authority granted by 53150 is exceeded. Mr. Hanns' DUI investigation, arrest and booking are not emergency responses to an incident as understood under California Government Code sections 53150 *et seq* and the inclusion of overhead costs, interest and other indirect costs in his bill are not allowable DUI emergency response costs. Mr. Hanns' did not cause an emergency incident resulting in an emergency response. Mr. Hanns' DUI consisted of traffic stop followed by a simple investigation, arrest, blood alcohol test, booking and report writing all of which are normal law enforcement activities and not emergency responses. Additional costs including interest, penalties and overhead charges have been added to Mr. Hanns' DUI cost bill. Interest, penalties and other overhead costs are not authorized by California Government Code 53150 and as such are illegal. Chico illegally attempts to expand its statutory authority, has been unjustly enriched, has breached other duties owing to Mr. Hanns, and violated his constitutional rights by levying and collecting sums of money not owed by Mr. Hanns to Chico as alleged further below.

7. On November 10, 2009 Mr. Hanns lodged a timely class action government claim and protest of payment with Chico on his own behalf and for other persons similarly situated. Mr. Hanns sought the return of monies improperly obtained by Chico and sought a cancellation of debt

for sums improperly billed by Chico. Chico rejected plaintiff's government claim on December 2, 2009.

CLASS ALLEGATIONS – PREMPTION BY GOVT CODE SECTION 53150

8. Plaintiff incorporates by this reference the preceding paragraphs. Plaintiff brings a class action claim against Chico which has billed and/or collected money from plaintiff and similarly situated persons for DUI emergency response services, as alleged above, pursuant to Chico Municipal Code Chapter 10.50. Chico is a charter city and a political subdivision of the State of California (or departments thereof), charged with interpreting and enforcing Article XI of the California Constitution and Government Code sections 53510 *et seq.* Government Code section 53150 occupies the field of DUI emergency response costs and as such preempts Chico Municipal Code Chapter 10.50 to the extent the Municipal Code exceeds the authority of California Government Code sections 53150 *et seq.* Chico bills for the costs of law enforcement activities as described above under the Chico Municipal Code for responses that are not "appropriate emergency responses" to emergency incidents and for the costs of penalties, interest, overhead and other indirect costs not authorized by California Government Code 53150. Chico bills for law enforcement costs and includes other indirect costs in DUI emergency response cost bills without authorizing legislation, in contravention of the Government Code and in doing so violates California law.

9. Plaintiff sues in plaintiff's individual capacity and on behalf of all persons similarly situated with respect to Chico. Such a representative action is necessary to prevent and remedy the unlawful practices alleged herein.

10. Pursuant to California Code of Civil Procedure section 382, plaintiff seeks to represent the following classes against Chico: A. All persons to whom Chico, or its agents, employees, or assigns, sent or will send bills for "DUI Cost Recovery Fees" and costs associated

with the DUI arrests of those persons whose DUI Cost Recovery Fees included amounts for interest, penalties, overhead or other costs not authorized by California Government Code sections 53150 *et seq.* B. All persons to whom Chico, or its agents, employees, or assigns, sent or will send bills for "DUI Cost Recovery Fees" and costs associated with the DUI arrests of those persons who did not cause any emergency incident as that term is defined under California Government Code sections 53150 *et seq.* The class periods start on November 10, 2008 or one year before the lodging of plaintiffs' government claim with Chico and extends forward into the future until such time that Chico ceases to bill and collect such illegal payments.

11. This plaintiff classes are readily ascertainable from the records of the respective defendant.

12. This plaintiff classes are so numerous that joinder is impractical.

13. There is a well-defined community of interest in the questions of law and fact involved in plaintiff's claims against Chico and the claims of respective class members, since the Chico Municipal Code far exceeds the authority granted under California Government Code 53150 and violates section XI of the California Constitution by billing for costs associated with DUI arrests when the person was billed for the costs of law enforcement and/or overhead costs and not for emergency responses to an "incident" as defined under Government Code section 53150. Chico bills for law enforcement costs and overhead costs of DUI arrests without authorizing legislation, and so violates the general laws of the State of California and the California Constitution as to plaintiffs and class members. In conducting itself in this way, Chico breaches common and statutory duties owing to plaintiff and class members, is unjustly enriched, and infringes other constitutional rights owing to plaintiff and class members. These breaches and infringements are common issues of law and fact. The commonality turns on the definitions of "incident" and "appropriate emergency response" and the definition of "direct" costs as defined under California Government Code section 53150 *et seq.* The illegality can be shown as a matter

of law and from defendants' own records. There are similarly common issues of law and fact between plaintiff's claims for the return of monies and/or cancellation of debt plaintiff incurred for alleged "DUI Cost Recovery Fees" and the claims of persons similarly situated for the return of monies they paid and/or cancelation of debt for such "DUI Cost Recovery Fees." There are also similarly common issues of law and fact between plaintiff's claims of overbilling for interest penalties and other illegal costs added to "DUI Cost Recovery Fees" and the claims of persons similarly situated who also were billed for interest, penalties and other illegal costs.

14. The relief plaintiffs seeks should include the following: an injunction to prevent defendant from billing and seeking to collect for DUI Cost Recovery Fees in the absence of an emergency incident as defined under Government Code 53150; an injunction to prevent defendant from adding interest, penalties, overhead or other illegal costs to DUI Cost Recovery Fees, and a declaration of the rights of the parties as to Chico Municipal Code Chapter 10.50 and Government Code 53150 *et seq*. Plaintiff similarly seeks the ancillary equitable relief of the imposition of a constructive trust, replevin, restitution and disgorgement of money illegally collected.

15. Plaintiff's claims are typical of those of the class plaintiff represents, and plaintiff will adequately represent the interests of the class. Plaintiff and/or class members not only have actually suffered by defendant's illegal actions, but there is a credible threat that such persons will suffer again by such actions. A decision as to plaintiff's claims on the issues described above, and herein, will determine those issues with regard to the claims of all other class members.

16. A representative action is superior to alternative forms of action. There is no plain, speedy, or adequate remedy other than by maintenance of this representative action because damage to each member of the class is small, and not likely to be resolved in a satisfactory way through other administrative or small claims litigation channels.

FIRST CLAIM FOR RELIEF

(Claim for Declaratory Relief)

17. Plaintiff incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here.

18. A controversy has arisen between plaintiff and defendant concerning the existence and validity of any outstanding obligations, or any part thereof, allegedly owed by plaintiff, specifically with respect to the billing for the cost of DUI arrests which are separate and apart from billing for an emergency "incident" as that term is used under California Government Code section 53150. The City of Chico has enacted Chico Municipal Code Chapter 10.50 sections 10.50.010 -10.50.090 which provide for the imposition and collection of DUI Cost Recovery Fees from all persons arrested and convicted of driving under the influence regardless of the circumstances leading to the arrest. California Government Code sections 53150 *et seq* occupies the field of DUI emergency response cost recovery. To the extent Chico Municipal Code Chapter 10.50 sections 10.50.010 *et seq* exceed the authority of California Government Code sections 53150 *et seq* the Chico Municipal Code is preempted under California Law. Plaintiff seeks the following declarations:

19. Plaintiff seeks a declaration that California Government Code 53150 *et seq* occupies the field for the imposition and collection of DUI Emergency Response Costs.

20. Plaintiff seeks a declaration that Chico Municipal Code section 10.50.020 exceeds the authority granted by California Government Code sections 53150 *et seq* and is therefore preempted under California law.

21. Plaintiff seeks a declaration that Chico Municipal Code section 10.50.030 exceeds the authority granted by California Government Code sections 53150 *et seq* and is therefore preempted under California law.

22. Plaintiff seeks a declaration that Chico Municipal Code section 10.50.060 exceeds the authority granted by California Government Code sections 53150 *et seq* and is therefore preempted under California law.

23. WHEREFORE, plaintiff prays for judgment as alleged below.

SECOND CLAIM FOR RELIEF

(Claim for Declaratory Relief)

24. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here.

25. An actual controversy has arisen between plaintiffs and similarly situated persons, on the one hand, and defendants on the other hand, on the following points:

25a. The billing for the cost of DUI arrests not associated with responses to an emergency "incident" as that term is used under California Government Code section 53150, when plaintiffs believes that defendants may properly bill only for emergency responses to an "incident," and not for normal law enforcement activities;

25b. The existence and validity of any outstanding obligations, or any part thereof, allegedly owed by plaintiffs, specifically with respect to the billing for the cost of DUI arrests and not for emergency responses to an "incident" as that term is used under California Government Code section 53150;

25c. The existence and breach statutory provisions resulting in the illegal collection of funds from plaintiff and class members and other duties owed plaintiff and class members, as well as the existence and deprivation of plaintiffs' constitutional rights.

26. Plaintiffs seek a declaration as to the proper interpretations and respective rights and obligations of the parties with respect to the referenced statutes and obligations.

27. WHEREFORE, plaintiffs pray for judgment as alleged below.

THIRD CLAIM FOR RELIEF

(Claim for Declaratory Relief)

28. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here

29. A controversy has arisen between plaintiffs and defendant concerning the existence and validity of any outstanding obligations, or any part thereof, allegedly owed by plaintiffs, specifically with respect to the billing for the cost of DUI arrests which are separate and apart from billing for an emergency "incident" as that term is used under California Government Code section 53150. Specifically the practice of including interest, penalties, overhead or other costs in DUI Cost Recovery Fees.

30. Plaintiffs seek a declaration as to the proper interpretations and respective rights and obligations of the parties with respect to the referenced statutes and obligations.

31. WHEREFORE, plaintiffs pray for judgment as alleged below.

FOURTH CLAIM FOR RELIEF

(Claim for Injunctive Relief)

32. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here.

33. As alleged, defendant's conduct has caused and will cause irreparable harm. Defendant continues to bill and collect illegal debts in violation of statute, common law, and constitutional principles. Defendant is undeterred by challenges to its illegal activity. This is a matter of general public interest. The violations of the rights of plaintiffs and class members will not be remedied by monetary damages alone, as the debts in question should never have come into

existence, nor should plaintiffs and class members be required to challenge them. Many class members will have their credit histories damaged. Further, litigation challenging defendant's practices is beyond the capacity of most class members to undertake. Further, monetary damages may not be available. Accordingly, there is no adequate remedy at law for defendant's conduct, and a prohibitory injunction should issue to prevent defendant's continuing illegal conduct. A mandatory injunction should issue to require defendants to stop billing DUI Cost Recovery Fees to those persons who did not cause any emergency incident, stop including interest, penalties, overhead and other costs not authorized by Government Code 53150 et seq in DUI Cost Recovery Fees; and require defendant take reasonable steps to cancel debts and clear the credit histories of plaintiffs and class members who were improperly billed DUI Cost Recovery Fees.

34. WHEREFORE, plaintiffs pray for judgment as alleged below.

FIFITH CLAIM FOR RELIEF

(Replevin / Constructive Trust / Unjust Enrichment)

35. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here. Defendants have wrongfully obtained money which rightfully belongs to plaintiffs. California Civil Code section 2224 provides that "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

36. Defendant represented to plaintiff and class members that they owed defendants money for DUI Cost Recovery Fees. As a governmental entity, defendant Chico is in a position of trust with the public which demand the highest standards of honesty and fair dealing. Chico so violates the public's trust by illegally demanding payments from members of the public to which Chico is not entitled.

37. Chico has illegally collected money from class members either by mistake of law or wrongfully exceeded their authority under California Government Code § 53150 and in violation section XI of the California Constitution. Accordingly, Chico is an involuntary trustee of the money mistakenly or wrongfully gained from class members for the benefit of the those class members in accordance with Cal. Civ. Code § 2224.

38. Failure to impress a constructive trust for the benefit of plaintiff and/or class members would offend principles of equity and unjustly enrich defendant by the allowing defendants to retain funds rightfully belonging to plaintiff and/or class members. Defendant has improperly collected for the costs of law enforcement and imposed other costs on persons to which they were not entitled. Plaintiff and/or class members request that the Court impose a constructive trust upon the funds taken from class members for the benefit of class members and further order the replevin/restitution and return of those funds or the value thereof to plaintiff and class members based upon such facts and applicable equitable principles.

39. Plaintiff and/or class members paid money to the defendants under circumstances of coercion making payment non-voluntary. Plaintiffs and/or class members made payment during the pendency of a criminal prosecution against him or her, or during the pendency of a term of probation requiring him or her to "obey all laws." Defendants represented or implied to the plaintiffs and class members that the emergency response obligation was linked to the criminal charges against the plaintiff and class members are therefore wrongfully induced plaintiffs give money to defendants. Plaintiffs and/or class members made payment to preserve plaintiffs and class members' life, property, and credit history. Defendants were aware of the claimed illegality of its practices by earlier protests of other individuals, legislative history and opinions relating to section 53150, correspondence and communications between defendants and other persons, and/or adverse judgments against the defendant. Notwithstanding the foregoing, defendant persisted in its illegal conduct. Protests by the plaintiff and class members would have been futile. Class

members who made payments after the filing of plaintiff's government claim and protest of payment for all persons similarly situated should be deemed to have made payment under coercion and/or protest. As a matter of equity, un-clean hands, and other applicable equitable principles, plaintiffs' payment should be deemed non-voluntary and/or recoverable. Without limiting the generality of the foregoing, plaintiffs and/or class members made payment to defendants under a unilateral mistake of law, under which the plaintiffs was ignorant of the true state of the law and the defendants were aware of the true state of the law, or under a mutual mistake of law, under which the plaintiffs, class members and the defendants were ignorant of the true state of the law. In either case, the Court should impress a constructive trust on those funds for the benefits of class members and order the return of those funds to the rightful owners.

40. WHEREFORE, plaintiffs pray for judgment as alleged below.

SIXTH CLAIM FOR RELIEF

(Money Had and Received/Assumpsit/Restitution)

41. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here.

42. Defendant is indebted to plaintiff and/or class members in a certain sum for money had and received by the defendant for the use of the plaintiff and/or class members. None of this money has been repaid. Defendant has been unjustly enriched by the collection of monies to which it was not entitled by billing for non-emergency incidents and/or adding illegal costs to DUI Cost Recovery Fees. Plaintiff and/or class members seek a return of monies paid to defendant based upon such facts and applicable equitable principles of restitution.

43. Plaintiff and/or class members paid money to the defendant under circumstances of coercion making the payment non-voluntary. Plaintiff and/or class members made payment subsequent to collection agency contact or a small claims judgment during the pendency of a

criminal prosecution against him or her, or during the pendency of a term of probation requiring him or her to "obey all laws." Defendant represented or implied to the plaintiff and/or class members that the emergency response obligation was linked to the criminal charges against the plaintiff and class members. Plaintiff and/or class members made payment to preserve plaintiff and or class member's life, property, and credit history. Defendant was aware of the claimed illegality of its practices by earlier protests of other individuals, legislative history and opinions relating to section 53150, correspondence and communications between defendants and other persons, and/or adverse judgments against the defendant. Notwithstanding the foregoing, defendant persisted in its illegal conduct. Protests by the plaintiff and class members have been futile. Class members who made payments after the filing of plaintiffs' government claim and protest of payment for all persons similarly situated should be deemed to have made payment under coercion and/or protest. As a matter of equity, clean hands, and other applicable equitable principles, plaintiffs' payment should be deemed non-voluntary and/or recoverable. Without limiting the generality of the foregoing, plaintiff and/or class members made payment to defendant under a unilateral mistake of law, under which the plaintiffs was ignorant of the true state of the law and the defendant was aware of the true state of the law, or under a mutual mistake of law, under which the plaintiff and/or class members and the defendant were ignorant of the true state of the law. In either case, the transaction should be undone and restitution made to the plaintiff and/or class members.

44. WHEREFORE, plaintiffs pray for judgment as alleged below.

SEVENTH CLAIM FOR RELIEF

(Violation of Equal Protection)

45. Plaintiffs incorporates by reference herein the paragraphs 1 through 16, above, as if set forth in full here.

46. Defendant has violated the rights of plaintiff and class members to equal protection of the laws by singling out DUI defendants for payment of the costs of law enforcement and other costs without criminal procedural protections. Defendant has done so with intent to discriminate and/or without any rational basis for their classification. Defendant has done so as a matter of practice, policy, and local enactment. Plaintiffs attacks Chico Municipal Code Chapter 10.50 and Government Code section 53150 et seq. as a violation of the rights of plaintiffs and class members to equal protection of the laws, but do so only to the extent the court rules that the municipal code or the statute allows defendant to bill for the costs of law enforcement and other illegal costs in the manner alleged herein.

47. As a proximate result of defendant's actions and omissions, plaintiff and class members have paid monies to defendants which they seek now to recoup.

WHEREFORE plaintiffs pray for judgment as follows:

1. For an injunction to prevent defendant from billing and seeking to collect for law enforcement costs, interest, penalties, overhead and other costs under Chico Municipal Code section 10.50.030 to the extent the Municipal Code is in violation of Government Code section 53150 et seq., where the costs collected are not for an emergency responses to incidents or do not directly arise from a emergency response to an incident as is provided under Government Code section 53150 *et seq*;

2. For a mandatory injunction requiring defendant to repay illegally collected funds, cancel outstanding debts, and take reasonable steps within their powers to clear the credit records of class members;

3. for a declaration of the rights of the parties;

4. For impression of a constructive trust for the benefit of plaintiff and class members upon the illegally obtained funds held by defendants and an order of replevin and return of those

funds or the value thereof improperly paid to defendants for DUI Cost Recovery Fees under Government Code section 53150 et seq. and/or Chico Municipal Code Chapter 10.50 which have been illegal obtained and unjustly enriched defendant;

5. For the restitution of monies to plaintiff and/or class members of funds improperly paid to defendants for DUI Cost Recovery Fees under Government Code 53150 et seq or Chico Municipal Code Chapter 10.50 or other practices which have unjustly enriched defendant;

6. for statutory interest on such monies from the time of payment;

7. for attorneys' fees pursuant to CCP 1021.5 or other applicable law;

8. for costs of suit;

9. for such and further relief as the court may deem just.

Respectfully submitted,

LAW OFFICES OF S. CHANDLER VISHER
LAW OFFICES OF MATTHEW J. WITTEMAN
LAW OFFICES OF BRADLEY C. ARNOLD

Date: February 3, 2010

By: _____
Bradley C. Arnold,
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Kimberly Nielsen, 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 Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on April 26, 2012, declarant served the **NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE** via U.S. Mail in a sealed envelope fully prepaid and addressed to 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 26th day of April, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, P.C.

By: _____
Kimberly Nielsen

McWilliams v. City of Long Beach, et al.
Case No. B200831
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McWilliams v. City of Long Beach, et al.
Case No. B200831
Service List

COURTESY COPIES TO:

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Superior Court of California
County of Los Angeles
600 S. Commonwealth Ave.
Los Angeles, CA 90005

Clerk of the Court
California Court of Appeal
Second Appellate Division
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013