LIU, J.

SUPREME COURT
FILED

MAY 31 2012

Frederick K. Ohlrich Clerk

Deputy

S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

SECOND 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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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, subds. (b), (d) and (h), Petitioner City of Long Beach hereby submits this Second Notice of Motion and Motion for Judicial Notice, and moves this Court to take judicial notice for the purposes of the Petition for Review filed on April 27, 2012, of the following true and correct documents, Exhibits A through C to the Declaration of Tiana J. Murillo attached hereto:

A. "City's Memorandum of Points and Authorities in Support of Demurrer and Motion to Strike Plaintiffs' First Amended Complaint" filed by the City of Paso Robles in *Borst et al. v. City of Paso Robles* on November 22, 2011 in the San Luis Obispo County Superior Court, Case Number CV 09-8117 .

B. "Notice of Ruling on Certain Defendants' Demurrers to the First Amended Complaint and Order of Stay," with attached written ruling issued by Court, filed by the City of Alhambra, California, et al. in *Sipple et al. v. City of Alameda et al.* on May 16, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

C. Sections 3.04.550 – 3.04.561 of the Paso Robles Municipal Code ("Claims for Refund of Taxes, Assessments or Fees").

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 C to the Declaration of Tiana J. Murillo, and the proposed order granting this motion.

DATED: May 30, 2012

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-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).) Courts may also judicially notice duly enacted municipal resolutions and ordinances. (*Id.*, subds. (b) and (h); see also, *Jordan v. Los Angeles County* (1968) 267 Cal. App. 2d 794, 798 [Evidence Code § 452(b) "permits judicial notice of legislative enactments of 'any public entity in the United States.'"]); *Shapiro v. Board of Directors of Centre City* (2005) 134 Cal.App.4th 170, 174, fn. 2 [judicial notice of municipal resolution].) A reviewing court may take judicial notice of any matter specified in Evidence Code § 452. (Cal. Evid. Code § 459.)

"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 a matter 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 Notice Municipal Ordinances and Pleadings in Related Court Actions.

The Court should take judicial notice of the documents in Exhibit C. These documents are duly acted municipal ordinances and are subject to notice pursuant to Evidence Code § 452 (b) and (h). The Court should also take judicial notice of the documents in Exhibits A and B. These documents are pleadings filed in relevant court actions and are subject to notice pursuant to Evidence Code § 452 (d). Pursuant to Evidence Code § 459, this Court may notice these matters as a reviewing court.

In its Answer to the City's Petition, Plaintiff — in an attempt to dispute the relevance of the questions raised by the City's Petition — contends that *Borst et al. v. City of Paso Robles,* San Luis Obispo County Superior Court Case Number CV 09-8117 (Exhibit G to the City's first Motion for Judicial Notice) did not mention a relevant local tax refund claiming ordinance. To demonstrate that the underlying dispute indeed involved such an ordinance, the City seeks judicial notice of the City's demurrer in that action (Exhibit A) along with its local claiming ordinance (Exhibit C).

As discussed in its Petition, the City of Long Beach is but one of more than 100 California municipalities now defending alleged class claims for refunds of local taxes and fees on the ground that class challenges are barred by local claiming ordinances. The Opposition to the City's first Motion for Judicial Notice – and the Answer to the City's Petition – claimed otherwise. The City therefore seeks judicial notice of the recent order in *Sipple, et al. v. City of Alameda, et al.* of the Los Angeles

County Superior Court (Exhibit B) granting demurrers without leave to amend as to a claim for refund to a class of telephone customers of allegedly overpaid utility taxes. That order is but one example of a trial court struggling with the very conflict of law which underlies this Petition.

Each of the documents proposed for notice in Exhibits A through C will aid the Court's understanding of the urgency of the questions presented by the Petition in this case:

- Did the Legislature use "statute" in Government Code § 905(a) to exclude local legislation and to require claims for refunds of local taxes, assessments, fees and charges to be governed by the Government Claims Act?
- If so, does § 905(a) violate the home rule power to tax conferred on charter cities by Article XI, §§ 3, 5 and on all cities and counties by Article XI, § 7 of the California Constitution?
- Does the second sentence of California Constitution, Article XIII, § 32, which requires express legislative authorization for tax refunds, apply to local government?

C. The City's Second Motion for Judicial Notice Complies with Rule of Court 8.252.

The Court should likewise take judicial notice of the documents in Exhibits A through C because the City's Motion complies with California Rule of Court 8.252.

First, as discussed in Section B, *supra*, this motion is relevant to the City's Petition for Review because Exhibits A and B are court records from class or class-like challenges to local taxes and fees. These pleadings further demonstrate that the questions presented by the City's Petition affect nearly all local governments in the state, many of which are facing (or have recently faced) lawsuits similar to the case at bar. Exhibit C is a municipal ordinance underlying the case to which Exhibit A relates. Notice of Exhibits A through C will demonstrate to the Court that the issues presented in the instant Petition underlie many more cases than the one presently at bar and that local governments around our state would benefit from the Court's resolution of these questions.

Second, Exhibits A through C were not presented to the trial court, because a decision by the trial court did not stand to clarify the law for parties other than those at bar. Accordingly, the trial court had no occasion to take judicial notice of those matters.

Third, Exhibits A through C relate to proceedings occurring after the April 13, 2007 decision of the Los Angeles County Superior Court to grant the City's demurrer in the present case. Judicial notice of these lawsuits will therefore demonstrate the ongoing nature and urgency of the questions presented for review without undermining the trial court function or imposing on this Court.

Accordingly, this motion complies with California Rule of Court 8.252.

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 take judicial notice of the materials attached as Exhibits A through C to the City's Second Notice of Motion and Motion for Judicial Notice.

DATED: May 30, 2012

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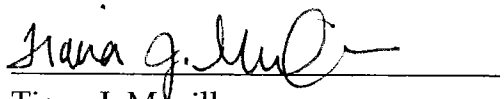

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ATTORNEYS FOR DEFENDANT/RESPONDENT

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 a document entitled "City's Memorandum of Points and Authorities in Support of Demurrer and Motion to Strike Plaintiffs' First Amended Complaint" filed by the City of Paso Robles in *Borst et al. v. City of Paso Robles* on November 22, 2011 in the San Luis Obispo County Superior Court, Case Number CV 09-8117.

3. Attached hereto as Exhibit B is a document entitled "Notice of Ruling on Certain Defendants' Demurrers to the First Amended Complaint and Order of Stay," with attached written ruling issued by Court, filed by the City of Alhambra, California, et al. in *Sipple et al. v. City of Alameda et al.* on May 16, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

4. Attached hereto as Exhibit C are sections 3.04.550 – 3.04.561 of the Paso Robles Municipal Code ("Claims for Refund of Taxes, Assessments or Fees").

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on this 30th day of May 2012.

By: Tiana J. Murillo

Tiana J. Murillo

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City of El Paso de Robles

Exempt from filing fees per Government Code § 6103

FILED

NOV 22 2011

SAN LUIS OBISPO SUPERIOR COURT
BY A. Leach, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

PASO ROBLES BRANCH

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

Plaintiff,

v.

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

Defendant.

Case No. CV 09-8117

CITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: December 20, 2011
Time: 10:30 a.m.
Dept.: P2
Judge: Hon Jac A. Crawford

Complaint Filed: March 25, 2009
First Am. Complaint Filed: July 28, 2009

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

OTHER AUTHORITIES

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The City of El Paso de Robles (the "City") respectfully submits the following memorandum in support of its demurrer to, and motion to strike, the First Amended Complaint filed on or about July 28, 2009 by John E. Borst, Brooke G. Mayo, Teresa St. Clair ("Plaintiffs") and a class of similarly situated individuals and businesses (the "putative class") ("FAC").[1]

I. INTRODUCTION

This lawsuit challenges the City's imposition of water and sewer fees because the City allegedly did not comply with Proposition 218 requirements in adopting those fees. More specifically, Plaintiffs allege that sewer fee increases imposed by Ordinance No. 841 and later by Ordinance No. 875, and water fee increases imposed by Ordinance No. 882 and its predecessor, were illegal and therefore they, and members of the putative class, are entitled to refunds.

The City first demurred to, and moved to strike, the FAC in 2009. Following briefing by the parties, the Court stayed this litigation pending the California Supreme Court's decision in *Ardon v. City of Los Angeles* ("*Ardon*"), which the Court anticipated would be highly instructive to issues in the instant case. Now that *Ardon* has been decided,[2] and the stay lifted, the Court may consider the merits of the City's demurrer.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Original Complaint and the City's Demurrer to the Original Complaint.

On March 25, 2009, Plaintiffs filed on behalf of themselves and the putative class,[3] an Individual and Class Action Complaint Against the City of El Paso de Robles for: (1) violation of California Constitution Articles XIII C and D (Proposition 218); (2) writ of mandate and stay of collections of fees imposed without public vote and public hearings; (3) conversion and money had and received; and (4) declaratory and/or injunctive relief ("Original Complaint"). Contending that the fees were actually special taxes imposed in violation of Proposition 218 requirements, Plaintiffs sought refunds of water and sewer fees paid to the City by Plaintiffs and by the putative class members since 2002 (for sewer) and 2004 (for water).

[1] William Taylor was originally a Plaintiff to the FAC but has withdrawn from the action since the FAC was filed.
[2] *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241.
[3] Plaintiffs bring this action for themselves and on behalf of all individuals and businesses who, since January 1, 2002, pay or paid the taxes, charges, or fees imposed pursuant to Paso Robles City Code sections 14.16.020 and 14.04.020. (*See* Original Complaint at ¶ 7; FAC at ¶ 9.)

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The City subsequently demurred to, and moved to strike, the Original Complaint. The City argued that Plaintiffs could not maintain their action as a class action because Health and Safety Code sections 5471 and 5472, which specifically govern the procedures for refunds of water and sewer fees, require compliance with Revenue and Taxation Code sections 5097 and 5140, which prohibit class action refund claims. Plaintiffs, on the other hand, contended that the only statutory scheme that applied to their claims was the Government Claims Act (Gov. Code §§ 900 *et seq.*).

The City also demurred to Plaintiffs' petition for writ of mandate because: (1) the California Constitution prohibits the Court from issuing a cease and desist order barring the City from collecting the fees; (2) Plaintiffs have an adequate legal remedy through a refund action; and (3) Plaintiffs failed to verify their petition. Finally, the City demurred to Plaintiffs' action for conversion and money had and received because it was a generalized claim for money. Plaintiffs opposed the City's demurrer, and the City filed a reply to the opposition.

The Court agreed with the City and concluded that the Health and Safety Code statutes, as well as the Revenue and Taxation Code provisions, applied to both the sewer and water charges that Plaintiffs were challenging. The Court noted it was "not persuaded that the above cited provisions of the Revenue and Taxation Code do not apply to the Plaintiffs' challenge to the City's water and sewer fees." (Order on Demurrer to Original Complaint, RJN, Exh. A at p. 7:17-19.) Moreover, the Court found that the case upon which Plaintiffs relied regarding the applicability of the Government Claims Act, *County of Los Angeles v. Superior Court (Oronoz)* (2008) 159 Cal.App.4th 353, had been overruled by the same Court of Appeal in *Ardon*, which determined that the Government Claims Act did not allow representative class action claims for tax refunds. (Order on Demurrer to Original Complaint, RJN, Exh. A at pp. 7:19 – 8:6.) Accordingly, the Court granted the City's motion to strike the putative class allegations in the Original Complaint, with leave to address those allegations. The Court additionally sustained, without leave to amend, the City's demurrer to Plaintiffs' second cause of action for writ of mandate as well as Plaintiffs' third cause of action for conversion. The Court also granted the City's motion to strike the "money had and received allegations" without leave to amend.

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B. **The First Amended Complaint and the City's Demurrer to the First Amended Complaint.**

Plaintiffs subsequently filed a First Amended Individual and Class Action Complaint Against the City for (1) violation of California Constitution, Articles XIII C and D (Proposition 218); and (2) declaratory and/or injunctive relief ("FAC"). Like the Original Complaint, the FAC seeks a refund of water and sewer fees paid by Plaintiffs and putative class members on the ground that the fees were imposed in violation of Proposition 218 requirements. The FAC now calls the City's water and sewer fees "utility user taxes," thereby hoping to escape the requirements of Revenue and Taxation Code sections 5097 and 5140 and Health and Safety Code sections 5471 and 5472. Plaintiffs again maintain that the Government Claims Act authorizes their class action refund claims.

The City again demurred to, and moved to strike, Plaintiffs' FAC. The City argued that Plaintiffs failed to present facts giving rise to claims that can be pursued as a class action and had failed to meet the procedural requirements of Revenue and Taxation Code sections 5097 and 5140 and Health and Safety Code sections 5471 and 5472. Alternatively, the City argued that even if the Government Claims Act governed Plaintiffs' refund claims, the Court of Appeal decision in *Ardon* precluded a class action for such refunds. Plaintiffs opposed the City's demurrer, and the City filed a reply to Plaintiffs' opposition.

During this time, however, the California Supreme Court granted a hearing in *Ardon.* As a result, the Court ordered that this matter be stayed until *Ardon* was decided. In its Ruling and Order on Defendant's Demurrer and Motion to Strike First Amended Complaint, the Court explained: "Because the issue in *Ardon* is highly relevant to the issues at stake in the instant case, and the opinion of the Supreme Court is likely to be highly instructive, this Court orders that the present matter be **stayed** until *Ardon* is decided." (Order on Demurrer to FAC, RJN, Exh. B at p. 3:16-19.)

The California Supreme Court issued its opinion in *Ardon* on July 25, 2011, and the stay in this litigation has been lifted. As a result, the City's demurrer may now be considered in light of *Ardon.*

III. STANDARD OF REVIEW

A. Demurrer and Motion to Strike Are Appropriate to Challenge Defects in Pleadings.

A demurrer may be used to challenge defects that appear on the face of the pleading under attack. (Civ. Proc. § 430.30(a).) The purpose of a demurrer is to test the sufficiency of the complaint as a matter of law. (*Elmore v. Oak Valley Hospital Dist.* (1988) 204 Cal.App.3d 716, 721.) When ruling on a demurrer to a complaint, the court must assume all allegations of the complaint are true. (*Id.*) Similarly, "when a substantive defect is clear from the face of a complaint, such as...a purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to strike." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-83.) A motion to strike tests improper matter in a pleading and all or part of pleadings not in conformity with the law. (Civ. Proc. §§ 435, 436.)

B. Demurrer and Motion to Strike Are Appropriate to Dispose of Class Claims.

In the context of class action litigation, the California Supreme Court has recognized that "nothing prevents a court from weeding out legally meritless suits prior to [class] certification via a defendant's demurrer or pretrial motion. In fact, it is settled that courts are authorized to do so." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440; *see also TJX Cos. v. Superior Court* (2001) 87 Cal.App.4th 747, 752-53.) Dismissal on demurrer is proper when the invalidity of the class allegations appears on the face of the complaint. (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101.) In discussing a motion to strike nationwide class allegations from a complaint, another court explained: "where the invalidity of the class allegations is revealed on the face of the complaint, and/or by matters subject to judicial notice, the class issue may be properly disposed of by demurrer or motion to strike.... In such circumstances, there is no need to incur the expense of an evidentiary hearing or class-related discovery." (*Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5, internal citations omitted.) Accordingly, the City's demurrer and motion to strike is a proper vehicle for disposing of Plaintiffs' claims.

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IV. ARGUMENT

A. *Ardon* Clarifies that Class Claims Under the Government Claims Act Are Not Permissible When Specific Statutes or Municipal Code Provisions Provide Refund Procedures.

The issue in *Ardon* was whether Government Code section 910 allows taxpayers to file a class action claim against a city for the refund of local taxes, as Plaintiffs here have argued. (*Ardon, supra,* 52 Cal.4th at 245.) While the California Supreme Court concluded that the statute allows class claims against cities for tax refunds, it did so subject to one important limitation. Specifically, the Court held: "Class claims for tax refunds against a local governmental entity are permissible under *section 910* in the absence of a specific tax refund procedure set forth in an applicable governing claims statute." (*Id.* at 253.)

In *Ardon*, the plaintiff filed a representative class action lawsuit challenging Los Angeles' telephone users tax ("TUT") and seeking, among other things, a refund of TUT funds. (*Id.* at 245.) The City demurred to the complaint, arguing that each member of the alleged class had to file a claim with the city before the plaintiff could proceed with a class action lawsuit. (*Id.* at 246.) The trial court refused to certify the class. The court of appeal affirmed the trial court's decision, and in doing so, overruled its prior decision in *Oronoz, supra.*

In reviewing the case, the California Supreme Court discussed its prior decision in *Woosley v. State of California* (1992) 3 Cal.4th 758, which involved specific statutes that did not authorize class claims. The *Ardon* opinion summarized *Woosley* as follows: "When construed in light of *article XIII, section 32 of the California Constitution*, we concluded that the Legislature did not intend to authorize class claims for the refund of fees and taxes *under those particular statutes*." (*Ardon, supra,* 52 Cal.4th at 249, emphasis in original.) The *Ardon* Court further explained: "*Woosley* precluded class claims for tax refunds where the Legislature has explicitly set forth procedures for obtaining those refunds and has refused to authorize class claims under those procedures." (*Id.*) It also pointed out that several cases decided after *Woosley* concluded that Article XIII, section 32 bars class claims and actions for the refund of locally adopted taxes absent specific statutory authority. The Court observed, however, that "these cases are distinguishable, because they all considered statutes or municipal ordinances enacted to provide

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specific procedures for filing tax claims against governmental entities – procedures that are not applicable or required in this case." (*Id.* at 250, emphasis added.) The Court additionally observed: "All that *Woosley* demands is that a court first examine the claims statutes at issue in a claim for a taxpayer refund to determine whether the Legislature contemplated a class claim under the applicable California code." (*Id.* at 251.) Because the specific claim in *Ardon* "did not involve any applicable municipal code or statute governing claims for refunds[,]" the Supreme Court held that that the Government Claims Act permitted the class claim. (*Id.*, emphasis added.)

B. Specific Statutes and the City's Municipal Code Govern the Claims For Refunds of Sewer and Water Fees At Issue Here.

1. The Challenged Ordinances Enact Water and Sewer User Fees, Not Taxes.

The FAC identifies Ordinances Nos. 841 N.S., 875 N.S. and 882 N.S. (collectively, the "Ordinances") as those which impose alleged "taxes." (*See* FAC ¶ 99.) As copies of these Ordinances were not attached to the FAC, certified copies are attached to the City's Request for Judicial Notice as Exhibits C, D, and E, respectively.

Ordinance No. 841 N.S., adopted October 1, 2002, amended Section 14.16.020 of the Paso Robles Municipal Code, which is entitled "Sewer Charges." It provides that "[e]very person whose premises are served by a connection with the system of sewerage of the city, whereby the sewage or industrial wastes, or either or both, are disposed of by the city through the sewage treatment plant, or otherwise, shall pay a sewer service charge...." (Ord. 841 N.S., RJN, Exh. C.)

Ordinance No. 875 N.S., adopted May 4, 2004, adjusts both sewer and water user fees. Section 1 of the Ordinance amends Subdivision C of Section 14.04.020 of the Paso Robles Municipal Code and is entitled "Fees – Water Usage Rates." The rates are based on water consumption. Section 2 of the Ordinance amends the sewer charges contained in Section 14.16.020 of the Municipal Code. (Ord. 875 N.S., RJN, Exh. D.)

Ordinance No. 882 N.S., adopted August 17, 2004, further amended Subdivision C of Section 14.04.020, Water Usage Rates. (Ord. 882 N.S., RJN, Exh. E.)

In *Los Altos Golf and Country Club et al. v. County of Santa Clara et al.* (2008) 165 Cal.App.4th 198 ("*Los Altos*"), plaintiffs asserted class action claims on behalf of property

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owners outside the City of Los Altos seeking refunds of sewer fees charged by the city for sewer service. The *Los Altos* plaintiffs, similar to those here, claimed that the sewer fees were taxes, rather than user fees. The court disagreed. Citing *Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, the *Los Altos* court noted that in *Utility Audit Co.* the court "agreed with the defendant city that the sewer fees at issue were user fees, not taxes or special assessments. 'User fees are amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided. [Citation.] As a general matter, sewer service fees are user fees.'" (*Los Altos, supra,* 165 Cal.App.4th at 206, *quoting Utility Audit Co., supra,* 112 Cal.App.4th at 957.) The same is true for water service fees.

Plaintiffs here try to recharacterize the fees as taxes, contending that the Ordinances were enacted to raise money for the future construction of water delivery systems, treatment system and sewer infrastructure improvements (FAC ¶ 21); Plaintiffs do not and will not receive any special benefits (FAC ¶ 23); the services are not immediately available (FAC ¶¶ 30); the funds will generally benefit the community and future development (FAC ¶ 61); and the City's use of the revenue is unknown (FAC ¶ 64). (*See also* FAC ¶ 116.)

After Plaintiffs filed this case, they filed a challenge, on essentially the same grounds, to an ordinance that amended and replaced the water rates adopted by Ordinance No. 882 N.S. (*See John E. Borst et al. v. City of El Paso de Robles*, San Luis Obispo Superior Court Case No. CV10-8193 ("*Borst III*"). Plaintiff John Borst filed yet another challenge to a subsequent water rate ordinance, also on the same grounds. (*See John E. Borst v. City of El Paso de Robles*, San Luis Obispo Superior Court Case No. CV11-8178 ("*Borst IV*").)

In *Borst III*, the petitioners claimed the water rates adopted by Ordinance No. 967 were special taxes requiring two-thirds voter approval because a portion of the revenues generated would be used to pay for certain capital improvements to supplement and improve the City's existing water system. As here, the *Borst III* petitioners argued that certain capital improvement projects were not immediately available to existing City customers and would provide no special benefit to water customers beyond those received by the general public. The Court rejected the petitioners' arguments and concluded that the water rates were indeed property-related fees and

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not special taxes. As the Court explained in its Tentative Decision, which was incorporated by reference in the Judgment in that case:

> Although the increase in fees is partially for the purpose of future capital improvements to the system, the water supply system is actually used by, and immediately available to, customers of the water supplier. To the extent that capital costs are included in the rate structure, those charges are for the purpose of ensuring a continued supply of water to customers of the system. Thus, even though the charges include a capital expenditures component, this Court concludes that Ordinance 967 N.S. imposes a "property related fee."

(*Borst III* Tentative Decision After Hearing, RJN, Exh. F at pp. 13:28 – 14:6; *see also Borst III* Judgment, RJN, Exh. G at p. 2:22-28.)

In *Borst IV*, the petitioner sought to repeal Ordinance No. 973, again alleging that the water rates enacted by that Ordinance constituted a special tax requiring two-thirds voter approval. The City demurred to the *Borst IV* petition and the Court concluded that *res judicata* barred relitigation of the character of the water rates, which were identical to the rates adopted by Ordinance No. 967 and litigated in *Borst III*. (*Borst IV* Tentative Ruling on Demurrer, RJN, Exh. H.) The Court recently denied the *Borst IV* petitioner's motion for reconsideration of the Court's order sustaining the City's demurrer without leave to amend. (*Borst IV* Tentative Ruling on Motion for Reconsideration, RJN, Exh. I.) As the water fees at issue here were the immediate predecessors of the fees challenged in *Borst III* and *Borst IV,* they cannot be either special taxes or "utility users taxes."

Similarly, the sewer fees are user fees, rather than taxes. As expressly stated in Ordinances Nos. 841 N.S. and 875 N.S., the sewer fees are charges for sewer service.

2. Health and Safety Code Sections 5471 and 5472 Govern Plaintiffs' Challenges to the City's Water and Sewer Fees.

Health and Safety Code sections 5471 and 5472 govern the water and sewer fees at issue here, and prescribe how refund claims are to be filed. Section 5471, subdivision (a), provides in relevant part:

> [A]ny entity shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise

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> and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.[4]

In ruling on the City's demurrer to the Original Complaint, this Court concluded that Health and Safety Code section 5471 applies to the water and sewer charges that Plaintiffs challenge here. As the Court explained in its Order:

> Health and Safety Code section 5471 is part of Article 4 (Sanitation and Sewerage Systems) of Chapter 6 (General Provisions With Respect to Sewers) of Part 3 (Community Facilities) of Division 5 (Sanitation) of the Health and Safety Code. A casual review of Division 5 might produce the conclusion that it only applies to the acquisition or construction of improvements, works, or systems for the collection, transmission, treatment, or disposal of sewage or industrial waste. However, Chapter 1 (Community Facilities Law of 1911) of Part 3 defines "improvement" to include the "acquisition, construction, or extension of waterworks, water systems or water distribution systems." (Health & Safety Code s. 4602.4 (f).) And section 4603 provides that "improvements" may be made pursuant to the Community Facilities Law. Thus, these provisions of the Health and Safety Code apply to both the sewer and water charges here challenged by the Plaintiffs.

(Order on Demurrer to Original Complaint, RJN, Exh. A at pp. 3:18 – 4:9.)

Health and Safety Code section 5472 governs the manner in which persons may protest fees levied under section 5471. Specifically, section 5472 provides, in pertinent part, as follows:

> [A]ny person may pay such fees...under protest and bring an action against the city...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 in Article 2, Chapter 5, Part 9, of Division 1 of the Revenue and Taxation Code, insofar as those provisions are applicable.

The *Los Altos* court found that the use of the word "may" in the payment-under-protest language did not mean that there were alternative ways to seek a refund. "It is the challenge itself that is optional, not the method of raising that challenge. Of course users of sewer services *may* challenge excessive fees if they wish to do so; but the manner in which they assert that challenge is prescribed by the statute." (*Los Altos, supra,* 165 Cal.App. 4th at 206, emphasis in original.)

[4] Health and Safety Code § 5470(e) includes cities within the definition of an "entity."

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The court went on to say:

> A property owner who wishes to challenge sewer fees will readily see that the governing provisions are set forth in the Health and Safety Code, which continues to require payment under protest. The referenced division 1, part 9, chapter 5, article 2 of the Revenue and Taxation Code describes the procedures for bringing an action in superior court to obtain a property tax refund, including the filing of a verified claim *after* making the payment to be refunded. Section 5472 directs the property owner to follow those procedures only 'insofar as those provisions are applicable.'
> ....
> However, because the legislative enactments of both the state and the City continue to require payment under protest, appellants' action was foreclosed by their failure to follow the prescribed procedures. The trial court did not err in sustaining respondents' demurrer without leave to amend.

(*Los Altos, supra,* 165 Cal.App.4th at 207, emphasis in original.)

Accordingly, in order for a ratepayer to obtain a refund of sewer and/or water fees, he or she must first timely pay the fee under protest. The FAC fails to allege that any of the Plaintiffs here complied with this prerequisite. Consequently, Plaintiffs' refund action is barred as a matter of law.

3. Revenue and Taxation Code Section 5140 Prohibits Class Actions.

As discussed above, the only manner in which Plaintiffs may seek a refund of water and sewer charges is by bringing an action "in the manner provided for payment of taxes under protest and actions for refund thereof in Article 2, Chapter 5, Part 9, of Division 1 of the Revenue and Taxation Code, insofar as those provisions are applicable." (Health & Safety Code § 5472.) Therefore, Plaintiffs' refund claims are governed by Revenue and Taxation Code section 5140 *et seq.* Revenue and Taxation Code section 5140 provides, in relevant part, as follows:

> 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...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.

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Section 5140 plainly states that only the person who paid the tax, subject to very limited exceptions, may file a refund claim. In addition, Revenue and Taxation Code section 5097 provides that no order for a refund shall be made except on a claim "[v]erified by the person who paid the tax, his or her guardian, executor, or administrator." Read together, these sections bar a class action against a city for such refunds, foreclosing Plaintiffs' class claims in this case.

In *Neecke v. City of Mill Valley* (1995) 39 Cal.App.4th 946, the court held that Revenue and Taxation Code sections 5097 and 5140 prohibit class actions. The plaintiff in *Neecke*, on behalf of himself and others similarly situated, sought a refund of a municipal services tax under sections 5097 and 5140, claiming the tax was levied on real property owners in violation of Proposition 13. (*Id.* at 949, 961-62.) Relying on *Woosley v. State of California* (1992) 3 Cal.4th 758, the *Neecke* court ruled that while Revenue and Taxation Code sections 5097 and 5140 were applicable to local tax refunds, they did not permit a class action because section 5097 requires a claim to be "verified by the person who paid the tax, his or her guardian, executor, or administrator." (*Id.* at 962.) If a properly-filed claim is denied, a refund action may be brought pursuant to section 5140. Like section 5097, section 5140 only permits a refund action by 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." (*Id.* at 962.) Section 5140 prohibits anyone else from bringing a refund action. As a result, the *Neecke* court concluded: "If anything, these statutory provisions are even more restrictive than the statutory provisions at issue in *Woosley*. Neither of these statutes provide for a class claim or suit such as the one [the plaintiff] attempted to certify." (*Id.*) Thus, Plaintiffs' class claims here are plainly foreclosed.

4. The Paso Robles Municipal Code Also Requires Payment Under Protest and Bars Class Claims for Refunds.

Unlike the situation in *Ardon*, Paso Robles adopted in 2007 a claims filing procedure, now embodied in its Municipal Code. Ordinance No. 928 N.S. added sections 3.04.550 through 3.04.561 to the City's Municipal Code and was adopted pursuant to the authority granted by

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Government Code section 935.[5] (Ord. 928 N.S., RJN, Exh. J.) The procedures "apply to all claims for recovery of taxes, fees or assessments enacted by the City which are not expressly governed by a claims procedure set forth in any other statute or ordinance." (Ord. 928 N.S., RJN, Exh. J, § 3.04.550.) If the Court determines that Health and Safety Code sections 5471 and 5472 and Revenue and Taxation Code sections 5097 and 5140 are inapplicable to Plaintiffs' claims, then these Municipal Code provisions govern. These provisions preclude Plaintiffs' claims because they also require timely payment of fees under protest and bar class claims.

Section 3.04.560 provides, in pertinent part, that: "Any assessee may contest a tax, fee or assessment by tendering the required payment when due and providing written notice that such payment is being tendered under protest, and the basis for such protest." (Ord. 928 N.S., RJN, Exh. J, § 3.04.560, emphasis added.) A refund claim must be filed "no later than one year after the date of the timely payment under protest." (*Id.* at § 3.04.554, emphasis added.)

In addition, section 3.04.553 provides:

> A claim for the refund of taxes, fees, or assessments subject to the provisions of this Chapter may be filed by the claimant, or by the claimant's guardian, executor, conservator or administrator. No claim may be filed on behalf of a class of persons unless verified by every member of that class as required by this section.

(Ord. 928 N.S., RJN, Exh. J, § 3.04.553.)

Because the FAC does not allege that any or all of the Plaintiffs provided written notice that the challenged fees were being paid under protest, or that they filed their claims within one year of any payment under written protest, they failed to perfect their individual claims under these Municipal Code provisions. Moreover, they are expressly prohibited from filing a class refund claim.

[5] Government Code section 935(a) provides:

> Claims against a local public entity for money or damages which are excepted by Section 905 from Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part, 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. (Emphasis added.)

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V. CONCLUSION

The Supreme Court clarified in *Ardon* that a class claim for refunds is permissible under the Government Claims Act only if there are no specific statutes that govern the claims procedures for the tax or fee at issue. In this case, there are both statutes and City code provisions that clearly apply to the sewer and water fees Plaintiffs seek to have refunded. Health and Safety Code sections 5471 and 5472 and Revenue and Taxation Code sections 5097 and 5140 together require timely payment of the fees under protest and prohibit class claims. Plaintiffs failed to follow the requisite procedures under these statutes and their claims are barred as a matter of law. In addition, Plaintiffs failed to follow the requisite procedures under the City's Municipal Code, which also bar their claims. Based on all of the above, the City respectfully requests that this demurrer be sustained without leave to amend and that the motion to strike all causes of action regarding the class allegations and all causes of action regarding Plaintiffs' individual refund claims of the FAC be granted.

Dated: November 21, 2011

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Exempt from Filing Fees
Government Code § 6103

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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)

NOTICE OF RULING ON CERTAIN DEFENDANTS' DEMURRERS TO THE FIRST AMENDED COMPLAINT AND ORDER OF STAY

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT:

The demurrers filed by defendants (1) the City of Oakland; (2) the Cities of Compton, Hawthorne, Long Beach, and Redondo Beach; (3) the City and County of San Francisco; (4) the Cities of Desert Hot Springs, Downey, El Cerritos, Pasadena, Pinole, and San Leandro; and (5) 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, and (6) the demurrer, motion to strike, and motion to change venue filed by the Cities of Hayward, Modesto, Palo Alto, Redwood City, San Luis Obispo and Santa Barbara came on regularly for hearing on May 2, 2012 in Department 307, the Honorable William F. Highberger presiding. Appearances were made by counsel for all parties.

Having heard argument from counsel for all parties, and having reviewed and considered the pleadings and papers filed by the parties, the Court sustained the six demurrers filed by the defendants listed above without leave to amend. A true and correct copy of the final written ruling issued by the Court on May 2, 2012 is attached hereto as Exhibit A. The Court further ordered that the action as to the remaining defendants be stayed pending resolution of any anticipated appeal of the ruling by Plaintiffs or until otherwise ordered by the Court.

DATED: May 15, 2012

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Exhibit A

BC462270 ***Sipple v. City of Alameda***

May 2, 2012 Ruling

Demurrers of Various Municipal Jurisdictions* To First Amended Complaint: Sustain without leave to amend

The court accepts the late-filing of the Demurrer of Desert Hot Springs, Downey, El Cerritos, Pasadena, Pinole and San Leandro. It was timely served and plaintiffs have not objected to the late filing, as such.

Factual Context In Which This Dispute Arises:
This case involves claims for municipal tax refunds and grows out of the settlement of a consumer class action which was filed in the United States District Court for the Northern District of Illinois. The defendants herein are some but not all of the remaining defendants in this case, who originally comprised over 130 separate municipal governments spread around the State of California. There are now approximately 115 cities and two counties left although it appears that settlements may shrink that count.

Each such jurisdiction collected a municipal telephone tax from customers of New Cingular Wireless. For some period of time, New Cingular calculated the municipal taxes due on the full amount of a given customer's bill and remitted the tax collected to the respective government entity. However, the Internet Tax Freedom Act, 47 U.S.C. § 151 (1998), imposed a moratorium on state and local taxation on internet access, which was a portion of the amount billed to New Cingular's customers as a separate line item.

The federal court class action disputed New Cingular's imposition of such taxes, and that case was settled with the approval of the federal judge in Chicago with an agreement that New Cingular would attempt to obtain refunds of the taxes remitted in error. New Cingular itself has not advanced these refunds back to its various customers, and, under the terms of the settlement, it has no independent obligation to do so. All it has to do is to attempt in good faith to get a refund, in which case the actual refunds obtained will be passed along to the relevant customers. The federal court also created various settlement sub-classes, including a California sub-class and appointed one or more class representatives to press the interests of the sub-class.

The California sub-class representatives named in the operative complaint in this case are Donald Sipple, John Simon, Karl Simonsen and Christopher Jacobs. The First Amended Complaint ¶10 states that: Sipple is a resident of Montecito (and the Court takes judicial notice that that is an unincorporated portion of the County of Santa Barbara); Simon is a resident of Long Beach; Simonsen is a resident of San Jose; and Jacobs is a resident of Los Angeles. The First Amended Complaint is silent on the question of which jurisdiction received taxes covered by the Internet Tax Freedom Act. The two specimen claim forms presented to the Court (which are represented as the uniform model by which such claims were submitted with a jurisdiction-specific spreadsheet attached as to taxes paid to a given locale) do not overtly reference any such named sub-class representative

or specially assert that a claim is being brought on such person's behalf. Exhibit A to Plaintiffs' Opposition, filed March 1, 2012, and Exhibit E to City and County of San Francisco's Request For Judicial Notice, filed January 31, 2012.

Key Legal Question Presented:
While there are additional issues raised by these various defendants, the threshold question is whether or not the First Amended Complaint states one or more viable claims on behalf of New Cingular Wireless, the four named class representatives or the "sub-class" certified by the United States District Court in Illinois (but not separately certified by this Court or tendered to this Court for the making of any such class certification decision). At the nub, the question is whether or not a settlement class (or sub-class) can press a claim for a municipal tax refund even when the putative class members have not themselves exhausted the municipal administrative remedies by submitting their own timely claim for a telephone tax refund.

The parties disagree on how to structure the legal analysis, including particularly whether or not Government Code § 905 or § 935, applies. The plaintiffs also dispute the relevance of municipal ordinances which purport to regulate how claims for municipal tax refunds are supposed to proceed. The Court agrees with defendants that plaintiffs herein are trying to press a de facto class action, even though plaintiffs now abjure that term in their opposition papers; the First Amended Complaint ¶ 145 asserts that this case is a class action by reason of the prior ruling in federal court in Chicago and that "Plaintiffs also could and would satisfy the requirements for class certification under Section 382 of the California Code of Civil Procedure." The Civil Cover Sheet filed at the initiation of the case also reflects the assertion of attorney Conan Doyle, one of plaintiffs' counsel, that this case is a class action.

The published appellate cases issued over the past generation do not line up neatly. There does appear to be a core split on policy judgments (as between the rights and interests of taxpayers as compared to the countervailing rights and interests of governmental entities) between cases which interpret the relevant statutes, particularly Government Code § 905, to encourage and allow class actions for tax refund claims and contrary cases which recognize and enforce state statutes and ordinances which do not condone class treatment. The immediate question presented by this case appears to be a question of first impression:

> Can plaintiffs state a claim to obtain municipal refunds via the litigation efforts of (a) the vendor which collected and remitted the tax and (b) the four sub-class representatives appointed through a separate litigation process in federal court in Chicago to seek refunds for the benefit of the consumer settlement class certified by that court?

Having carefully reviewed the parties' briefs and the conflicting authorities cited therein, this Court holds the answer to this question is "No" where, as here, the corporate entity trying to make the refund claim has not already refunded the tax payments at issue to its customers and where, as here, the claims presented were not made in the name of any of

the four sub-class representatives appointed by the federal court. The vendor which collected and remitted the tax (which may not even be the plaintiff herein New Cingular Wireless) does not have standing to seek a refund when it has not incurred any financial loss because it has not yet refunded the amounts in question to its own customers before making the refund claim. At present, that party (New Cingular Wireless) is not out any money for the taxes in question as all amounts remitted to the several municipal jurisdictions were paid in full by the vendor's customers. *Scol Clorporation v. City of Los Angeles* (1970) 12 Cal.App.3d 805, 808. New Cingular Wireless (or some corporate affiliate) simply passed those moneys along to the governments after including such items in error on periodic billings.

The key conclusion of law that this Court reaches is that Government Code § 910 does NOT pre-empt the relevance and controlling importance of the various municipal ordinances regarding the tax refund claiming process and the underlying right to a refund where such enactments exist. It appears that for each of these many demurring governmental defendants there were such ordinances in place.

By contrast, the cases on which plaintiffs rely arose in contexts where the appellate courts had concluded that there was no preemption issue because there were NO specific municipal ordinances in place governing the refund claim for the disputed taxes. The following shows that the three key opinions that plaintiffs rely upon avoided the question of pre-emption of local ordinance before they went on to apply Government Code § 905 or § 935 (or both) to determine that class treatment was appropriate.

*1. **Ardon v. City of Los Angeles*** (2011) 52 Cal.4th 241, 246 n. 2 (emphasis added) expressly noted that preemption was not a question before the court:

> 2. Subsequent to Ardon's filing his complaint, the City amended Los Angeles Municipal Code section 21.1.3 to remove all reference to the FET [federal excise tax]. The city council passed the amendment to the ordinance on January 9, 2007. (L.A.Ord. No. 178,219.) 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 [telephone users tax] 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 then went on to distinguish and limit – but not overrule – lower court cases which had applied the Supreme Court's own prior decision in *Woosley v. State of California* (1992) 3 Cal.4th 758, to apply Art. XIII, § 32 of the state Constitution to bar class action refund claims against municipalities:

> As *Oronoz* observed, however, **these cases are distinguishable, because they all consider statutes or municipal ordinances enacted to provide specific procedures for filing tax claims against government entities – procedures**

that are not applicable or required in this case. (*Oronoz, supra,* 159 Cal.App.4th at p. 365, fn. 9, 71 Cal.Reprt.3d 485.)

52 Cal.4th 250 (emphasis added).

2. County of Los Angeles v. Superior Court (Oronoz)(2008) 159 Cal.App.4th 353. The language in *Oronoz* cited above in *Ardon* reflected the limited reach of the *Oronoz* holding (at least after the Supreme Court had occasion to try to reconcile the pre-existing and somewhat inconsistent Court of Appeal decisions while deciding *Ardon*):

> 9. **We find no basis in *Woosley, supra,*** [cite] or its progeny **for the overbroad statement in *Howard Jarvis Taxpayers Assn. v. City of Los Angeles, supra,*** 79 Cal.App.4th at page 249, 93 Cal.Reprt.2d 742, **that "class-action-type lawsuits seeking a refund of fees and taxes are barred unless each plaintiff has first filed an administrative refund claim with the City," particularly as applied to claims against local public entities that are not governed by specific tax refunds statutes. We therefore decline to follow that opinion.**

159 Cal.App.4th at 365, n. 9 (emphasis added.)

3. *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48. Finally, plaintiffs take comfort from selective language quoted from *Volkswagen Pacific, Inc.* 7 Cal.3d 48 at 61-62, for the proposition that a municipal ordinance is not the kind of legislative act which fits the municipal tax refund process into the first exception to coverage of Government Code § 905(a); plaintiffs thus deduce that the cases applying § 905 and related provisions such as Government Code § 910 to approve of class treatment of municipal tax refund cases apply here. The problem with this argument is that it is based wholly on unneeded dictum in *Volkswagen Pacific*, since the Supreme Court went on to consider, in the alternative, what ruling should be made if Government Code § 935 applies (necessarily because § 905 does not), and it thereupon concluded that the same mandatory six-month limitations period (set forth in Government Code § 945.6) for the timely filing of suit after a claim is rejected or deemed rejected controlled whether or not § 905 or § 935 applied:

> Moreover, even if section 905, subdivision (a) is read to except all tax refund actions, the claim in the instant case is still government by section 945.6.
> * * *
>
> As indicated, *supra*, the city prescribes that a claim be presented as a prerequisite to suit for tax refund. [cite] Therefore, section 945.6 applies and requires that the action for tax refund be brought within six months after the claims is acted upon or deemed to be rejected.
>
> Thus, 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.

7 Cal.3d 47-48. Further, *Volkswagen* did not have occasion to consider whether or not a class action was appropriate in a tax refund case so it is no support for plaintiffs' ultimate argument.

In contrast to plaintiffs' authorities – which did not arise in situations where the terms of a municipal ordinance or relevant state statute speak to the suitability of handling a tax refund case on a class basis or on the basis of a claim submitted by someone other than a person who actually paid the tax in dispute to the relevant jurisdiction – the cases cited by the demurring defendants do approve of limitations on the use of a class action device and the requirement that the claimant have actual standing to make the claim when the relevant statute or local ordinance so provides:

Batt v. City and County of San Francisco (2007) 155 CalApp.4th 65, 74-77 (affirming the sustaining of a demurrer to class action allegations in tax refund case when contrary to controlling San Francisco ordinance)

Neecke v. City of Mill Valley (1995) 39 Cal.App.4th 946, 963 (class certification properly denied for attempted class action to seek refund of "municipal services tax" as Revenue and Taxation Code § 5097 "does not provide for a class claim.") In analyzing § 5097 and the related provisions of § 5140, the appellate court noted:

> If a claim, filed pursuant to section 5097, is denied, a suit to recover the improperly collected taxes 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. . . ." That statute also provide that "[n]o other person may bring such an action; but if another should do so, judgment shall not be rendered for the plaintiff." (Rev. & Tax. Code, § 5140.) If anything, these statutory provisions are even more restrictive than the statutory provisions at issue in *Woosley*. Neither of these statutes provide for a class claim or suit such as the one Neecke attempted to certify.

Id at 962.

Pasadena Hotel Dev. Venture v. City of Pasadena (1981) 119 Cal.App.3d 412, 414-15 (time limit for tax refund claims in local ordinance enforced under authority of Government Code § 935)

Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 79 Cal.App.4th 242. The Court recognizes that the dictum in *Howard Jarvis Taxpayers Assn.* stating a total prohibition on class actions in the tax refund context in this case has been disapproved by *Ardon*. Conversely, the Supreme Court in *Ardon* did not overrule the actual holding of *Howard Jarvis Taxpayers Assn.* that "The only remaining portion of the claim – for 'all others similarly situated' – is insufficient to constitute a valid refund claim" complying with the provisions of Los Angeles Municipal Code § 21.07 and City Charter § 376,

requiring the "filing of an administrative refund claim with the City before suit can be maintained for money or damages." 79 Cal.App.4th 242, 249 and n. 5 thereto.

Although the state Supreme Court in *Ardon* decision criticized the "overbroad statement in *Howard Jarvis Taxpayers Assn.* that 'class-action-type lawsuits seeking a refund of fees and taxes are barred unless each plaintiff has first filed an administrative refund claim with the City'" (52 Cal.4th at 250), the Supreme Court limited its holding to be "'as applied to claims against local public entities that are **not governed by specific tax refund statutes**.' (*Oronoz, supra,* at p. 365, fn. 9, 71 Cal.Rptr.3d 485.)" *Ardon, supra,* 52 Cal.4th at 250. Given that limiting language, the only reasonable conclusion to draw is that specific provisions in state law and/or municipal ordinances which prohibit class action tax refund claims and require individual claim filing with the jurisdiction as a prerequisite to filing suit remain good law.

As noted by defendants, the question of how local taxes are raised and how refunds of local taxes are processed and adjudicated are matters of local concern, and the Court should not rush to find preemption of ordinances addressing such matters of local concern when the appellate authorities do not actually compel such conclusion.

The government's interest in the collection and retention of revenue received in the ordinary course speak strongly in favor of allowing reasonable procedures to be imposed before the public entity has to return funds. It is not an undue burden on taxpayers' right to expect the taxpayer who is actually aggrieved to make a timely personal claim for refund. Strict compliance with tax refund processes, rather than substantial compliance, is required for exactly these reasons. *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299 ("This constitutional limitation 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.")

The several jurisdictions now before this Court had no due process opportunity to participate in the federal court case in Chicago before the tax refund settlement class and sub-classes were certified, so the rulings made by that court showing that it thought that handling the post-settlement claiming process on a class basis was a good or suitable way to recover the taxes paid in error is due no deference whatsoever. The Court respectfully declines plaintiffs' request that comity be given to such an order as a stepping stone to precluding these defendants from enforcing their normal tax refund claiming processes.

The Court is not persuaded that two other cases cited by plaintiffs require a contraqry result. The cases are *Delta Airlines Inc. v. State Board of Equalization* (1989) 214 Cal.App.3d 518 (not a class action), and *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 (not a tax refund case, rather a class action re nuisance created by city-owned airport).

The several demurring parties' requests for judicial notice of their various ordinances are granted. The demurring parties have consistently shown that their ordinances do not

allow for class action tax refund claims (or require that each purported class member personally execute the needed claim verification, a condition concededly not met here by plaintiffs). The Court also agrees that a party with actual injury (and thus standing) has to make the claim, separate and apart from the question of whether or not such a hypothetical representative can pursue a class claim on behalf of others. The Court declines plaintiffs' request to take judicial notice of Judge Richard Strauss' recent trial court ruling in the San Diego Superior Court. The Court does grant plaintiffs' request for judicial notice of ordinances of Alhambra, Berkeley, Chico, East Palo Alto, Monterey, Oakland and Winters, but reference to such material does not change this Court's conclusion that the plaintiffs' case is legally deficient and not susceptible to a cure by repleading. The Court does grant defendants' request that it take judicial notice of the certain items of legislative history and of the various orders and papers in the federal court case in Chicago.

The Court is aware that the practical result of this ruling will be that the various defendants will be allowed to retain the tax revenue paid in error. Since the aggrieved individual tax payers could have theoretically filed a personal refund claim had they wished to fully vindicate their personal rights under the federal Internet Tax Freedom Act to be spared from owing these amounts, this Court finds no due process violation which justifies the abrogation of otherwise valid statutes and ordinances regulating the tax refund process.

Claims Of Four Individual Plaintiffs:
The First Amended Complaint fails to plead to whom the disputed taxes were paid. The specimen claim forms provided to the Court show that the claim was made only in the name of New Cingular Wireless PCS LLC. Therefore, the pleading fails to show that any one of these plaintiffs exhausted his administrative remedy before filing this action. Plaintiffs did not ask for leave to amend in their Opposition to overcome these omissions. For such reason, they have failed to show how they could overcome this pleading defect. Plaintiffs' failure to do so is presumably because the monetary value of any one sub-class member's personal tax refund is de minimis; the claim form submitted by plaintiffs to the Court show the typical individual refund amount sought to be in the range of $5.00 or less up to $40.00, occasionally more. Under the circumstances, the Court holds that it is proper to sustain the demurrer in its entirety and thus to terminate the claims of the four named plaintiffs as well as the representative claims of the unnamed sub-class members.

Related Legal Claims:
The operative "First Amended Complaint For Refunds Of Taxes Erroneously Collected And Paid" attempts to recover the taxes paid in error through various theories, which all derive from the same core issue. In addition to the First Cause Of Action for "Claim For Tax Refunds Based On State Statute And City Or County Code Or Ordinance," there are the following claims:

Second Cause of Action for Common Law Restitution Based Upon Unjust Enrichment
Third Cause of Action for Money Had and Received

Fourth Cause of Action for Violation of Due Process Clauses of the 5th and 14th Amendments to U.S. Constitution
Fifth Cause of Action for Violation of Due Process Clause of California Constitution

The long and short of it is that if the cities are not obligated to pay a refund at this time to these claimants for reasons noted above, it does not improve the case or change the analysis to assert these alternative theories. In holding on to the revenues paid in error unless and until a proper claimant steps forward with a timely claim submitted in accordance with the several jurisdiction's refund claiming process, these defendants are acting within their rights, and, accordingly, there is no due process violation.

Additional Arguments:
Defendants make additional arguments why the purported assignment of certain rights by the federal court class members is not legally effective, why the "voluntary payments" doctrine prohibits the current claim and why the various claims are mis-joined. The Court does not believe that it needs to address such arguments in view of the dispositive ruling set forth above.

Further Status Conference:
Counsel for the Alhambra coalition defendants to prepare a Judgment consistent with this ruling.

Recognizing that an appeal from today's ruling is very likely, the case is stayed as to all other remaining defendants without prejudice to such parties' continuing right to reach whatever compromises they wish with the filing of a dismissal thereafter. The case is set for a Non-Appearance Case Review re status of appeal on August 20, 2012, at 9 a.m. No filing by the parties is needed. If action sooner by this Court is needed, contact the clerk.

---

* The demurrers are filed as six separate demurrers by various appearing defendants. By group, they are:
1. City of Oakland
2. Cities of Compton, Hawthorne, Long Beach and Redondo Beach
3. City and County of San Francisco
4. Cities of Hayward, Modesto, Palo Alto, Redwood City, San Luis Obispo and Santa Barbara
5. 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, Orange Cove, Pacific Grove, Pico Rivera, Pomona, Porterville, Richmond, San Bernardino, San Jose, Santa Cruz, Sierra Madre, Stockton, Torrance, Tulare, Waterford and Winters. **[Note: For reasons not obvious, this law firm omitted its clients Cities of Ceres, La Palma, Lindsay, Los Alamitos, Paramount, Pico Rivera and Sunnyvale as parties joining this demurrer.]**
6. City of Desert Hot Springs, Downey, El Cerrito, Pasadena, Pinole and San Leandro

PROOF OF SERVICE
Sipple v. City of Alameda, et al.
Case No. BC 462270

I, Kimberly Nielsen, declare:

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 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071-3137.

BY ELECTRONIC SERVICE: Based on the Court's Order to serve documents in this case via Lexis/Nexis File & Serve ("LNFS"), I hereby certify that on May 16, 2012, I served the foregoing: **NOTICE OF RULING ON CERTAIN DEFENDANTS' DEMURRERS TO THE FIRST AMENDED COMPLAINT AND ORDER OF STAY** by using the LNFS system.

I certify that all participants listed below are identified on LNFS and that service will be accomplished by the LNFS system.

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

Executed on May 16, 2012, at Los Angeles, California.

Kimberly Nielsen

Colantuono & Levin, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

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Court:	CA Superior Court County of Los Angeles
Division/Courtroom:	N/A
Case Class:	Civil-Sipple vs City of Alameda (BC462270)
Case Type:	Complex Litigation
Case Number:	BC462270
Case Name:	Sipple, Donald et al vs City of Alameda et al

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El Paso de Robles, California, Code of Ordinances >> Title 3 - REVENUE AND FINANCE* >> Chapter 3.04 - ASSESSMENT, LEVY AND COLLECTION OF TAXES—GENERAL* >> Division XXV. - Claims for Refund of Taxes, Assessments or Fees* >>

Division XXV. - Claims for Refund of Taxes, Assessments or Fees*

3.04.550 - Authority/scope.

The provisions of this division are enacted pursuant to Section 935 of the California Government Code and shall apply to all claims for recovery of taxes, fees or assessments enacted by the city which are not expressly governed by a claims procedure set forth in any other statute or ordinance.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.551 - Claim required.

No suit for the recovery of any taxes, fees, or assessments which have been paid by any person to the city may be maintained unless a claim for refund of such taxes, fees, or assessments has been filed and rejected in accordance with Part 3 of Divisions 3.6 of Title 1 of the California Government Code (commencing with Section 900 thereof) as those provisions now exist or shall hereafter be amended, and as further provided in this division.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.552 - Time limit for filing a claim.

Any claim for a refund of taxes, fees, or assessments subject to this chapter shall be made within one year after payment was made under protest.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.553 - Claim—Who may make.

A claim for the refund of taxes, fees, or assessments subject to the provisions of this chapter may be filed by the claimant, or by the claimant's guardian, executor, conservator or administrator. No claim may be filed on behalf of a class of persons unless verified by every member of that class as required by this section.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.554 - Claims procedures.

A claim for the refund of any taxes, fees, or assessments paid under protest shall be filed in writing no later than one year after the date of the timely payment under protest. The claim shall be deemed filed on the date of receipt by the city attorney. Any such claim shall contain the information required by Government Code Section 910, as that provision now exists or may be amended in the future, as well as the following information:

(a) The name and address of the claimant, and where applicable, the claimant's guardian, executor, conservator or administrator;

(b) The amount paid and the amount assessed, the payment date and the nature of any taxes, fees, or assessments paid, including the address of any property to which the tax, fee or assessment is applicable;

(c) A description of the specific reason for the refund and whether the whole tax, fee, or assessment is claimed to be void or, if only a part, what portion;

(d) The signature of the claimant or the claimant's guardian, executor, conservator, or administrator, accompanied by a contemporaneous statement that the information on the claim has been provided under penalty of perjury.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.555 - Reasons for refunds.

On order of the city council, any taxes, assessments, fees, penalties, or costs paid to the city shall be refunded if they were due to:

(a) Mathematical, computational or other error on the part of the city; or

(b) Overpayment or duplicate payment.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.556 - Processing of claims.

The city council shall act on a claim in the manner provided in Government Code Sections 912.4 and 912.6 within forty-five days after the claim is presented.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.557 - Time-barred claims.

Nothing in this division revives or reinstates any cause of action that on May 4, 2007, is barred by failure to comply with any previously applicable statute, ordinance or regulation requiring the presentation of a claim prior to a suit for refund of taxes, fees, or assessments subject to this chapter, or by failure to commence any action thereon within the period prescribed by an applicable statute of limitations.

(Ord. 928 N.S. § 1 (part), 2007)

3.04.558 - Deducted proportionately from funds.

If the amount paid has been apportioned to any funds or revenue or assessment districts, the proper proportion of the refund shall be deducted from any amounts due each fund or revenue or assessment district.

(Ord. 628 N.S. § 1 (part), 2007)

3.04.559 - Moneys not refunded—Deposit.

Any amount subject to refund for which application is not made within the time allowed shall be placed in the city general fund.

(Ord. 628 N.S. § 1 (part), 2007)

3.04.560 - Payment under protest—Not voluntary.

Any assessee may contest a tax, fee or assessment by tendering the required payment when due and providing written notice that such payment is being tendered under protest, and the basis for such protest. A payment under protest is not a voluntary payment.

(Ord. 628 N.S. § 1 (part), 2007)

3.04.561 - Time of commencement of lawsuit.

Any lawsuit for the refund of any taxes, fees, or assessments shall be commenced within six months from and after the date on which the city council rejects a claim for refund. The action may be brought only:

(a) As to the portion of the tax, fee, or assessment claimed to be void;
(b) On the grounds specified in the claim;
(c) By the person making payment, his guardian, executor, administrator, or heir.

Payment of a judgment against the city shall not be made to an assignee of the person bringing the action.

(Ord. 628 N.S. § 1 (part), 2007)

[Proposed]

ORDER TAKING JUDICIAL NOTICE OF MUNICIPAL ORDINANCES AND PLEADINGS FILED IN RELATED ACTIONS

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

1. "City's Memorandum of Points and Authorities in Support of Demurrer and Motion to Strike Plaintiffs' First Amended Complaint" filed by the City of Paso Robles in *Borst et al. v. City of Paso Robles* on November 22, 2011 in the San Luis Obispo County Superior Court, Case Number CV 09-8117.

2. "Notice of Ruling on Certain Defendants' Demurrers to the First Amended Complaint and Order of Stay," with attached written ruling issued by Court, filed by the City of Alhambra, California, et al. in *Sipple et al. v. City of Alameda et al.* on May 16, 2012 in the Los Angeles County Superior Court, Case Number BC462270.

3. Sections 3.04.550 – 3.04.561 of the Paso Robles Municipal Code ("Claims for Refund of Taxes, Assessments or Fees").

Dated: _____

_____

Chief Justice Tani Cantil-Sakauye

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 May 30, 2012, declarant served the **SECOND 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 30th day of May, 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

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Second Appellate Division
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Los Angeles, CA 90013