SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MIRIAM GREEN,

Petitioner and Plaintiff,

v.

CITY OF PALO ALTO,

Respondent and Defendant.

Case No.: 16CV300760 [consolidated with Case No. 18CV336237]

ORDER CONCERNING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This is a consolidated class action for writ of mandate, declaratory judgment, and refunds of gas and electric fees imposed by defendant/respondent the City of Palo Alto (the "City") in 2012, 2016, and 2018. The judgement for plaintiff/petitioner Miriam Green ("Plaintiff") was entered in June 2021, along with notice of entry of judgment. In September 2021, the City appealed to the Sixth District Court of Appeal and Plaintiff later cross-appealed. While the appeal was pending, the parties negotiated a settlement.

Before the Court is Plaintiff's motion for final approval of settlement and motion for attorney's fees, costs and incentive award. No one appeared at the December 21, 2023 to oppose these motions. For the reasons discussed below, the Court GRANTS the motions.

I. BACKGROUND

In 2016, Plaintiff filed the lead case (the "2016 Action"). In 2017, the parties agreed to stay the matter while *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 (*Redding*) was pending before the California Supreme Court. The parties stipulated to certify the 2016 action as a class action, which was granted by the Court. Plaintiff was also appointed as the class representative and her attorneys were appointed as class counsel. In 2018, after the City passed new utility rates, she filed a second action challenging the 2018 gas and electric rates (the "2018 Action"). After the Supreme Court issued its opinion in *Redding* and the stay was lifted, the Court granted the parties' request to consolidate the matters and amended the certified class accordingly (the "Judgment Class"). The parties entered into tolling agreements regarding the 2019, 2020, and 2021 gas rates (the "Tolled Claims").

Over two phases of trial, the Court (Judge Walsh) rejected Plaintiff's challenges to the City's electric rates, but found that its gas rates constituted unapproved taxes in violation of article XIII C of the California Constitution ("Article XIII C"), which pertains to voter approval for local tax levies, "to the extent [the City's General Fund Transfer] and/or market-based rental charges were passed through to ratepayers."[1] The Court found that these improper pass-throughs totaled approximately $12.6 million, which the City must refund to gas ratepayers. The judgement in favor of Plaintiff was entered on June 25, 2021, along with notice of entry of judgment and Plaintiff was awarded a common fund for the gas classes for $12,618,510. On March 25, 2021, class notice was completed. On September 21, 2021, the City appealed to the Court of Appeal and Plaintiff later cross-appealed. The Court of Appeal appointed Bob Blum to mediate the dispute. On April 13, 2022, while the appeal was pending, the parties successfully mediated the case and reached an agreement in principle and the settlement agreement (the "Settlement" or "Settlement Agreement") was finalized in September 2022.

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[1] In 1996, Proposition 218, also known as the "Right to Vote on Taxes Act," passed, adding articles to Article XIII C and XIII D. Proposition 218 prohibited local governments from imposing, extending, or increasing taxes without voter approval. (Art. XIII C, §2, subds. (b) and (d).) However, it did not define "tax". In 2010, Proposition 26 was passed and it amended article XIII C to provide that a "'tax' means any levy, charge, or exaction of any kind imposed by a local government.'" (Art. XIII C, § 1, subd. (e).)

Plaintiff now seeks an order finally approving the Settlement, decertifying the Judgment Class, certifying the settlement class (the "Settlement Class"), appointing Plaintiff as class representative, appointing Thomas A. Kearney ("Kearney") and Prescott W. Littlefield ("Littlefield") of Kearney Littlefield, LLP and Vincent D. Slavens ("Slavens") of Benink & Slaves, LLP as class counsel; approving Phoenix Class Action Administration Solutions ("Phoenix") as the settlement administrator; directing the Clerk to enter the Order of Final Approval and Judgment; and setting a compliance hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91

Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

III. SETTLEMENT CLASS

The Settlement Class includes the following five subclasses of gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service:

(1) 2012 Gas Rate Class: all gas utility customers billed between September 23, 2015 and June 30, 2016;

(2) 2016 Gas Rate Class: all gas utility customers billed between June 1, 2016 and June 30, 2018;

(3) 2018 Gas Rate Class: all gas utility customers billed between July 1, 2018 and June 30, 2019;

(4) 2019 Gas Rate Class: all gas utility customers billed between July 1, 2019 and June 30, 2020; and

(5) 2021 Gas Rate Class: all gas utility customers billed between July 1, 2021 and June 30, 2022.

Excluded from the Settlement Class are (1) all persons who were excluded from the Judgement Class; (2) all persons who timely elected to be excluded from the Settlement Class;

and (3) judge(s) to whom the case is assigned and any immediate family members thereof. Additionally, the parties agree that the gas utility customers of the City billed for natural gas service between June 30, 2020 and July 1, 2021 and after June 30, 2022 are not entitled to any refund, pursuant to the original judgment.

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiff had demonstrated by a preponderance of the evidence (1) an

ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Nothing has changed since preliminary approval to affect this decision. Consequently, the Court will certify the sub-classes for settlement purposes.

IV. DECERTIFICATION OF JUDGMENT CLASS

In *Kight v. CashCall, Inc.* (2014) 231 Cal.App.4th 112, the appellate court provided the legal standard for class decertification:

> After certification, a trial court retains flexibility to manage the class action, including to decertify a class if the court subsequently discovers that a class action is not appropriate. To prevail on a decertification motion, a party must generally show new law or newly discovered evidence showing changed circumstances. A motion for decertification is not an opportunity for a disgruntled class defendant to seek a do-over of its previously unsuccessful opposition to certification. Modifications of an original class ruling, including decertifications, typically occur in response to a significant change in circumstances, and [i]n the absence of materially changed or clarified circumstances courts should not condone a series of reargruments on the class issues[.] A class should be decertified only where it is clear there exist changed circumstances making continued class action treatment improper.
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> A party moving for decertification generally has the burden to show that certification is no longer warranted, and courts have broad discretion in ruling on this issue. Trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action and therefore are afforded great discretion in evaluating the relevant factors. However, [d]ecertification resting on improper legal criteria or an incorrect assumption is an abuse of discretion.

(*Id*. at pp. 125-126, internal quotations and citations omitted.)

At preliminary approval, the Court determined that good cause existed to provisionally decertify the Judgment Class because it needed to be expanded to include the new members who are entitled to recover from the settlement of the Tolled Claims. The parties also agreed to the decertification of the Judgment Class pursuant to the Settlement Agreement.

The Court sees no reason to depart from that previous determination and therefore decertifies the Judgment Class.

V. TERMS AND ADMINISTRATION OF SETTLEMENT

The Settlement provides a common fund of $17,337,111.00 from which refunds will be paid to the City's gas utility retail customers in three installments over approximately two years. The total is before the deduction of attorneys' fees, costs, and an incentive award.

The amount of the settlement fund after the exclusion of administrative expenses, any service awards, and any attorneys' fees and expenses is the "Net Settlement Fund." The Net Settlement Fund allocation to each gas rate sub-class will be as follows: 26% to the 2012 Sub-Class; 21% to the 2016 Sub-Class; 13% to the 2018 Sub-Class; 23% to the 2019 Sub-Class; and 17% to the 2021 Sub-Class. In reaching the Settlement, the City calculated that the average refund for a class member, if they are a member of all classes is $156.32. Refunds will issued by check or bill credit. Phoenix was preliminarily approved as settlement administrator, and is now finally approved as such. The Court also approves its administrative fee of $85,000 to be paid from the common settlement fund pursuant to the terms of the Settlement.

In exchange for settlement, class members release:

> [A]ny and all claims, demands, suits, petitions, liabilities, causes of action, rights, and damages of any kind and/or type relating to the subject matter of the Action arising during the period between January 1, 2012 and June 30, 2023, including, but not limited to, compensatory, exemplary, punitive, expert, and/or attorneys' fees, or by multipliers, whether past, present, or future, mature, or not yet mature, known or unknown, suspected or unsuspected, contingent or non-contingent,

> derivative or direct, asserted or unasserted, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim of any kind related, arising from, connected with, and/or in any way involving the Litigation, that are, or could have been, defined, alleged or described in the Litigation, including, but not limited to, claims that the City's gas and/or electric utility rates during the period of January 1, 2012 to June 30, 2023 Violate Article XIII-C of the California Constitution (commonly known as Proposition 218 or Proposition 26) and claims that the City's transfer of funds from its gas and electric utility enterprise funds to the City's general fund based on article XII, section 2 of the City's Charter violates Article XIII C of the California Constitution.

The notice period has now been completed. On July 20, 2023, settlement administrator Phoenix received the names and contact information for the 48,514 individuals identified as class members. Phoenix conducted a National Change of Address search in an effort to update the list as accurately as possible. On August 3, Phoenix mailed Notice of the Settlement ("Notice") to members, either via email if such an address was available, or first class mail if one was not.

As of November 29, 2023, the date of the declaration of the Case Manager at Phoenix submitted in support of the instant motion, Kevin Lee, 160 Notice packets have been returned to Phoenix, none of which included a forwarding address. Phoenix attempted to locate current mailing addresses using skip tracing and obtained 87 updated addresses, to which Notice was promptly re-mailed. Seventy-three (73) Notices remain undeliverable. Phoenix has received three requests for exclusion and no objections to the settlement; the deadline to submit either of the foregoing was October 2.

As discussed in detail on the order preliminarily approving the parties' settlement, the Court found that the proposed settlement provided a fair and reasonable compromise to Plaintiff's claims. It finds no reason to depart from these findings now, especially considering

that there are no objections. Thus, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

VI. MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD

Plaintiff seeks a fee award of $4,319,720.10, or 24.91% of the common fund.[2] Under the terms of the Settlement, class counsel is entitled to apply for payment of fees in an amount not to exceed 25% of the settlement fund. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff also provides a lodestar figure of $1,324,750 (inclusive of both pre-judgment and post-judgment fees), based on 1,645.2 hours spent on the case by counsel with billing rates of $700 to $850 per hour, resulting in a multiplier of 3.26, which is less than the multiplier previously applied by this Court at the time of judgment.. The Court finds that this multiplier is reasonable considering: (1) the great risk Class Counsel took in litigating this case on an entirely contingent basis; (2) the substantial outlay of time; (3) the complex and consistently evolving case law under the claims alleged; (4) the exceptional results; and (5) the long delay in being compensated.

Plaintiff also requests reimbursement of $7,597.65 in litigation costs and $6,960 in judgment class notice costs, which appear to be reasonable based on the materials provided and are approved.

Finally, Plaintiff requests an incentive award of $7,500. To support her request, she submits a declaration describing her efforts in this case. The Court finds that the class representative is entitled to an incentive award and the amount requested is reasonable.

In accordance with the foregoing, Plaintiff's motion for fees, costs and an incentive award is GRANTED.

VII. ORDER AND JUDGMENT

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

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[2] As Plaintiff notes, the Court previously awarded class counsel attorneys' fees of $3,154,627.50 in a contested fee motion (representing 25% of the judgment amount of $12,618,510, with a 3.68 lodestar cross-check multiplier) in an order dated May 14, 2021.

Plaintiff's motion for final approval is GRANTED. Plaintiff's motion for attorneys' fees and costs is GRANTED. The Judgment Class is decertified. The following five subclasses of gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service are certified for settlement purposes:

(6) 2012 Gas Rate Class: all gas utility customers billed between September 23, 2015 and June 30, 2016;

(7) 2016 Gas Rate Class: all gas utility customers billed between June 1, 2016 and June 30, 2018;

(8) 2018 Gas Rate Class: all gas utility customers billed between July 1, 2018 and June 30, 2019;

(9) 2019 Gas Rate Class: all gas utility customers billed between July 1, 2019 and June 30, 2020; and

(10) 2021 Gas Rate Class: all gas utility customers billed between July 1, 2021 and June 30, 2022.

Excluded from the class are the three individuals who submitted timely requests for exclusion, as well as all persons who were excluded from the Judgement Class and judge(s) to whom the case is assigned and any immediate family members thereof.[3] Additionally, the parties agree that the gas utility customers of the City billed for natural gas service between June 30, 2020 and July 1, 2021 and after June 30, 2022 are not entitled to any refund, pursuant to the original judgment.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Under Rule 3.769(h) of

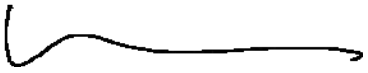
[3] Accordingly, the Court (Judge Kulkarni) and its immediate family members are excluded from the class, even though they live in Palo Alto.

the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **July 11, 2024 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

IT IS SO ORDERED.

Date: 12/21/2023



The Honorable Sunil R. Kulkarni
Judge of the Superior Court