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Superior Court of California
County of Los Angeles

FEB 22 2021

Sherril R. Carter, Executive Officer/Clerk
By: Rita Nazaryan, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

LORIN M. ENGQUIST and ANGELICA)
G. DIVINAGRACIA dba FUN FIT)
FACTORY, on behalf of themselves and all)
others similarly situated,)
Plaintiffs,)

v.)

CITY OF LOS ANGELES,)
Defendant.)

Case No. BC591331

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

DATE: March 17, 2021
TIME: 10:30 a.m.
JUDGE: Hon. Daniel J. Buckley
DEPT: SS1

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 17, 2021 at 10:30 a.m., or as soon thereafter as
3 the matter may be heard, in Department SS1 of the Superior Court of California, County of Los
4 Angeles, located at 312 North Spring Street, Los Angeles, California, Plaintiffs Lorin M. Engquist,
5 Angelica G. Divinagracia dba Fun Fit Factory, and David Bernstein (“Plaintiffs”), on behalf of
6 themselves and the Class, will move and do hereby move this Court, pursuant to California Rules
7 of Court, rule 3.769, *et seq.*, and California Code of Civil Procedure, section 382, for an order
8 finally approving the proposed settlement of this action and entering the Final Judgment and the
9 Final Order, attached to the First Amended Stipulation of Settlement filed October 2, 2020 (the
10 “Settlement Agreement” or “FASS”) as Exhibits A and B, respectively. Specifically, Plaintiffs
11 seek a final order and judgment that, *inter alia*: (i) finally approves the proposed Settlement; (ii)
12 certifies the Settlement Class; and (iii) finds that the Class Notice constituted the best practicable
13 notice and was provided in accordance with the Court’s October 12, 2020 Order Granting Motion
14 for Preliminary Approval of Class Action Settlement (“Preliminary Approval Order”) and the
15 terms of the Settlement. Plaintiffs also request an award of Attorneys’ Fees and Expenses and
16 Class Representative Service Payments, as set forth in the Motion for an Award of Attorneys’
17 Fees, Reimbursement of Expenses and Class Representative Service Payments, filed on December
18 8, 2020 (“Motion for Fees”).

19 This Motion is made on the grounds that the proposed Settlement is fair, reasonable and
20 adequate and that class notice has been provided in compliance with the Court’s Preliminary
21 Approval Order and the terms of the Settlement.

22 This Motion is based upon the Memorandum of Points and Authorities attached hereto; the
23 Declaration of Jennifer M. Keough Regarding Settlement Notice and Administration; the
24 Declaration of Monika R. McKnight in Support of Motion for Final Approval of Settlement; the
25 Declaration of Rachele R. Byrd in Support of Plaintiffs’ Motion for an Award of Attorneys’ Fees,
26 Reimbursement of Expenses and Class Representative Service Payments, filed December 8, 2020
27 (the “Byrd Decl.”); the Declaration of Jon A. Tostrud in Support of Plaintiffs’ Motion for an Award
28 of Attorneys’ Fees, Reimbursement of Expenses and Class Representative Service Payments filed

1 December 8, 2020 (the "Tostrud Decl."); the Declaration of Brittany N. DeJong in Support of
2 Plaintiffs' Motion for Final Approval of Settlement and exhibits; the Settlement Agreement and
3 exhibits filed on October 2, 2020; all files and records in this action; and any argument and
4 evidence which may be presented at the hearing on this motion.

5 DATED: February 22, 2021

6 Respectfully submitted,

7
8 By: 
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Plaintiffs' Class Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Lorin M. Engquist, Angelica G. Divinagracia dba Fun Fit Factory and David
4 Bernstein (“Plaintiffs”) request that the Court finally approve this excellent Settlement, which
5 resolves all class claims arising out of the City of Los Angeles’s (the “City”) unlawful application
6 of the gas users’ tax (“GUT”) to Southern California Gas Company’s (“SoCal Gas”) Customer
7 Charge and Service Establishment Charge, which are not “charges made for gas,” and provides for
8 all the remedies sought in the Complaint.¹

9 The Parties have complied with the Court’s October 12, 2020 Order Granting Motion for
10 Preliminary Approval of Class Action Settlement (“Preliminary Approval Order”) (*see* Declaration
11 of Brittany N. DeJong in Support of Plaintiffs’ Motion for Final Approval of Class Action
12 Settlement (“DeJong Decl.”), Ex. P), and the reaction of the Class has been overwhelmingly
13 positive. In response to 1.8 million direct Summary Notice postcards, a print publication campaign,
14 an internet campaign, a press release, a website, and a toll-free number, only 2 people (0.0001% of
15 the direct notices mailed) objected to the Settlement and only 40 people (0.0023%) timely and
16 completely properly opted out.²

17 The overwhelming support for the Settlement is not surprising given that the non-
18 reversionary \$32.5 million Settlement Fund alone (which by the Date of Cessation will increase to
19 \$33.9 million) recovers approximately 62% of all alleged overpayments. *See* Declaration of Rachele
20 R. Byrd in Support of Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of
21 Expenses and Class Representative Service Payments, filed December 8, 2020 (“Byrd Decl.”),
22

23 ¹ The “Customer Charge” is described on SoCal Gas invoices as the “[c]harge to recover costs
24 of gas delivery including reading meters, preparing bills, and processing payments.” First Amended
25 Complaint (“FAC”), ¶ 12. SoCal Gas charges a Service Establishment Charge upon initiation of
26 service. *Id.*

26 ² The Claims Administrator also received 4 late opt-outs and 38 incomplete exclusion
27 requests, two of which were duplicate submissions. Declaration of Jennifer M. Keough Regarding
28 Settlement Notice and Administration, filed herewith (“Keough Decl.”), ¶ 19. The 82 exclusion
requests, whether timely and complete or not, amount to only 0.0047% of the 1,758,015 notices
successfully mailed.

1 ¶ 19.³ But the Settlement achieves much more. It also eliminates the alleged illegal tax, guarantees
2 that Los Angeles gas consumers will have the right to vote on any attempt by the City to bring the
3 tax back, and results in future tax savings of \$8.8 million *per year* to consumers with active SoCal
4 Gas accounts (or \$24.5 million over a 3-year period, \$49.1 million over a 6-year period, and \$81.8
5 million over a 10-year period). Thus, the monetary value of the Settlement totals **\$57 million** over
6 a 3-year period, **\$81.6 million** over a 6-year period, and **\$114.3 million** over a 10-year period.⁴

7 In addition, the automatic tax abatement method of distribution required by the Settlement
8 is the fairest and most efficient distribution method, which further benefits the Class. The Settlement
9 saves the Class millions of dollars which would otherwise be spent in a claim filing structure
10 requiring the huge cost of millions in processing claims, not to mention the costs of printing and
11 postage, etc. Instead, here the City will absorb the internal costs incurred in the distribution process.
12 The Class' transaction costs will also be minimized as Class Members are not required to expend
13 efforts to complete and send claim forms, locate and send invoices, or cash any method of payment
14 and other related expenses.

15 The Claims Administrator received only two objections which should be overruled. Both
16 objections concern the *cy pres* payments that will be made related to former SoCal Gas customers
17 who will not directly receive a benefit from the Settlement. The objectors would prefer to receive
18 a cash benefit, but as explained in Sections V.D. and IX., *infra*, distribution of a check to all accounts
19 that paid the challenged GUT is not possible. After much vetting and exploration of this possibility,
20 Plaintiffs determined that a claims filing distribution to all Class Members is likewise not practical,
21 and allowing a claims-filed distribution solely for former customers is impractical and would result
22 in double-recovery in some instances. Therefore, the *cy pres* award as to Class Members who are

23 _____
24 ³ Within 70 days of the Effective Date, the City will stop charging the GUT on the Customer
25 Charge and Service Establishment Charge (the Date of Cessation). FASS, ¶ 18. If the Court enters
26 the Final Judgment on the currently scheduled Final Approval Hearing date of March 17, 2021, the
27 Date of Cessation, assuming no appeals, will be July 26, 2021, and the Settlement Fund will increase
28 to approximately \$33,891,484 and represent 62% of the total damages (which by that time will be
approximately \$54,422,472). Byrd Decl., ¶ 19.

⁴ In *Lavinsky, et al. v. City of Los Angeles*, No. BC542245 (“*Lavinsky*”), a similar settlement
to which the Court granted final approval on October 19, 2019, the City has made no effort to date
to reinstate that tax.

1 former SoCal Gas customers is appropriate and the two objections should be overruled.

2 In total, the Settlement presents comprehensive, significant and immediate benefits to the
3 Class, an excellent result especially given the significant risks and delay of continued litigation. The
4 Settlement takes the same form as the settlement in *Lavinsky, et al. v. City of Los Angeles*, No.
5 BC542245 (*i.e.*, injunctive relief, refunds in the form of a tax abatement, and a *cy pres* payment),
6 which was granted final approval by this Court on October 19, 2019 as “fair, reasonable, adequate
7 and in the best interests of the Class.” DeJong Decl., Ex. A at ¶ 11. The Court should grant final
8 approval.

9 **II. SUMMARY OF THE LITIGATION**

10 Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses and Class
11 Representative Service Payments, filed on December 8, 2020 (“Attorneys’ Fees Motion”), and
12 noticed to be heard on the same day as this Motion, as well as the Declaration of Rachele R. Byrd
13 (“Byrd Decl.”) and the Declaration of Jon A. Tostrud (“Tostrud Decl.”) filed in support thereof,
14 contain detailed descriptions of the claims alleged in this action, the procedural history, and the
15 settlement negotiations. In order to avoid repeating those details here, Plaintiffs respectfully refer
16 the Court to those filings. *See* Attorneys’ Fees Motion, Section II; Byrd Decl., ¶¶ 2-11; and Tostrud
17 Decl., ¶¶ 2-10.

18 **III. SETTLEMENT TERMS**

19 The Settlement Agreement⁵ provides substantial automatic benefits (both monetary and
20 injunctive) to Class Members. The total value of those benefits, without consideration of the time
21 value of money, is between **\$57.0 million** and **\$114.3 million**, depending on the time period to be
22 considered (between 3 years and 10 years). Byrd Decl., Ex. A (Tregillis Decl.), ¶ 39. Application
23 of either a risk-free rate of discounting or a market level of risk results in those ranges falling to
24 \$55.5 to \$110.2 million (risk-free) and \$45.1 to \$82.9 million (market-risk). *Id.* Therefore, at a
25 minimum, the Settlement is valued at \$57 million without consideration of the time value of money
26 and \$45.1 million with application of a discount rate.

27 ⁵ The First Amended Stipulation of Settlement (“Settlement Agreement” or “FASS”) was
28 filed with the Court on October 2, 2020, concurrently with Plaintiffs’ supplemental briefing in
further support of their motion for preliminary approval.

1 *Lavinsky* settlement.⁸ FASS, ¶¶ 2, 63.c.iv. Payment over the Abatement Period will be made as a
2 reduction in the GUT rate applied to SoCal Gas customers’ billing statements. The credit will be
3 applied by equally reducing both the 5% and 10% GUT rates (“Adjusted Tax Rates”)⁹ to effectuate
4 the distribution of the Net Settlement Fund, pro rata, among SoCal Gas customers. FASS, ¶¶ 4, 6,
5 63.c.iv. Class Members are not required to file claims to benefit from either the injunctive relief or
6 the GUT rate reduction, and there is no reversion of any portion of the Settlement Fund to the City.
7 In addition, the City will pay for any and all costs, including any borne by SoCal Gas (or any other
8 entity) associated with calculating and carrying out the tax abatement pursuant to Public Utilities
9 Code §§ 791-99. FASS, ¶ 64.

10 The payment of the Net Settlement Fund to SoCal Gas customers as a Tax Abatement after
11 completion of the tax abatement in the *Lavinsky v. City of Los Angeles* case was a material term of
12 the Settlement and is in the best interests of the Class because, if the City was required to distribute
13 the refunds in this case simultaneously with distribution of the refunds in *Lavinsky*, it would have
14 insisted on a smaller settlement fund and would not have agreed to pay \$32.5 million (or
15 approximately 75% of the damages as of February 2020). *See* DeJong Decl., Ex. B (Declaration of
16 Benjamin Ceja), ¶ 3. The City uses GUT revenue to fund services such as police and fire protection,
17 street maintenance, and library operations. *Id.*, ¶ 4. From a fiscal and practical perspective, the
18 City’s need to balance the more immediate, and potentially permanent, reduction in GUT revenue
19 with the additional requirement to distribute refunds by lowering the GUT rate prevented it from
20 being able to run the refund periods in this case and *Lavinsky* simultaneously. *Id.*, ¶ 5. This is even
21 more so the case following the COVID-19 shutdown, which has dramatically increased the demands
22 on City services. *Id.*, ¶¶ 4, 5.

23 The Abatement Remainder Amount, which is likely to be *de minimis*, will be paid by either
24 a further tax abatement or, as described below if too small to allocate, by payment to nonprofit The
25

26 ⁸ The *Lavinsky* abatement period began on April 1, 2020 and will likely last three (3) years,
27 through March 31, 2023. *See* Byrd Decl., ¶ 14.

28 ⁹ The City shall authenticate the Adjusted Tax Rates and the method used to calculate them.
FASS, ¶ 63.c.iv.2. The City shall also reconcile the amount actually credited to SoCal Gas
customers with the Net Settlement Fund to ensure that its entirety is distributed. *Id.*, ¶ 63.c.iv.4, 6.

1 Utility Reform Network. The “Abatement Remainder Amount” is the difference between the
2 amount of the Net Settlement Fund and the amount credited to SoCal Gas Customers during the
3 Abatement Period up to the Reconcile Date, which is a date that falls between 90 and 180 days prior
4 to the last day of the Abatement Period. FASS, ¶¶ 3, 37, 38.

5 The Settlement Agreement provides that if the Net Settlement Fund has not been fully
6 credited on the Reconcile Date, the remainder left to be credited (the “Abatement Remainder
7 Amount”) will be credited within 60 days after the Abatement Period, unless it would take longer
8 than that at the current Adjusted Tax Rates, in which case the City shall further decrease the rates
9 as necessary to pay the Abatement Remainder Amount within that 60-day window. *Id.*,
10 ¶ 63.c.iv.6. However, “[i]n the event at any time during the Abatement Period it is no longer feasible
11 to pay the remainder of the Net Settlement Fund not previously paid to Class Members during the
12 Abatement Period (*i.e.*, the remaining balance is so low that it cannot be feasibly divided amongst
13 all SoCal Gas Customers), then such remaining total amount of the Net Settlement Fund shall be
14 paid to The Utility Reform Network, a 26 U.S. § 501(c)(3) non-profit charitable organization(s)
15 approved by the Court.” *Id.*, ¶ 63.c.iv.7.

16 Also, as discussed further in Sections V.D. and IX., *infra*, due to gas account attrition, some
17 Class Members may not be SoCal Gas customers after the Effective Date; *i.e.*, some of these Class
18 Members may have relocated out of the City and others may no longer be SoCal customers. These
19 Class Members will not receive the benefits of the Settlement. Accordingly, the Settlement provides
20 for payments to Non-Profit Recipients: \$400,000 to the Alliance and \$100,000 to TURN. FASS, ¶
21 63.b. As discussed in Section V.D., *infra*, *cy pres* distributions to these organizations are useful in
22 fulfilling the purposes of the underlying causes of action.¹⁰

23 _____
24 ¹⁰ The Declaration of Rachele R. Byrd filed on September 3, 2020 in support of Plaintiffs’
25 motion for preliminary approval provided: “None of the Plaintiffs or Class Counsel have any
26 interests or involvement in the governance or work of the Alliance or TURN.” *Id.*, ¶ 29. Pursuant
27 to the Court’s request, Plaintiffs also submitted with their supplemental briefing in further support
28 of their motion for preliminary approval seven (7) additional declarations attesting to the lack of any
interest or involvement by any counsel or party in the governance or work of the *cy pres* recipients.
See Declarations of Benjamin Ceja, Lorin M. Engquist, Angelica G. Divinagracia, David Bernstein,
and Holly O. Whatley and the Supplemental Declarations of Rachele R. Byrd and Jon A. Tostrud,

1 **C. The Release is Narrowly Tailored to the Claims**

2 Class Members will release only claims accrued during the Class Period of April 16, 2014
3 through Judgment. FASS, ¶¶ 10; 84-85. The Released Claims are limited to those related to factual
4 allegations averred in the Litigation. *Id.*, ¶¶ 40, 85. There is no Civil Code section 1542 waiver
5 included in the Settlement Agreement; however, the Released Claims include those “known or
6 unknown, suspected or unsuspected,” which is appropriate since they are limited solely to claims
7 that relate to the allegations contained in the complaint. *Id.*, ¶ 85.

8 The Class Period and release period extend beyond preliminary approval because the City is
9 not obligated to cease collecting the tax or begin the Tax Abatement until after the Final Judgment
10 is entered and becomes final. Therefore, the end of the Class Period is the date of entry of Judgment
11 to capture the largest number of taxpayers possible who will be paying taxes on the Customer
12 Charge and Service Establishment Charge through entry of the Final Judgment. Similarly, the
13 effective date of the Release (the “Effective Date”) extends beyond the date of preliminary approval
14 because the Class should not be required to release their claims against the City until the Judgment
15 becomes final and the City becomes obligated to cease collection of the challenged taxes and begin
16 the Tax Abatement. *See Id.*, ¶¶ 20, 85.

17 Similarly, the release will be effective before some of the Settlement funds are paid, but this
18 is in the best interest of the Class. The Settlement is comprised of both monetary and injunctive
19 relief. The injunctive relief (*i.e.*, the City’s cessation of collection of the GUT on the Customer
20 Charge and Service Establishment Charge) is valued, for the 3-year, 6-year, and 10-year periods
21 following the Date of Cessation, at \$24.5 million, \$49.1 million and \$81.8 million, respectively—a
22 huge value to the Class. *See* Byrd Decl., Ex. A (Tregillis Decl.), ¶¶ 21, 39. This relief will occur
23 within 70 days of the Effective Date. FASS, ¶ 18.

24 The monetary portion of the Settlement, *i.e.*, the more than \$32.5 million Settlement Fund,
25 will be paid out at various times. The Release will become effective on the Effective Date (*i.e.*,
26 when the Judgment becomes final), which is before the Abatement Period begins (FASS, ¶¶ 2,
27

28 all filed on October 2, 2020. For the Court’s convenience these declarations are re-submitted
herewith as Exhibits B, and D through I to the DeJong Declaration.

1 63.c.iv.), because that is when the City becomes obligated to pay the Settlement Fund. The City is
2 then obligated to begin paying shortly thereafter portions of the Settlement Fund, including:
3 Administration Expenses as they become due (*id.*, ¶ 63.c.i.); the Non-Profit Payments (*id.*, ¶ 63.c.ii.);
4 any court awarded Service Payments (*id.*, ¶¶ 63.c.ii.2., 101); and Attorneys’ Fees and Expenses
5 awarded by the Court (*id.*, ¶¶ 63.c.ii.3., 107). Moreover, because the Date of Cessation will not
6 occur before May 1, 2021, the City will increase the Settlement Fund by 75% of all GUT collected
7 on the Customer Charge and Service Establishment Charge collected after May 1, 2021. *Id.*, ¶ 45.
8 Therefore, it is appropriate for the Release to become effective on the Effective Date, when the City
9 will incur significant financial and economic obligations under the Settlement.

10 **D. Requested Attorneys’ Fees and Costs and Incentive Award**

11 As agreed to in the Settlement Agreement, in Plaintiffs’ Motion for Award of Attorneys’
12 Fees, Reimbursement of Expenses and Payment of an Incentive Award, filed on December 8, 2020
13 and posted on the Settlement Website immediately thereafter, Class Counsel have applied for 25%
14 of the \$32.5 million Settlement Fund in attorneys’ fees, or \$8,125,000, and expenses of \$155,144.34.
15 Plaintiffs will file a supplemental brief five (5) court days prior to the Final Approval Hearing with
16 updated lodestar and expense figures. Also addressed in the motion filed on December 8, 2020 is
17 Plaintiffs’ application for Incentive Awards of \$10,000 each to be paid to Plaintiffs Divinagracia
18 and Bernstein and \$20,000 to be paid to Plaintiff Engquist from the Settlement Fund in recognition
19 of their respective contributions to the Class. The City has agreed not to oppose Plaintiffs’ attorneys’
20 fees and expenses request and the request for incentive awards in those amounts. FASS, ¶¶ 101,
21 105.

22 **IV. METHODS AND REACH OF NOTICE AND NOTICE AND CLAIMS**
23 **ADMINISTRATION COSTS**

24 Notice was given as directed in the Preliminary Approval Order to reach as many Class
25 Members as possible and was extraordinarily robust, covering virtually every medium imaginable
26 including, for example, 1.8 million pieces of direct mail, publication notice in nine (9) newspapers
27 and magazines, digital notice, a press release, the Settlement Website and a toll-free telephone line.
28 Keough Decl., ¶¶ 6-16; Dejong Decl., Ex. P. The City also posted notice of the Settlement on its

1 website. *See* Declaration of Monika R. McKnight in Support of Motion for Final Approval of
2 Settlement, filed herewith, ¶¶ 3-4.

3 JND has billed the City \$867,066.35 and has not yet received payment. Keough Decl., ¶ 23.
4 The administration costs reflect the work JND has performed in connection with settlement
5 administration to date (as well as expenses), which includes: administering the Notice Plan;
6 implementing and maintaining a dedicated toll-free number and e-mail inbox for Class Member
7 communications; designing and maintaining the dual-language Settlement Website with online
8 exclusion filing capabilities; receiving and processing exclusion requests; forwarding copies of the
9 Long Form Notice upon request; and time spent overseeing and managing the project. *Id.*

10 JND had estimated that notice and administration costs would total approximately \$913,483,
11 and now expects total administration costs to be \$984,090.35. *Id.*, ¶ 24; FASS, ¶ 7. JND’s original
12 proposal estimated the project would occur over the course of four (4) months, but it now expects
13 the project to continue through May 2021, or for nine (9) months. Keough Decl., ¶ 24. Furthermore,
14 if administration deadlines are further delayed for any reason, JND estimates it could accrue
15 additional costs of between \$15,000 and 17,000 per month. *Id.*

16 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND THE COURT**
17 **SHOULD FINALLY APPROVE THE SETTLEMENT**

18 **A. Standards for Final Approval of Settlement**

19 California Rules of Court (“CRC”), rule 3.769(a) provides: “A settlement or compromise of
20 an entire class action, or of a cause of action in a class action, or as to a party, requires the approval
21 of the court after hearing.” The Court has broad discretion to approve or reject a proposed
22 settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001), *disapproved*
23 *on other grounds in Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018); *Mallick*
24 *v. Super. Ct.*, 89 Cal. App. 3d 434, 438 (1979); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,
25 1801 (1996).

26 California has a well-established and strong public policy favoring compromises of
27 litigation. *Hamilton v. Oakland Sch. Dist.*, 219 Cal. 322, 329 (1933) (“[I]t is the policy of the law
28 to discourage litigation and favor compromises”); *see also Ebensteiner Co., Inc. v. Chadmar Group,*

1 143 Cal. App. 4th 1174, 1179-80 (2006). This policy is particularly compelling in class actions. *See*
2 *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152 (2000).

3 Preliminary approval is the first of three steps in the approval process for settlements of class
4 actions. The second is dissemination of notice of the Settlement to all Class Members. The third is
5 a final settlement approval hearing, at which evidence and argument concerning the fairness,
6 adequacy, and reasonableness of the Settlement may be presented and Class Members may be heard
7 regarding the Settlement. *See* CRC 3.769; MANUAL FOR COMPLEX LITIGATION §§ 21.632-21.635
8 (4th ed. 2004). The standard for final approval is whether the Settlement is “fair, adequate and
9 reasonable” to the Class. *Wershba*, 91 Cal. App. 4th at 244-45.

10 **B. The Settlement Is Entitled to a Presumption of Fairness**

11 “The burden is on the proponent of the settlement to show that it is fair and reasonable.
12 However, ‘a presumption of fairness exists where: (1) the settlement is reached through arm’s-length
13 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
14 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
15 small.’” *Wershba*, 91 Cal. App. 4th at 245 (citing *Dunk*, 48 Cal. App. 4th at 1802). The Settlement
16 is entitled to a presumption of fairness because it was reached only as a result of extensive,
17 contentious, arm’s-length negotiations by knowledgeable counsel after sufficient investigation and
18 discovery.

19 **1. The Settlement is the Result of Arm’s-Length Negotiations**

20 Given the years of hard-fought litigation between the parties, the Court should have no doubt
21 that the Settlement was the result of arm’s-length negotiations between experienced counsel. The
22 parties engaged in two days of mediation before Judge Carl J. West on February 26 and 27, 2020,
23 at which point the parties reached a settlement in principle. The parties thereafter engaged in
24 substantial further negotiations concerning the details of the Settlement Agreement and executed it
25 on September 3, 2020. Case law recognizes that a respected mediator provides a high degree of
26 assurance that the settlement is the result of arm’s-length bargaining. *See, e.g., Chavez v. Netflix,*
27 *Inc.*, 162 Cal. App. 4th 43, 52-53 (2008).

28 ///

1 **2. Sufficient Investigation and Discovery Have Been Conducted**

2 The discovery taken in this case is more than adequate to make an informed settlement
3 decision. *Chavez*, 162 Cal. App. 4th at 53 (characterizing as “extensive” discovery which included
4 “written discovery, document production, and depositions of key Netflix employees.”). Plaintiffs
5 propounded requests for production of documents, and the City produced documents, concerning
6 the City’s affirmative defenses, the billing practices and identities of gas providers within the City
7 and the amounts of GUT they remitted, and the legislative history and the City’s historical
8 interpretation of the GUT ordinance. *See* Byrd Decl., ¶ 4. Plaintiffs also propounded, and the City
9 responded to, two sets of requests for admission and three sets of special interrogatories. *Id.*
10 Plaintiffs also subpoenaed and received documents from SoCal Gas and deposed a SoCal Gas
11 representative. Plaintiff Bernstein produced documents in response to the City’s request for
12 production of documents, and the City took all three Plaintiffs’ depositions. *Id.*, ¶¶ 5, 6. Moreover,
13 in connection with the City’s Motion for Summary Judgment or, in the Alternative, Summary
14 Adjudication (“MSJ”) and its opposition to Plaintiffs’ MSJ, the City requested judicial notice of
15 hundreds of pages of documents pertinent to the legislative history of the GUT ordinance that it had
16 not previously produced. *Id.*, ¶ 8. Therefore, the action settled only after the City, Plaintiff Bernstein
17 and a third party produced documents and data, the City responded to written discovery, Plaintiffs
18 took the deposition of a key SoCal Gas employee, the City took all Plaintiffs’ depositions, and
19 Plaintiffs reviewed hundreds of pages of documents concerning the legislative history of the GUT
20 ordinance and the history of taxation on the Customer Charge and the Service Establishment Charge.
21 This is entirely sufficient to allow the Court to ascertain that this Settlement is the product of
22 informed, arms-length negotiation.

23 **3. Class Counsel is Experienced in Similar Litigation**

24 There is no dispute regarding Class Counsel’s experience and ability. Collectively, Class
25 Counsel have many decades of experience litigating complex class actions in state and federal
26 courts. *See* Byrd Decl., ¶ 24 & Ex. B and Tostrud Decl., ¶ 15 & Ex. A. This Court already appointed
27 Plaintiffs’ counsel as Class Counsel based upon the finding that they “will fairly and adequately
28 protect the interests of the class.” DeJong Decl., Ex. J (Order Granting Class Certification) at 22-

1 23. Moreover, Plaintiffs’ counsel were Class Counsel in several other similar utility users’ tax
2 refund class actions litigated and settled in this Court, including: *Ardon v. City of Los Angeles*, No.
3 BC363959 (telephone users’ tax refund class action that settled for \$92.5 million); *McWilliams v.*
4 *City of Long Beach*, No. BC361469 (telephone users’ tax refund class action that settled for \$16.6
5 million), and *Granados v. County of Los Angeles*, No. BC361470 (telephone users’ tax refund class
6 action that settled for \$16.9 million). Byrd Decl., ¶ 30; Tostrud Decl., ¶ 21.

7 **C. The Settlement is Fair, Adequate and Reasonable**

8 “In determining whether a class settlement is fair, adequate and reasonable, the trial court
9 should consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense,
10 complexity and likely duration of further litigation, the risk of maintaining class action status
11 through trial, the amount offered in settlement, the extent of discovery completed and the stage of
12 the proceedings, the experience and views of counsel, the presence of a governmental participant,
13 and the reaction of the class members to the proposed settlement.” *Wershba*, 91 Cal. App. 4th at
14 244-45 (internal quotations and citation omitted). Reference to these factors demonstrates that the
15 Settlement is well within the range of approval. Tellingly, the settlement in *Lavinsky*, which took
16 the same form as this Settlement (injunctive relief, refunds through a tax abatement, and a *cy pres*
17 payment) was found to be fair, adequate, and reasonable. DeJong Decl., Ex. A (*Lavinsky* Final
18 Approval Order), ¶ 11. The same applies here.

19 **1. The Strength of Plaintiffs’ Case Balanced Against the Amount Offered**
20 **in Settlement Favors Approval**

21 The \$32.5 million Settlement Fund represents a significant recovery for the Class, it will
22 grow to approximately \$33.9 million by the Date of Cessation, and will represent approximately
23 62% of the total damages, which will be approximately \$54,422,472. Byrd Decl., ¶ 19. If Plaintiffs
24 had prevailed at trial, each Class Member (assuming there are 1,193,581—the number of SoCal Gas
25 customers as of April 30, 2020) would have, on average, recovered approximately \$46.00, before
26 deducting fees, expenses and costs (*i.e.*, \$54,422,472 divided by 1,193,581). Byrd Decl., ¶19;
27 DeJong Decl., Ex. C (Malane Decl.), ¶ 7. The Settlement provides Class Members who are still
28 SoCal Gas customers during the Abatement Period with approximately \$28.00, on average, before

1 fees, expenses and costs, in the form of a Tax Abatement (*i.e.*, \$33,891,484 divided by 1,193,581).
2 In addition, the Settlement eliminates the challenged tax. Together with the \$32.5 million cash
3 Settlement Fund, the total minimum value of the Settlement is approximately \$57 million, *i.e.*, more
4 than the damages to date, (or \$48.00 per Class Member)—an excellent result.¹¹ Byrd Decl., Ex. A
5 (Tregillis Decl.), ¶ 39.

6 In determining whether the Settlement is fair and warrants approval, the Court must assess
7 whether the relief offered is reasonable in light of the strength of Plaintiffs’ case. *Kullar v. Foot*
8 *Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008). While Plaintiffs strongly believe that the
9 Court would grant their MSJ or, failing that, Plaintiffs would have proven at trial that the GUT
10 ordinance did not authorize taxation of the Customer Charge or Service Establishment Charge, the
11 City has argued that its interpretation of the GUT ordinance is the correct one and that all charges
12 for the provision of gas, including the Customer Charge and Service Establishment Charge, are
13 taxable. Thus, the outcome is uncertain. The Settlement provides certainty and an opportunity for
14 Class Members to obtain refunds of 62% of GUT improperly collected during the Class Period in
15 the form of a tax abatement and elimination of the City’s GUT applied to the Customer Charge and
16 Service Establishment Charge until such time as the City properly amends the GUT ordinance, if
17 ever, to allow for such taxation.¹² Therefore, the relief offered by the Settlement is reasonable.

18 **2. The Benefits of the Settlement Balanced Against the Risk, Expense,**
19 **Complexity and Likely Duration of Further Litigation Favors Final**
20 **Approval**

21 The benefits of this Settlement must also be balanced against the risk, expense, and
22 complexity of further litigation. *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1152.

23 ¹¹ Courts have determined that settlements are reasonable even where only a portion of actual
24 losses are recovered. *See, e.g., Custom LED, LLC v. eBay, Inc.* No. 12-cv-00350-JST, 2014 U.S.
25 Dist. LEXIS 87180, at *14 (N.D. Cal. June 24, 2014) (“[C]ourts have held that a recovery of only
26 3% of the maximum potential recovery is fair and reasonable when the plaintiffs face a real
27 possibility of recovering nothing absent the settlement”); *In re Omnivision Techs., Inc.* 559 F. Supp.
28 2d 1036, 1042 (N.D. Cal. 2007) (6% of potential damages); *In re LDK Solar Sec. Litig.*, No. C 07-
5182 WHA, 2010 U.S. Dist. LEXIS 87168, at *6 (N.D. Cal. July 29, 2010) (5% of potential
damages).

¹² *See* footnote 4, *supra*.

1 An evaluation of the Settlement must be tempered by recognition that any compromise involves
2 concessions by the settling parties. Indeed, the very essence of a settlement agreement is
3 compromise, “a yielding of absolutes and an abandoning of highest hopes.” *Officers for Justice v.*
4 *Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted).¹³ While Plaintiffs are
5 prepared to proceed with the hearing on the parties’ cross-MSJs if the Settlement is not approved,
6 Plaintiffs do face some risk of an adverse ruling, and even if Plaintiffs are successful they face the
7 prospect of further delay and expense as the City would likely appeal the Court’s ruling. Despite
8 these risks, the Settlement provides taxpayers with a significant benefit in the form of the tax
9 abatement and injunctive relief. Accordingly, a balancing of these considerations supports approval
10 of the Settlement at this stage of the litigation.

11 **3. Risk of Maintaining Class Action Status through Trial Favors Final**
12 **Approval**

13 Even though the Court certified the Class, there is always a risk of decertification. *See*
14 *Weinstat v. Dentsply Int’l, Inc.*, 180 Cal. App. 4th 1213, 1226 (2010) (“Our Supreme Court has
15 recognized that trial courts should retain some flexibility in conducting class actions, which means,
16 under suitable circumstances, entertaining successive motions on certification if the court
17 subsequently discovers that a class action is not appropriate.”).

18 **4. The Extent of Discovery Completed Favors Final Approval**

19 The Settlement came only after Plaintiffs and their counsel conducted extensive discovery
20 (including document production, review and analysis, and a key deposition), were successful on
21 their motion for class certification, and fully briefed their MSJ and opposition to the City’s MSJ.
22 *See* Byrd Decl., ¶¶ 4-8.

23 **5. The Experience and Views of Counsel Support Final Approval**

24 In determining whether a proposed settlement is fair, reasonable and adequate, California
25 courts value highly the opinion of experienced counsel. *See, e.g., Chavez*, 162 Cal. App. 4th at 53.
26 Class Counsel have extensive experience litigating consumer class actions, having represented

27 ¹³ California courts look to procedures and standards from the federal courts for “guidance on
28 matters involving class action procedures.” *Cellphone Termination Fee Cases*, 186 Cal. App. 4th
1380, 1392 n.18 (2010) (upholding final approval of class action settlement) (citations omitted).

1 millions of consumers in numerous class actions, including several tax refund actions. Byrd Decl.,
2 ¶¶ 24, 38 & Ex. B; Tostrud Decl., ¶¶ 15, 21 & Ex. A. Based upon this experience, Class Counsel
3 believe the Settlement is fair, reasonable and adequate and in the best interest of the Class members.
4 *Id.*

5 **6. Presence of a Governmental Participant**

6 The defendant in this case is a governmental entity, which weighs in favor of approval. *See*
7 *Touhey v. United States*, No. EDCV 08-01418-VAP (RCx), 2011 U.S. Dist. LEXIS 81308, at *20-
8 21 (C.D. Cal. July 25, 2011) (fact that defendants “are the government” weighed “in favor of final
9 approval.”)

10 **D. The *Cy Pres* Provisions are Appropriate**

11 Of all of the options for allocating to Class Members the Net Settlement Fund, abatement in
12 the form of a GUT rate reduction coupled with two *cy pres* payments to non-profit organizations is
13 the most practicable and best option.

14 First, automatic distribution of a check by U.S. mail to all accounts that paid the challenged
15 GUT is not possible. This method of allocation requires a process whereby each Class Member’s
16 individual settlement share amount would require calculation by the administrator or SoCal Gas.
17 However, from the papers submitted in the related *Lavinsky* action in support of the settlement,
18 Class Counsel were aware when negotiating the Settlement in this action that SoCal Gas cannot
19 even provide the total number of current or former gas customers because it cannot determine which
20 account holders terminated an account and opened a new account, terminated an account and did
21 not open a new account, or terminated only one of multiple accounts. DeJong Decl., Ex. K (Ahdoot
22 Decl.), ¶¶ 17-19. Class Counsel confirmed these facts with SoCal Gas. *See id.*, Ex. C (Malane
23 Decl.), ¶ 6. Moreover, SoCal Gas — a third party — refused to involve itself in any distribution of
24 proceeds of a Judgment or Settlement in that case. *Id.*, Ex. K (Ahdoot Decl.), ¶¶ 17-18. Plaintiffs
25 did not expect a different response from SoCal Gas here. *See generally id.*, Ex. C (Malane Decl.).
26 Thus, aside from the very large costs involved in such an endeavor, automatic distribution by
27 physical payment is not a viable option.

28 Second, even if SoCal Gas were willing and able to provide Class Member names and data,

1 a claims-filed distribution available to all Class Members also is not practical. Class Members who
2 did not submit claims would get nothing through the Settlement. Claim rates would likely be low
3 as Class Members would likely need to submit some proof in support of their claim, including past
4 invoices.¹⁴ Also, the estimated additional cost of a claims-filed structure (assuming seven minutes
5 of time for claim assessment and verification), is conservatively estimated at \$6.78 per claim plus
6 \$1.09 for each invoice submitted in support of the claim. *Id.*, Ex. L (9/3/20 Keough Decl.), ¶ 27.
7 This estimate does not include the costs of printing and postage, which would be additional. Thus,
8 assuming a Class size of 1,193,581—the number of SoCal Gas customers as of April 30, 2020, *see*
9 *Id.*, Ex. C (Malane Decl.), ¶ 7, and a Class Period ending date in July 2021, if the Class submits
10 even ten (10) Class Period invoices, the total cost to the Settlement would be over \$21 million,
11 before adding the costs of printing and postage and assuming there are no complications with the
12 claim process that would require a back-and-forth between the claims administrator and claimants
13 (*i.e.*, Claims: [1,193,581 * \$6.78] + Invoices: [1,193,581 * 10 * \$1.09] = \$21,102,512). This
14 relatively high cost demonstrates the inefficiencies of a claims-filed settlement here.

15 Third, allowing either automatic or claims-filed distribution solely for former customers,
16 while current customers receive credits as called for in this Settlement is also impracticable as it
17 inevitably results in double recovery for some and challenges basic fairness. Double recovery is
18 inevitable because former customers would receive up-front cash, while current customers would
19 receive credit over a given period. And SoCal Gas/the City cannot determine whether a “former
20 customer” is also a “current customer.” *Id.*, Ex. K (Ahdoot Decl.), ¶¶ 19, 21.b; *id.* Ex. C (Malane
21 Decl.), ¶ 6. As a result, where a former customer later becomes a current customer during the
22 Abatement Period, any distribution plan would enable him to (i) obtain an immediate pay-out as to
23 his terminated account, but also (ii) enjoy the Abatement distributed to current customers, while
24 decreasing pro rata the total monetary benefit distributed over the Abatement Period. While it is
25 theoretically conceivable to develop a claims process to offset the risk of double recovery, the costs
26 of administration relative to the average recovery per claimant are clearly prohibitive.

27 ¹⁴ In *Ardon v. City of Los Angeles*, No. BC363959, where class members were required to file
28 claims, only approximately 54% of the settlement fund was distributed, including fees and
significant administrative expenses, and only 18% of the class or potential class filed claims.

1 Aside from double recovery, an up-front, one-time distribution to former customers raises
2 other fairness concerns *vis-à-vis* current customers. In such a scenario, current customers would
3 likely contend that, due to the time value of money, offering some Class Members immediate cash
4 payment while compensating others over time via the Tax Abatement confers an unfair advantage
5 to the former. It also raises questions on how current customers who close their accounts during the
6 Abatement Period should be treated. But, remedying this fundamental unfairness through an
7 automatic or claims-filed process open to all customers is impracticable, as previously discussed.
8 Thus, the inefficiencies imposed by direct payment favor shifting the cost of administration to SoCal
9 Gas and the City through distribution of credit to current customers—and ensuring automatic, broad
10 recovery. Because former customers cannot escape the cost of administration by shifting it onto
11 SoCal Gas, nor the likelihood of fraud or double-recovery through a hybrid distribution scheme,
12 approval of the *cy pres* award as to former customers is appropriate. Therefore, in consideration for
13 the release of Class Members’ claims who terminated an account and did not subsequently open a
14 new one and did not have multiple accounts at the time of termination, a payment of \$400,000 will
15 be made to the Alliance, a non-profit organization, pending approval by this Court.

16 Moreover, SoCal Gas has also indicated that it is unable to identify customers who paid the
17 Service Establishment Charge during the Class Period because customers may have moved out of
18 the SoCal Gas service territory without a forwarding address or moved within the service territory
19 and did not sign up for gas with the same credentials. *Id.*, ¶ 4. It would be a “major undertaking”
20 for SoCal Gas to provide any credit to those customers who paid the Service Establishment Charge
21 during the Class Period and would require many hours of program development testing and
22 validation. *Id.* The amount of GUT collected on the Service Establishment Charge is only 5.17%
23 of the total amount at issue in this case, which equates to \$1.68 million of the \$32.5 million
24 Settlement Fund. *Compare id.*, ¶ 3 with ¶ 5 (total GUT collected from April 2014 to April 2020 on
25 Customer Charge is \$42.8 million and on Service Establishment Charge is \$2.3 million or 5.17% of
26 total collected on both).¹⁵ Class Members who paid the Service Establishment Charge during the

27 ¹⁵ Every Class Member who paid the Service Establishment Charge also paid the Customer
28 Charge because those who established service with SoCal Gas (and therefore paid the Service

1 Class Period paid only \$2.50 in GUT on that charge. It would be extraordinarily costly for SoCal
2 Gas to provide any credit to those former customers. *Id.*, ¶ 4. Class Counsel considered, in
3 negotiating the Settlement, that the cost of identifying Class Members who paid the \$2.50 Service
4 Establishment Charge and providing for partial reimbursement would swallow a large portion, if
5 not all, of the Net Settlement Fund attributable to such charges.¹⁶ Therefore, in consideration for
6 the release of Class Members’ claims who paid the Service Establishment Charge, a payment of
7 \$100,000 will be made to TURN, a non-profit organization, pending approval by this Court.

8 *Cy pres* or fluid recovery in class actions was pioneered in California state courts. *See Daar*
9 *v. Yellow Cab Co.*, 67 Cal. 2d 695 (1967); *State v. Levi Strauss & Co.*, 41 Cal. 3d 460 (1986); *Bruno*
10 *v. Super. Ct.*, 127 Cal. App. 3d 120 (1981). Under the doctrine of *cy pres*, “when it is not possible
11 or practicable . . . to compensate class members according to their respective damages, the best
12 alternative for the court is to award damages in a way that benefits as many of the class members as
13 possible, despite the probability that some class members will not benefit whereas some
14 nonmembers will.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 716 (2006). The *cy pres*
15 distributions here are proper because cash distributions to “former customers” and to those who paid
16 the Service Establishment Charge are not feasible.

17 Generally, *cy pres* funds are paid to a third party such as a charitable organization or agency
18 for use for designated purposes. 3 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS
19 ACTIONS § 10:17 at 514-21 (4th ed. 2002). The proper criteria for determining the appropriateness
20 of a proposed *cy pres* distribution is “whether the distribution was useful in fulfilling the purposes

21 _____
22 Establishment Charge) immediately began also paying Customer Charges. However, not every
23 Class Member who paid the Customer Charge also paid the Service Establishment Charge, because
24 many Class Members who paid the Customer Charge paid the Service Establishment Charge before
25 the beginning of the Class Period. Every member of the Class, whether they paid only the Customer
26 Charge or both the Customer Charge and the Service Establishment Charge during the Class Period,
27 will receive the same benefits of the Settlement so long as they are still SoCal Gas customers and
28 remain so throughout the Abatement Period.

¹⁶ The GUT on the \$25.00 Service Establishment Charge was \$2.50. By the Date of Cessation,
the Settlement will represent 62% of the total damages (Byrd Decl., ¶ 19), which equates to \$1.55
attributable to the GUT charged on the Service Establishment Charge. After deducting the fees and
costs of the Settlement, Class Members who paid the Service Establishment Charge would be
entitled to even less for those charges, if it were feasible to identify those Class Members.

1 of the underlying cause of action.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th at 726. The
2 distribution to the Alliance, a Los Angeles based charitable organization, is appropriate. The
3 organization provides an important public service to City residents/Class Members by dedicating
4 resources to support foster youth and families in the communities this Settlement encompasses. In
5 the context of this Action, the Alliance’s services include assisting with SoCal Gas discounts,
6 matriculation into the CARE program, and ensuring that utility cost obligations are met. *See*
7 *generally* DeJong Decl., Ex. M (Declaration of Jennifer Braun). Similarly, TURN’s services include
8 reaching out to low-income households, communities of color, immigrants and other underserved
9 communities so that people most impacted by policy decisions have a voice in advocating for
10 affordable access to essential gas and other utilities. *See generally* DeJong Decl., Ex. N (Declaration
11 of Mark Toney). The Alliance and TURN thus both address the purposes of the underlying causes
12 of action and the subject matter of this litigation.

13 Finally, none of the Plaintiffs or Class Counsel have any interests or involvement in the
14 governance or work of the *cy pres* recipients. *See* DeJong Decl., Exs. B, D - I.

15 **VI. THE CLASS IS ALREADY CERTIFIED**

16 Plaintiffs filed their motion for class certification on August 1, 2017, and on May 13, 2019,
17 this Court certified a “mandatory non-opt-out class, akin to a (b)(1)/(b)(2) class action,” defined as:
18 “All persons, including individuals, non-corporate entities, and corporations, wherever organized
19 and existing, that have paid the City of Los Angeles Gas Users Tax imposed by section 21.1.5 of
20 the Los Angeles Municipal Code on amounts charged by Southern California Gas Company for
21 reading meters, preparing bills, processing payments, and establishing service.” *See* DeJong Decl.,
22 Ex. J (Order Granting Class Certification) at 23. The Court further divided the Class into two
23 subclasses: (i) a Customer Charge subclass represented by Plaintiffs Engquist and Divinagracia;
24 and (ii) a Service Establishment Charge subclass represented by Plaintiff Bernstein. *Id.* The class
25 period was defined as April 2014 to present. *Id.* The Court found that the Class is ascertainable (*id.*
26 at 10), sufficiently numerous (*id.* at 5), the Class Representatives’ claims were typical of those of
27 the Class (*id.* at 18), Plaintiffs’ counsel was qualified to serve as Class Counsel (*id.* at 23), common
28 issues of law or fact predominated over individualized issues (*id.* at 12), and a class action was the

1 superior method for adjudicating the action (*id.* at 22). Plaintiffs now seek to amend the certified
2 class to permit Class Members to opt out of the Class, and to amend the Class Period to run from
3 April 16, 2014 through the date of entry of the Judgment. FASS, ¶ 10.

4 It is appropriate for the Settlement Agreement to provide Class Members with an opportunity
5 to opt out of the Class even though the Class was certified as a mandatory non-opt-out class. The
6 Court certified the Class as a mandatory non-opt-out class in response to the City’s arguments that
7 the Class was not ascertainable because the City did not have records of who paid the tax, and third
8 party SoCal Gas could not identify who paid the tax and how much without immense undue burden.
9 *See DeJong Decl., Ex. J (Order Granting Class Certification)* at 5-6. In other words, the City argued
10 that the Class was unmanageable “because of the cited administrative cost in identification.” *Id.* at
11 7 (internal quotations and citation omitted). The Court therefore certified a mandatory non-opt-out
12 class to “allay Defendant’s concerns with the accompanying costs of notice and potential burdens
13 placed on non-party SoCalGas.” *Id.* at 23. *See also id.* at 8 (“[T]he Court is convinced that any
14 burden concerns with prejudgment notice and undue expense arising therefrom can be properly
15 alleviated by certifying the class here as a mandatory non-opt-out class action.”). The Court found
16 that such treatment was appropriate in this case because “Plaintiffs’ requested relief is entirely
17 equitable in nature—they seek declaratory relief, an injunction, and return of the allegedly wrongfully
18 collected taxes (i.e. restitution).” *Id.* at 9 (citing *Frazier v. City of Richmond*, 184 Cal. App. 3d
19 1491, 1501 (1986)). The Court further found such treatment appropriate here because “Plaintiffs
20 seek to challenge the City’s uniform tax collection practice: a practice generally applicable to the
21 class, which—if challenged in a piecemeal fashion—would create the risk of inconsistent
22 adjudications and prospective tax practices with respect to each individual class member.” *Id.* at 9.
23 Finally, the Court also held that certifying the class as a mandatory non-opt-out class would obviate
24 the need for prejudgment notice, and thereby alleviate any concerns with manageability prior to the
25 ‘remedial stage.’” *Id.* (citing *Reyes v. San Diego Cty. Bd. Of Supervisors*, 196 Cal. App. 3d 1263,
26 1275 (1987)). The Court noted that “any burden concerns with regard to either costs placed on non-
27 party SoCalGas, or the relative costs of delivering class notice by mail—even if that notice is sent
28 post-judgment—can be respectively alleviated by Public Utility Code section 799(a)(3), which

1 requires municipalities to reimburse utilities for costs incurred in issuing ordered tax refunds, and
2 California Rule of Court 3.766(f), which permits notice by publication through newspaper,
3 broadcast, internet, or posting.” DeJong Decl., Ex. J (Order Granting Class Certification) at 9-10.

4 In the context of the Settlement, the City has agreed to allow Class Members to opt out of
5 the Class, which is only a benefit to Class Members. Opt-outs will still receive the benefits provided
6 by the Settlement if they continue to be SoCal Gas customers, *i.e.*, the cessation of taxation of the
7 Customer Charge and the Service Establishment Charge as well as the Tax Abatement. *See* DeJong
8 Decl., Ex. O (Supplemental Declaration of David Malane), ¶ 4. Notice to the Class is required to
9 allow Class Members an opportunity to object to the Settlement, and the Class will not incur any
10 additional notice costs by also allowing Class Members to opt out. *See* Cal. Rules of Court 3.769(f)
11 (“If the court has certified the action as a class action, notice of the final approval hearing must be
12 given . . . [and] must contain an explanation of the proposed settlement and procedures for class
13 members to follow in filing written objections to it”); Fed. R. Civ. P. 23(e)(1) & (5)(A).

14 Finally, the City is obligated under the Settlement Agreement and Public Utilities Code,
15 section 799(a)(3) to reimburse SoCal Gas for its costs associated with making refunds via the Tax
16 Abatement. FASS, ¶¶ 7, 64.b. And, there is no additional burden to SoCal Gas by permitting Class
17 Members to opt out since opt-outs who remain SoCal Gas customers during the Abatement Period
18 will still receive the benefits of the Settlement. DeJong Decl., Ex. O (Supp. Malane Decl.), ¶ 4.¹⁷

19 **VII. THE NOTICE PLAN SATISFIES DUE PROCESS AND WAS EXECUTED IN**
20 **ACCORDANCE WITH THE COURT’S ORDER**

21 Due process requires that reasonable notice of the settlement be given to all potential class
22 members. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Moreover, “notice of the final
23 approval hearing must be given to the class members in the manner specified by the court.” CRC
24 3.769(f). The notice methods utilized here complied with the direction of the Order. Notice was

25 ¹⁷ Class Members who are no longer SoCal Gas customers, and who will therefore not share
26 directly in the benefits of the Settlement, were given an opportunity to opt out and pursue their
27 claims against the City if they chose to do so. The option to opt out of the Class and preserve the
28 right to sue the City regarding the same claims only benefits Class Members, whereas disallowing
opt-outs would only benefit the City. Therefore, it was and is in the best interests of the Class to
allow opt-outs.

1 conveyed through a broad, multi-layered, multimedia program. Keough Decl., ¶¶ 6-16.
2 Furthermore, the Long Form Notice included verbatim paragraphs 85 through 88 of the FASS
3 concerning the release, as well as the definitions of the Class Period, the Released Claims and the
4 Released Parties. See FASS, Ex. C at 4-5. Consequently, the Settlement meets the requirements
5 for reasonable notice in order to obtain final approval.

6 The FASS and the Long Form Notice now provide that, once entered by the Court, the Final
7 Judgment shall be posted on the Settlement Website. See FASS, ¶¶ 24, 96 and Ex. C at 8. The
8 Judgment will remain on the Settlement Website for until at least thirty (30) days after the Effective
9 Date. FASS, ¶¶ 68.b., 96. The [Proposed] Final Order Granting Final Approval of Class Action
10 Settlement also provides, “The Settlement Administrator shall post the Final Order and Final
11 Judgment on the settlement website, www.GasTaxSettlementLA.com, forthwith, and it shall remain
12 there until at least thirty (30) days after the Effective Date.” FASS, Ex. B, ¶ 21.

13 **VIII. THE POSITIVE REACTION OF THE CLASS SUPPORTS FINAL APPROVAL**

14 The Objection and Opt Out deadlines were December 29, 2020 or January 18, 2021 for those
15 who received a re-mailed Summary Notice. FASS, ¶ 32; DeJong Decl., Ex. P (Preliminary Approval
16 Order), ¶ 9. There are only 2 objections and 40 completed timely opt-outs. See Keough Decl., ¶ 19
17 and Ex. E. The miniscule percentage of class members objecting – well below one-tenth of 1% –
18 indicates overwhelming support for the Settlement and strongly favors its approval. *7-Eleven*
19 *Owners for Fair Franchising*, 85 Cal. App. 4th at 1152-1153 (one factor that “lead[s] to a
20 presumption the settlement was fair” is that only “a small percentage of objectors” came forward; 9
21 objections out of 5,454 noticed class members represented “overwhelming positive” response).
22 Also, “[i]t is established that the absence of a large number of objections to a proposed class action
23 settlement raises a strong presumption that the terms of a proposed class settlement action are
24 favorable to the class members.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523,
25 529 (C.D. Cal. 2004); 4 NEWBERG ON CLASS ACTIONS, § 11:48 (“Courts have taken the position that
26 one indication of the fairness of a settlement is the lack of or small number of objections [citations
27 omitted]”).

28

1 **IX. THE TWO OBJECTIONS ARE WITHOUT MERIT AND SHOULD BE**
2 **OVERRULED**

3 Objections to class action settlements can be a productive contribution to the democratic
4 process of class actions. Though Class Counsel appreciate the comments made by the objectors,
5 respectfully, these objections have no merit, are impractical, and are not based on legal analysis
6 and/or accurate facts. None of the objectors provide legal authority or analysis for their position –
7 only opinion and/or conclusion. The objections (addressed below) should, we submit, both be
8 overruled.

9 The objections are attached as exhibits to the Declaration of Jennifer Keough (the objectors
10 are Kevin Murphy and Frederick Dashiell). *See* Keough Decl., Ex. F. Mr. Murphy has recently
11 moved to New Mexico and Mr. Frederick will be moving outside of the Los Angeles area. The
12 Objectors complain that because they are no longer, or will no longer be, SoCal Gas customers, they
13 will not directly receive the benefits of the Settlement. In effect, the objectors challenge the *cy pres*
14 award and Mr. Dashiell seeks cash compensation for all Class Members.

15 As we have previously noted, the objectors had the opportunity along with other Class
16 Members to opt out of the Settlement and seek a cash recovery on an individual basis; neither chose
17 to do so. Nonetheless, with consultation with Defendant, the parties have agreed to permit them to
18 opt out even at this late date if they choose to do so. We will communicate this offer to both
19 objectors and advise the Court of their response.

20 However, under any scenario, direct payment is not feasible. *See* Section V.D., *supra*. For
21 reasons set forth above, the available options (other than the Settlement’s method of allocation) of
22 (i) automatic distribution to all Class Members by physical payment, (ii) claims-filed distribution
23 available to all Class Members, or (iii) automatic physical payment distribution or claims-filed
24 distribution to former customers, coupled with this Settlement’s credit distribution (using SoCal Gas
25 infrastructure) to current customers are all impracticable. Balancing the significant additional
26 administrative costs, the interest in avoiding fraud or double recovery, and fairness, *cy pres*
27
28

1 distribution as to former customers and credit distribution as to current customers is the best option
2 to allocate the Settlement Fund. The two objections should be overruled.¹⁸

3 **X. CONCLUSION**

4 For the all of the foregoing reasons, Plaintiffs respectfully request the Court grant final
5 approval to the proposed Settlement and enter the [Proposed] Final Approval Order and the
6 [Proposed] Judgment, submitted herewith.

7 DATED: February 22, 2021

Respectfully submitted,

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18 Similar objections were overruled in the related *Lavinsky* action. See DeJong Decl., Ex. A
(*Lavinsky* Final Approval Order) at ¶¶ 15, 23.