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11 *Plaintiffs' Class Counsel*

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE COUNTY OF LOS ANGELES

15 LORIN M. ENGQUIST and ANGELICA) Case No. BC591331
16 G. DIVINAGRACIA dba FUN FIT)
17 FACTORY, on behalf of themselves and all) **PLAINTIFFS' NOTICE OF MOTION AND**
18 others similarly situated,) **MOTION FOR AN AWARD OF**
19 Plaintiffs,) **ATTORNEYS' FEES, REIMBURSEMENT**
v.) **OF EXPENSES AND CLASS**
20 CITY OF LOS ANGELES,) **REPRESENTATIVE SERVICE**
21 Defendant.) **PAYMENTS; MEMORANDUM OF POINTS**
) **AND AUTHORITIES**
)
) DATE: March 17, 2021
) TIME: 10:30 a.m.
) JUDGE: Hon. Daniel J. Buckley
) DEPT: SSC-1
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1 **NOTICE OF MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on March 17, 2021 at 10:30 a.m., in Department SSC-1 of the
4 Superior Court of California, County of Los Angeles, 312 North Spring Street, Los Angeles, California
5 90012, Plaintiffs Lorin M. Engquist, Angelica G. Divinagracia dba Fun Fit Factory and David
6 Bernstein (collectively, "Plaintiffs"), will move and do hereby move this Court for an Order awarding:
7 (a) Class Counsel attorneys' fees in the amount of \$8,125,000, which represents just 14% of the
8 estimated value of the Settlement over the next three years, 10% of the estimated 6-year value, 7% to
9 the 10-year value, and 25% of the non-reversionary \$32.5 million Settlement Fund recovered on behalf
10 of the Class; (b) reimbursement of litigation expenses in the amount of \$155,144.34; and (c) Service
11 Payments of \$10,000 each for Class Representatives Angelica Divinagracia and David Bernstein and
12 \$20,000 for Class Representative Lorin Engquist. This motion is made on the grounds that the
13 requested fees and awards are reasonable and in accordance with California law.

14 This motion is based upon this Notice of Motion and Motion; the Memorandum of Points and
15 Authorities attached hereto; the Declarations of Rachele R. Byrd, Jon A. Tostrud, Lorin M. Engquist,
16 Angelica G. Divinagracia, David Bernstein, Richard M. Pearl and Christian Tregillis; the First Amended
17 Stipulation of Settlement with exhibits (the "Settlement"), previously filed with the Court; the
18 [Proposed] Final Order and [Proposed] Final Judgment; all papers filed in support of Plaintiffs' Motion
19 for Final Approval; the argument of counsel; all papers and records on file in this matter; and such
20 other matters as the Court may consider.

21 DATED: December 8, 2020

Respectfully submitted,

22
23 By: 
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Plaintiffs' Class Counsel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 After five years of zealous advocacy in this novel and complex case, Class Counsel achieved an
4 excellent Settlement and now request that the Court award attorneys' fees and costs as contingent
5 compensation for their efforts. Counsel request that the Court award \$8,125,000 in attorneys' fees and
6 reimbursement of \$155,144.34 in expenses.¹

7 The cash Settlement Fund, which will be used to fund, among other things, the rebates to
8 taxpayers in the form of a tax abatement, is \$32.5 million. The injunctive relief, *i.e.*, the City's
9 cessation of the collection of taxes at issue in this case, provides an additional concrete value to Los
10 Angeles taxpayers of \$8.18 million per year. The requested fees, therefore, amount to just 7% of the
11 projected 10-year value of the Settlement (\$114.3 million), 10% of the projected 6-year value (\$81.6
12 million), and 14% of the Settlement's projected 3-year value (\$57 million). Even valuing only the cash
13 rebate portion of the Settlement, the fee request is 25% of the non-reversionary \$32.5 million
14 Settlement Fund and is presumptively fair. Viewed against this concrete monetary value of the
15 Settlement, the fee request is modest.

16 While the Court need not consider Class Counsel's lodestar in this common fund case, a cross-
17 check reveals that the fees requested represent a 5.76 multiplier on the reasonable lodestar of
18 \$1,410,300.50. The multiplier is within the range of others awarded by this and other courts in
19 California and is justified in light of the risk Class Counsel undertook litigating this risky, novel and
20 complex case for over five years. While Plaintiffs are confident they would have prevailed at trial, the
21 City offered vigorous defenses that may well have been victorious had the case been tried. While
22 Plaintiffs disagree with the City's legal position, the outcome was uncertain and no court had ever
23 ruled on the particular dispositive issues in this case before.

24 As the Court is aware, Class Counsel litigated the case zealously and extensively, including:
25 (i) researching and investigating the claims; (ii) preparing and submitting pre-lawsuit government
26 claims to the City; (iii) drafting the Complaint and the First Amended Complaint; (iv) propounding
27 discovery; (v) meeting and conferring on discovery disputes; (vi) researching for and drafting several

28 ¹ Plaintiffs will report updated lodestar and expenses information in their supplemental brief, which they will file on March 10, 2021.

1 rounds over more than a one-and-a-half year period of the ultimately successful Motion for Class
2 Certification and its supporting declarations; (vii) drafting Plaintiffs’ Motion for Leave to Amend
3 Complaint; (viii) preparing a trial plan; (ix) retaining and working with a damages expert who
4 submitted an expert report in support of Plaintiffs’ trial plan; (x) drafting Plaintiffs’ Motion for
5 Summary Judgment or, in the Alternative, Summary Adjudication (“MSJ”) and related Separate
6 Statement of Undisputed Material Facts (“Separate Statement”) and reply; (xi) drafting the Plaintiffs’
7 Opposition to the City’s MSJ, responding to the City’s Separate Statement, and responding to the
8 City’s evidentiary objections; and (xii) attending a two-day mediation and negotiating the terms of and
9 preparing the Settlement Agreement and its exhibits. Class Counsel will invest significant additional
10 time in the future preparing the Motion for Final Approval of the Settlement, responding to objections,
11 supervising the Settlement Administrator, and supervising the City’s implementation of and reporting
12 to the Court on the tax abatement.

13 The excellent results achieved here speak for themselves. The Settlement resolves all class
14 claims arising out of the City’s application of the gas utility users’ tax (“GUT”) to the Customer
15 Charge and Service Establishment Charge, which are not “charges made for gas,” and provides for all
16 the remedies sought in the Complaint.² It establishes a \$32.5 million Settlement Fund to provide for
17 cash rebates in the form of a tax abatement and eliminates the allegedly illegal tax, guaranteeing that
18 Los Angeles residents will have the right to vote on any attempt by the City to bring the tax back, and
19 resulting in future savings of \$8.18 million per year to taxpayers (or \$24.5 million for a 3-year period,
20 \$49.1 million for a 6-year period, and \$81.8 million for 10-year period). Thus, the concrete monetary
21 value of the Settlement totals \$57 million over a 3-year period, \$81.6 million over a 6-year period,
22 and \$114.3 million over a 10-year period. Class Members overwhelmingly support the Settlement,
23 with so far only 1 person objecting to the Settlement (and no one objecting to the attorneys’ fees
24 request), and only 47 people opting out.³

25 ² The “Customer Charge” is described on Southern California Gas Company (“SoCalGas”) invoices as the “[c]harge to recover costs of gas delivery including reading meters, preparing bills, and processing payments.” First Amended Complaint (“FAC”), ¶ 12. SoCalGas charges a Service Establishment Charge upon initiation of service. *Id.*

26 ³ The objection and opt-out deadlines are not until December 29, 2020, and January 18, 2021 for
27 those who received re-mailed Summary Notices. Plaintiffs will address objections to the Settlement
28 and report the total opt-outs in their Motion for Final Approval of the Settlement, due on February 22,
2021, and/or in a supplemental brief on March 10, 2021.

1 Given the excellent recovery obtained for the Class, the novel and complex nature of the
2 claims, the amount of work involved, the skill and expertise required, the substantial work performed,
3 and the significant risks that counsel undertook, the requested attorneys fees and expenses award is fair
4 and reasonable.

5 Finally, the Class Representatives actively participated in the prosecution of the case for the
6 benefit of the entire Class and fulfilled all their duties. They request Service Payments in the amounts
7 of \$10,000 each for plaintiffs Divinagracia and Bernstein and \$20,000 for plaintiff Engquist in
8 recognition of their time and efforts devoted to this litigation.

9 II. SUMMARY OF THE LITIGATION AND SETTLEMENT NEGOTIATIONS

10 Plaintiffs commenced this action more than five years ago, alleging that the City illegally
11 charges the 10% GUT on the entire gas bill, including for services such as SoCalGas' Customer
12 Charge and Service Establishment Charge, which are not "charges made for gas." Plaintiffs contend
13 the GUT ordinance expressly limits taxation to charges for the gas commodity itself and does not
14 permit the tax to be imposed on charges for services associated with providing the gas. The GUT
15 ordinance requires service providers, such as SoCalGas, to collect the GUT and remit it to the City.
16 FAC, ¶ 9; Los Angeles Municipal Code ("LAMC"), § 21.1.5(c). The Class is limited to SoCalGas
17 customers who paid the GUT during the Class Period⁴ on the Customer Charge and the Service
18 Establishment Charge. SoCalGas charged Class Members and remitted to the City on average
19 approximately \$618,437 per month in GUT taxed on the Customer Charge and the Service
20 Establishment Charge. Declaration of Rachele R. Byrd in Support of Motion for Attorneys' Fees and
21 Reimbursement of Expenses and for Class Representative Service Payments ("Byrd Decl."), Ex. A
22 (Tregillis Decl.), ¶ 16.

23 On April 16, 2015, Class Counsel assisted Plaintiffs Engquist and Divinagracia in preparing
24 and submitting a government claim to the City. FAC, ¶ 17 & Ex. A thereto; Byrd Decl., ¶ 3.
25 Subsequently, on August 13, 2015, Class Counsel prepared and filed on behalf of Plaintiffs Engquist
26 and Divinagracia dba Fun Fit Factory a Class Action Complaint for: (1) Declaratory Relief; (2)
27 Permanent Injunctive Relief; (3) Common Count – Money Had and Received; and (4) Accounting. On
28

⁴ The "Class Period" in the First Amended Stipulation of Settlement, filed October 2, 2020 ("FASS"), is April 16, 2014 to the date of entry of the Judgment. FASS, ¶ 10.

1 September 17, 2015, the City answered. Byrd Decl., ¶ 3.

2 Subsequently, the parties engaged in extensive discovery. On November 2, 2015, Plaintiffs
3 propounded requests for production of documents concerning, among other things, the City's
4 affirmative defenses, the billing practices and identities of gas providers within the City and the
5 respective amounts of GUT they remitted, and the legislative history and the City's historical
6 interpretation of the GUT ordinance. The City served objections and responses on December 1, 2015,
7 and the parties met and conferred to resolve their disputes. Defendant served amended responses and
8 produced 677 pages of documents on May 6, 2016. Plaintiffs also propounded, and Defendant
9 answered, two sets of requests for admission and three sets of special interrogatories. In addition,
10 Plaintiffs subpoenaed and received documents from SoCalGas and deposed a SoCalGas representative
11 on November 29, 2017. The City took the depositions of Plaintiffs Engquist and Divinagracia on
12 October 17, 2017. *Id.*, ¶¶ 4-5.

13 On August 1, 2017, Plaintiffs Engquist and Divinagracia filed a Motion for Class Certification,
14 the City opposed the motion on November 1, 2017, and Plaintiffs Engquist and Divinagracia filed a
15 reply in further support of the motion on December 14, 2017. A hearing was held on January 11,
16 2018. *Id.*, ¶ 5. The tentative ruling questioned Plaintiffs Engquist and Divinagracia's ability to
17 represent Class Members who were charged the GUT on the Service Establishment Charge during the
18 Class Period because they paid the charge prior to the beginning of the Class Period. *Id.* Additionally,
19 during the hearing, the Court ordered Plaintiffs Engquist and Divinagracia to submit a trial plan
20 demonstrating that adjudicating the claims on a class-wide basis would be manageable. *Id.*
21 Accordingly, on January 18, 2018, Class Counsel prepared and submitted to the City a government
22 claim on behalf of David Bernstein, and on April 2, 2018, Plaintiffs Engquist and Divinagracia filed a
23 motion for leave to file a first amended complaint to add Plaintiff Bernstein as a plaintiff. Plaintiffs
24 also filed, on June 29, 2018, a Class Action Trial Plan, Class Counsel's declaration in support, and the
25 Declaration of Gareth Macartney, Ph. D. in support. *Id.*

26 On July 9, 2018, the Court held a hearing on Plaintiffs' Motion for Leave to Amend and a
27 status conference and ordered the parties to submit supplemental briefing regarding the motion for
28 class certification. On July 10, 2018, the Court granted Plaintiffs' motion for leave to file an amended
complaint, and Plaintiffs filed their First Amended Complaint on July 16, 2018, adding David

1 Bernstein as a plaintiff. The City then propounded, and Plaintiff Bernstein responded to, requests for
2 production of documents, and the City took Plaintiff Bernstein's deposition on August 30, 2018. *Id.*, ¶
3 6. On October 19, 2018, Defendant filed a supplemental brief regarding Plaintiffs' trial plan and in
4 further opposition to the Motion for Class Certification, a declaration in support, and objections to the
5 Macartney Declaration. On November 8, 2018, the Court scheduled a further hearing on Plaintiffs'
6 Motion for Class Certification for February 8, 2019. *Id.* On November 28, 2018, Plaintiffs filed a
7 supplemental reply brief in further support of their Motion for Class Certification, the Reply
8 Declaration of Gareth Macartney, Ph.D., and responses to the City's objections to the Macartney
9 Declaration. *Id.*

10 On November 14, 2018, the case was reassigned to the Honorable Daniel J. Buckley, and
11 Plaintiffs' Motion for Class Certification was subsequently rescheduled for April 23, 2019. On that
12 date, the Court issued a lengthy tentative ruling granting Plaintiffs' Motion for Class Certification and
13 requesting supplemental briefing. *Id.*, ¶ 7. Accordingly, on May 7, 2019, Plaintiffs filed a second
14 supplemental reply brief in further support of Plaintiffs' Motion for Class Certification, and the City
15 also filed a supplemental brief regarding the tentative ruling. The Court held another hearing on May
16 13, 2019, at which time the Court granted Plaintiffs' Motion for Class Certification. *Id.*

17 On September 18, 2019, Plaintiffs filed a Motion for Summary Judgment or, in the Alternative,
18 Summary Adjudication of Issues ("MSJ"), supported by four declarations and a Separate Statement.
19 *Id.*, ¶ 8. The City filed an opposition and a cross-MSJ on December 11, 2019, which included
20 evidentiary objections, an opposition to Plaintiffs' Separate Statement, its own Separate Statement, and
21 three declarations, one of which attached 172 pages of California Public Utilities Commission
22 decisions and SoCalGas tariffs and rate schedules. On February 14, 2020, Plaintiffs filed a
23 combination brief opposing the City's MSJ and replying to the City's opposition to their MSJ,
24 responding to the City's evidentiary objections, filing evidentiary objections to the City's evidence,
25 and responding to the City's Separate Statement. On February 26, 2020, the City filed a reply brief in
26 further support of its MSJ, a reply Separate Statement, and a response to Plaintiffs' evidentiary
27 objections. The hearing on both motions was set for March 2, 2020. *Id.*

28 On February 26 and 27, 2020, just days before the hearing on the MSJs, the parties participated
in mediation with JAMS mediator Hon. Carl J. West (ret.) in Los Angeles. *Id.*, ¶ 9. Judge West

1 previously served on the Los Angeles County Superior Court’s Complex Litigation Program, where he
2 presided over numerous class and mass tort actions. In preparation for the mediation, Plaintiffs
3 submitted an in-depth mediation brief detailing the merits of Plaintiffs’ claims and the potential
4 damages in this matter. *Id.* At that mediation, the parties came to agreement on the terms of a
5 settlement and executed a Memorandum of Understanding. *Id.* Over the next six months, they
6 exchanged several drafts of the Stipulation of Settlement and its exhibits and executed it on September
7 3, 2020. At all times during the settlement discussions, the negotiations were at arm’s-length.
8 Furthermore, it was always Plaintiffs’ and Class Counsel’s primary goal to achieve the maximum
9 economic relief possible for the Class. *Id.*

10 After the lengthy process that led to finalization of the Settlement, Class Counsel prepared and
11 filed the Motion for Preliminary Approval, which included voluminous supporting documents,
12 declarations, and exhibits. *Id.*, ¶ 10. Class Counsel retained expert Christian Tregillis to assist them
13 with calculating the total value of the Settlement, including both the value of the \$32.5 million
14 Settlement Fund and the value of the tax abatement over various time intervals and with various
15 methods of valuation. *See Id.* and Ex. A (Tregillis Decl.). As the Court is aware, on September 22,
16 2020, it issued a tentative decision requesting supplemental briefing on several issues. *Id.* Class
17 Counsel filed a supplemental brief, nine declarations, and the FASS on October 2, 2020. The Court
18 then commented on October 6, 2020 that Class Counsel had “superbly addressed the concerns raised in
19 the tentative ruling,” and it granted the Motion for Preliminary Approval on October 9, 2020. *Id.*

20 After the Court preliminarily approved the Settlement, Class Counsel worked closely with the
21 Settlement Administrator to supervise dissemination of notice to Class Members. Byrd Decl. ¶ 11.
22 These efforts included review and editing of the language and format of the website, banner
23 advertisements, Facebook mock-ups, Google Search mock-up, Long Form Notice, Summary Notice,
24 Publication Notice, and the Press Release. *Id.* When the Settlement Administrator advised that the
25 Publication Notice contained too many words, Class Counsel obtained the Court’s permission to
26 shorten it, saving the Class over \$10,000 in notice costs. *Id.* Class Counsel also worked with the
27 Settlement Administrator to ensure prompt response to each Class Member inquiry regarding the
28 Settlement. *Id.* Further, Class Counsel communicated with several Class Members by email and
telephone and answered questions about the Settlement. *Id.*

1 **III. CLASS COUNSEL ACHIEVED A SUPERB RESULT FOR THE CLASS**

2 The Settlement provides substantial economic benefits (both monetary and injunctive) to Class
3 Members. In addition to creating a Settlement Fund of \$32.5 million which will be used to pay for
4 rebates to Class Members (in the form of a tax abatement) and the *cy pres* payments, the Settlement
5 achieves complete elimination of the challenged tax, valued at \$8.1 million per year.⁵ Byrd Decl. ¶ 13.
6 The only way the City can ever again charge GUT on the Customer Charge or Service Establishment
7 Charge is if it successfully amends the LAMC with voter approval compliant with Propositions 26 and
8 218—a substantial benefit to Los Angeles residents. FASS, ¶ 62b.i.

9 In total, the Settlement has a value of \$57 million over 3 years, \$81.6 million over 6 years, and
10 \$114.3 million over 10 years. Byrd Decl., Ex. A (Tregillis Decl.), ¶¶ 21, 30. In perpetuity, the present
11 value of the tax savings from the injunctive relief alone is currently valued at \$121 million, thus
12 putting the total value of the Settlement at a minimum of \$153.5 million (\$121 million plus \$32.5
13 million). *Id.*, ¶¶ 34, 35.

14 **IV. AGREEMENTS REGARDING ATTORNEYS' FEES**

15 The City has agreed to not oppose any: (1) fee request in the amount of 25% of the Settlement
16 Fund (or \$8,125,000 based upon the current cash rebate Settlement Fund amount of \$32.5 million);⁶
17 and (2) request for reimbursement of expenses up to \$200,000. FASS, ¶ 105.

18 Furthermore, Class Counsel have reached agreement among themselves as to the division of
19 fees, and each Class Representative has been informed and consented to that agreement in writing.
20 Byrd Decl., ¶ 23 and Exs. H (Engquist Decl.), ¶ 9, I (Divinagracia Decl.), ¶ 8, and J (Bernstein Decl.),
21 ¶ 8.

22 **V. LEGAL ARGUMENT**

23 There are two generally accepted methods for determining an award of attorneys' fees under
24 California law: the percentage-of-the-recovery method and the lodestar-multiplier method. Typically,

25 ⁵ Within 70 days of the Effective Date, the City will stop charging the GUT on the Customer
26 Charge and Service Establishment Charge (the "Date of Cessation"). FASS, ¶ 18. If the Court enters
27 the Final Judgment on the currently scheduled Final Approval Hearing date of March 17, 2021, the
Date of Cessation, assuming no appeals, will be July 26, 2021. Byrd Decl., ¶ 19.

28 ⁶ The Settlement Fund is defined as \$32.5 million, "plus 75% of any GUT remitted to the City
by SCGC on the Customer Charge and Service Establishment Charge after May 1, 2021" , FASS
¶ 45. Therefore, if the City collects the GUT on the Customer Charge and/or Service Establishment
Charge after May 1, 2021, the Settlement Fund will grow.

1 the percentage method is selected when a settlement, like the one here, results in a common fund.

2 As discussed below, Class Counsel’s requested award of attorneys’ fees in the amount of
3 \$8,125,000 is appropriate under both the percentage-of-recovery method and the lodestar-multiplier
4 method, particularly given the Settlement’s value (\$57 million over 3 years, \$81.6 million over 6 years,
5 and \$114.3 million over 10 years), the great risk Class Counsel undertook in this novel and complex
6 five-year litigation, and their superb skill in litigating the case to its successful conclusion.

7 **A. The Requested Fees Are Reasonable Under the Percentage of the Common Fund**
8 **Method Approved by The California Supreme Court in 2016**

9 In 2016, the California Supreme Court held that an award of attorneys’ fees may be based
10 solely on a percentage of the common fund created. *See Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th
11 480, 503 (2016) (“when class action litigation establishes a monetary fund for the benefit of class
12 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
13 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
14 created.”). The common fund doctrine is generally held applicable “where plaintiffs’ efforts have
15 effected the creation or preservation of an identifiable fund of money out of which the fees will be
16 paid.” *Jordan v. Dep’t of Motor Vehicles*, 100 Cal. App. 4th 431, 446-47 (2002) (citing *Serrano v.*
17 *Priest*, 20 Cal. 3d 25, 37-38 (1977)). As the Supreme Court held in *Laffitte*, the advantages of the
18 percentage method—including the relative ease of calculation, alignment of incentives between
19 counsel and the class, an approximation of market conditions in a contingency case, and the
20 encouragement it provides counsel to seek the greatest recovery and avoid unnecessarily prolonging
21 the litigation—make the percentage method a “valuable tool.” *Laffitte*, 1 Cal. 5th at 503; *see also*
22 Declaration of Richard M. Pearl, filed concurrently herewith (“Pearl Decl.”), ¶¶ 24-25.⁷

23 According to Mr. Pearl, an often-cited and renowned authority, author and lecturer on
24 California attorneys’ fees who reviewed Class Counsel’s fee request in this matter, “*the percentage-of-*
25 *the-fund method is the better method to use in this common fund case*, because there are no limitations
26 or special circumstances that suggest otherwise” *Id.*, ¶ 24 (emphasis added) and Ex. A thereto
27

28 ⁷ Class Counsel submit the Pearl Declaration to provide the Court with additional analysis and assistance in determining the reasonableness of the attorneys’ fees request.

1 (experience).⁸

2 When applying a percentage-of-the-fund methodology in a common fund case such as this,
3 courts usually award fees of 30% of the common fund amount or higher. Pearl Decl., ¶ 41 (“A fee of
4 25% of the Settlement Fund, equivalent to 14% of the 3-year value of the Settlement, also is squarely
5 in line with the range of reasonable attorneys’ fees awarded in other similar cases in California and
6 across the nation.”); *id.*, ¶ 44; *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 n.13 (2009)
7 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is
8 used, fee awards in class actions average around one-third of the recovery.”) (quoting *Chavez v.*
9 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008)).⁹

10 Here, the percentage-of-the-fund method is most appropriate because, in addition to the
11 substantial projected future savings, the Settlement results in the immediate creation of an identifiable,
12 non-reversionary \$32.5 million cash common fund from which the tax abatement, the *cy pres*
13 payments, the settlement notice and administration costs, and the court-approved attorneys’ fees and
14 expenses and service payments to class representatives will be paid. Class Counsel’s request is even
15 more reasonable given that the fee requested represents only 14% of the Settlement’s projected value
16 of \$57 million over three years, and the fee percentage drops to 10% of the projected 6-year value, and
17 7% of the projected 10-year value. Byrd Decl., ¶ 21. Ignoring the additional concrete monetary value
18 of future tax savings resulting from the elimination of the illegal tax, the fee amount is just 25% of the
19 \$32.5 million Settlement Fund, which itself is lower than the typical 30% award and well within the
20 range routinely approved by courts for similarly sized settlements. Pearl Decl., ¶¶ 27-45.

21
22 ⁸ The percentage method is particularly appropriate in contingency litigation, as it “provides a
23 credible measure of the market value of the legal services provided” (which almost always involves
24 percentage fee agreements). *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 49 (2000). It
25 encourages the successful attorney to accept the contingency risk and delay in payment, the
26 importance of which California decisions have repeatedly emphasized. *See, e.g., Ketchum v. Moses*,
27 24 Cal. 4th 1122, 1136 (2001) (“lawyers generally will not provide legal representation on a
28 contingent basis unless they receive a premium for taking that risk”) (internal quotations and citation
omitted); *Lealao*, 82 Cal. App. 4th at 47 (“attorneys providing the essential enforcement services must
be provided incentives roughly comparable to those negotiated in the private . . . legal marketplace, as
it will otherwise be economic for defendants to increase injurious behavior”); *Melendres v. City of Los
Angeles*, 45 Cal. App. 3d 267, 273 (1975) (“There must always be a flavor of generosity in the awards
. . . in order that an appetite for efforts may be stimulated.”).

⁹ *See also* Pearl Decl., ¶ 42 n.3 for a non-exhaustive list of other cases awarding a percentage of
the common fund of 30% or more.

1 The fee requested also bodes well in comparison to the probable terms of a contingent fee
2 contract negotiated in private litigation, which is typically in the range of 33%-40%. See *In re*
3 *Consumer Privacy Cases*, 175 Cal. App. 4th at 557 (a common fund fee award should be “within the
4 range of fees freely negotiated in the legal marketplace in comparable litigation”); *Fernandez v.*
5 *Victoria Secret Stores, LLC*, No. 06-cv-4149-MMM-SH, 2008 WL 8150856, at *16 n.59 (C.D. Cal.
6 July 21, 2008) (citing study showing that in some jurisdictions, standard contingency fee rates are 33%
7 if the case settles before trial, 40% if a trial commences, and 50% if trial is completed). “It is
8 indisputable that if Class Counsel had been able to negotiate a fee directly with the Class Members, a
9 25% contingent fee (much less a 14% fee) would have been eminently reasonable, if not low, for a
10 case this complex and difficult.” Pearl Decl., ¶ 48.

11 **B. The Lodestar Method Confirms the Reasonableness of Class Counsel’s Request**

12 The lodestar-multiplier method calculates the fee by multiplying the number of hours expended
13 by counsel by an hourly rate and then increasing or decreasing that amount by applying a positive or
14 negative multiplier. *Laffitte*, 1 Cal. 5th at 489. While it may be used as a cross-check on the
15 percentage of recovery method, it “does not override the trial court’s primary determination of the fee
16 as percentage of the common fund and thus does not impose an absolute maximum or minimum on the
17 potential fee award.” *Id.* at 505.

18 Class Counsel’s combined lodestar of \$1,410,300.50 as of November 30, 2020, confirms that
19 the requested fee is reasonable. The requested fee represents a multiplier of 5.76 on Class Counsel’s
20 lodestar, which is appropriate in light of the “quality of the representation, the novelty and complexity
21 of the issues, the results obtained, and the contingent risk presented.” *Id.* at 489; see also Pearl Decl., ¶
22 55 (“[A] 5.76 lodestar multiplier is well-supported and reasonable in this case and fully supports a fee
23 award of 25% of the Settlement Fund or 14% of the 3-year value of the Settlement.”) The requested
24 fee is even more reasonable when considering the value of the Settlement over 6 or 10 years (or in
25 perpetuity).

26 **1. Class Counsel’s Rates Are Reasonable**

27 In calculating a lodestar, the Court should first examine the prevailing hourly rate for similar
28 work in the pertinent geographic region. *Chodos v. Borman*, 227 Cal. App. 4th 76, 93 (2014) (value of
attorney services is variously defined as the “hourly amount to which attorneys of like skill in the area

1 would typically be entitled”) (citing *Serrano v. Unruh*, 32 Cal. 3d 621, 640 n.31 (1982)); *PLCM Grp.,*
2 *Inc. v. Drexler*, 22 Cal. 4th 1084, 1094-95 (2000) (using prevailing hourly rate in community for
3 comparable legal services even though party used in-house counsel).

4 Class Counsel include highly-regarded members of the bar with national practices and have
5 successfully brought to bear in this case their extensive experience in class actions and complex
6 litigation. Byrd Decl. ¶ 38, Ex. B; Declaration of Jon A. Tostrud in support of Motion for Attorneys’
7 Fees and Reimbursement of Expenses and for Class Representative Service Payments (“Tostrud
8 Decl.”) ¶ 28, Ex A. Their customary rates used to calculate the lodestar here are squarely in line with
9 prevailing rates in this jurisdiction for attorneys of comparable skill, experience, and reputation, have
10 been approved by other courts in California and across the country, and have been reviewed and
11 deemed reasonable by Richard Pearl. Byrd Decl. ¶ 30; Tostrud Decl. ¶ 28; Pearl Decl., ¶ 60 (“In my
12 opinion, [Class Counsel’s] hourly rates . . . are well within the range of rates charged by comparably
13 qualified Los Angeles area attorneys for comparably complex work.”); *see also id.*, ¶ 65.¹⁰

14 2. Class Counsel’s Lodestar Is Reasonable

15 As explained in detail above and in the declarations of Rachele R. Byrd and John A. Tostrud,
16 Class Counsel expended significant time litigating this case and achieving the Settlement for the Class.
17 These declarations describe how Class Counsel and their staffs devoted a total of 2,288.40 hours to
18 this litigation and have incurred a combined lodestar through November 30, 2020, of approximately
19 \$1,410,300.50. Byrd Decl., ¶ 27; Tostrud Decl., ¶ 18. Both firms maintained detailed
20 contemporaneous time records which were reviewed by Mr. Pearl, and the hours expended were
21 reasonable and necessary. Pearl Decl., ¶¶ 6-7, 56-58; *see also Concepcion v. Amscan Holdings, Inc.*,
22 223 Cal. App. 4th 1309, 1324 (2014) (“It is not necessary to provide detailed billing timesheets to
23 support an award of attorney fees under the lodestar method Declarations of counsel setting forth
24 the reasonable hourly rate, the number of hours worked and the tasks performed are sufficient.”)
25 (citing *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 254-55 (2001)).¹¹ Further, after conducting

26 ¹⁰ The use of current rates is proper since such rates compensate for inflation and loss of use of
27 funds. *Mo. v. Jenkins*, 491 U.S. 274, 283-84 (1989). *See also Graham v. DaimlerChrysler Corp.*, 34
28 Cal. 4th 553, 579 (2004); *Robles v. Emp’t Dev. Dept.*, 38 Cal. App. 5th 191, 205 (2019); *Davis v. City*
and Cty. of San Francisco, 976 F.2d 1536, 1548 (1992).

¹¹ If the Court deems it necessary, Class Counsel will make their contemporaneous billing
records available, for *in camera* review, upon request. Byrd Decl., ¶ 31; Tostrud Decl., ¶ 22.

1 a comprehensive review of Class Counsel’s detailed contemporaneous time records, the Court’s
2 docket, and a number of other documents relevant to this matter, Mr. Pearl has opined that all of this
3 time was reasonable and necessary for the prosecution of this Action. Pearl Decl., ¶¶ 56-58 (“Based
4 on that review, Class Counsel’s hours appear to be consistent with the number of hours I would expect
5 to have been spent in a case of this duration, intensity, and complexity.”)

6 Finally, these amounts do not include the additional time that Class Counsel will continue to
7 spend going forward in obtaining final approval of the Settlement, working on any appeal, or
8 monitoring the City’s implementation of and reporting to the Court on the tax abatement, among other
9 things. See, e.g., FASS, ¶ 63.c.iv.2&4. Class Counsel therefore anticipate incurring significant
10 additional lodestar in the future. Byrd Decl. ¶ 31.

11 **3. The Requested 5.76 Multiplier Is Justified**

12 Class Counsel’s “unadorned lodestar reflects the general local hourly rate for a *fee-bearing*
13 *case*; it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors
14 a trial court may consider” *Ketchum*, 24 Cal. 4th at 1138. To “approximate market-level
15 compensation for such services, which typically includes a premium for the risk of nonpayment or
16 delay in payment of attorney fees” (*id.*), courts employ fee enhancements, adjusting the fee “based on
17 consideration of factors specific to the case.” *PLCM Grp., Inc.*, 22 Cal. 4th at 1095. Those factors
18 include: (1) the results achieved on behalf of the Class; (2) the novelty and difficulty of the questions
19 involved and the skill displayed in presenting them; (3) the response of the Class to the settlement,
20 including a lack of objections to the settlement terms, and particularly to the fee award; (4) counsel’s
21 experience, reputation, and ability; (5) counsel’s preclusion from other work; and (6) the contingent
22 nature of the fee award. See *Ketchum*, 24 Cal. 4th at 1132; *Cundiff v. Verizon Cal., Inc.*, 167 Cal. App.
23 4th 718, 724 n.3 (2008); *Consumer Privacy Cases*, 175 Cal. App. 4th at 556. All of these factors weigh
24 in favor of enhancement.

25 One of the primary fee enhancement factors is contingency risk. In *Ketchum*, the Supreme
26 Court explained that its purpose “is to bring the financial incentives for attorneys enforcing important
27 . . . rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-
28 for-services basis.” *Ketchum*, 24 Cal. 4th at 1132 (citation omitted). To achieve this purpose, the
“contingent fee *must be* higher than a fee for the same legal services paid as they are performed.” *Id.*

1 (emphasis added; citation omitted). The enhancement is “intended to approximate market-level
2 compensation for [the attorney’s] services, which [in contingency-fee cases] typically includes a
3 premium for the risk of nonpayment or delay in payment of attorney fees.” *Id.* at 1138; *Graham v.*
4 *DaimlerChrysler Corp.*, 34 Cal. 4th at 579 (“One of the most common fee enhancers . . . is for
5 contingency risk.”); *Greene v. Dillingham Constr. N.A., Inc.*, 101 Cal. App. 4th 418, 428-29 (2002)
6 (trial court erred by refusing to consider contingency risk in awarding fees).

7 Class Counsel undertook substantial risk in litigating this novel and complex case over the
8 course of five years on a contingency basis while foregoing other work. While Plaintiffs are confident
9 the Court would have likely granted their MSJ or, failing that, Plaintiffs would have proven at trial that
10 the GUT ordinance did not authorize taxation of the Customer Charges or Service Establishment
11 Charges, the City argued that its interpretation of the GUT ordinance is the correct one and that all
12 charges for the provision of gas, including the Customer Charge and Service Establishment Charge, are
13 taxable. While Plaintiffs disagree with the City’s interpretation of the GUT ordinance, the outcome
14 was uncertain. Byrd Decl., ¶ 39. Furthermore, there is always a risk that the Class could be
15 decertified. *Id.* Class Counsel’s experience, reputation, and ability to achieve the extraordinary results
16 here are evident, and Class Counsel’s skill was put to the test by a sophisticated defendant with
17 experienced and respect counsel and ample resources. Pearl Decl., ¶¶ 4-7, 55 (“a 5.76 lodestar
18 multiplier is well-supported and reasonable in this case and fully supports a fee award of 25% of the
19 Settlement Fund or 14% of the 3-year value of the Settlement.”)

20 The excellent result achieved here also easily supports the requested multiplier. The Settlement
21 provides substantial injunctive and monetary relief that continues to increase with time. The non-
22 reversionary Settlement Fund million will be approximately 62% of the total Class Period damages by
23 the estimated Date of Cessation. Byrd Decl., ¶ 19.¹² The injunctive relief results in elimination of the
24 illegal tax, additional savings to the Class of over \$8 million per year, in perpetuity, unless and until
25 voters chose to bring the tax back. The automated rebate distribution plan provides additional savings
26 and minimizes Class Members’ transaction costs in claiming the benefit. In reaction to a robust notice
27

28 ¹² If the Date of Cessation is July 26, 2021 (*see* n.5, *supra*), the Settlement Fund will increase to approximately \$33,891,484 by that time and represent 62% of the total damages (which will increase to approximately \$54,422,472). *Id.*

1 plan including over 2 million direct notice mailings, Class Members overwhelmingly support the
2 Settlement. The objection deadline is December 29, 2020, and, for those who received re-mailed
3 Summary Notices, it is January 18, 2021. So far, Class Counsel has received only two objections,
4 which do not object to Class Counsel’s attorneys’ fees request. *Id.*, ¶ 32.

5 Finally, the requested multiplier of 5.76 is well within the range of multipliers commonly
6 awarded to counsel in class action litigation. *Wershba*, 91 Cal. App. 4th at 255 (“Multipliers can range
7 from 2 to 4 or even higher.”); *Eck v. City of Los Angeles*, No. BC577028 (L.A. Super. Ct. Feb. 26,
8 2018) (awarding a multiplier of 5.80 in Settlement with the City before Department 11 (CCW)); *Craft*
9 *v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (“A 25% of the fund award
10 will result in a multiplier of approximately 5.2. While this is a high end multiplier, there is ample
11 authority for such awards resulting in multipliers in this range or higher.”) (citing cases where courts
12 awarded multipliers ranging between 4.5 and 19.6); *see also* Pearl Decl., ¶¶ 54-55.

13 **C. Class Counsel’s Expenses Are Reasonable**

14 Class Counsel request reimbursement for reasonable expenses incurred in litigating this matter
15 totaling \$155,144.34. These costs were necessary to the investigation, prosecution, and settlement of
16 this action. Byrd Decl. ¶ 33; Tostrud Decl. ¶ 24. The majority of these costs are professional fees paid
17 by Class Counsel to the mediator and to experts (although amounts billed by Mr. Pearl are not included
18 here). These, as well as the other categories of costs incurred by Class Counsel, are the common types
19 of costs regularly billed to paying clients and recoverable in cases where statutory cost-shifting
20 provisions are available, as they are here.

21 **D. The Requested Service Payments to Plaintiffs Are Reasonable**

22 Service awards are “fairly typical” in class action cases, “are discretionary, and are intended to
23 compensate class representatives for work done on behalf of the class, to make up for financial or
24 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to
25 act as a private attorney general.” *See In re Cellphone Termination Fee Cases*, 186 Cal. App. 4th
26 1380, 1393-94 (2010) (citing *Rodriquez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)

27 Class Counsel respectfully request \$10,000 service payments each to Class Representatives
28

1 Divinagracia and Bernstein, and a \$20,000 service payment to Class Representative Engquist.¹³ Such
2 amounts are commonplace, even in cases resolved in much shorter periods of time and providing less
3 remarkable results. *See, e.g., In re Cellphone Termination Fee Cases*, 186 Cal. App. 4th at 1393-95
4 (affirming the trial court’s grant of four \$10,000 incentive awards for a \$21,000,000 settlement fund);
5 *Ross v. US Bank Nat’l Ass’n*, No. C 07-02951 SI, 2010 U.S. Dist. LEXIS 107857, at *6 (N.D. Cal.
6 Sep. 29, 2010) (awarding \$20,000 for each of the four class representatives); *Blacksher v. United*
7 *States Sec. Assocs.*, No. BC348103, 2008 Cal. Super. LEXIS 1464, at *10-11 (L.A. Cty. Super. Ct.
8 Mar. 7, 2008) (incentive award of \$10,000 was reasonable for assisting in two years of litigation). To
9 date, no Class member has objected to the requested service awards. Byrd Decl., ¶ 32.

10 The service payments are also well justified. The Class Representatives here invested
11 significant time and effort in order to vindicate the rights of City natural gas users by supervising
12 counsel, reviewing pleadings, and sitting for depositions. Byrd Dec., Ex. H (Engquist Decl.), ¶ 6; *id.*,
13 Ex. I (Divinagracia Decl.), ¶ 5; *id.*, Ex. J (Bernstein Decl.), ¶ 5. In addition, Mr. Engquist, an
14 experienced tax attorney, discovered that he was personally being charged GUT on services that he did
15 not believe, after studying the GUT ordinance, were properly taxable. *Id.*, Ex. H (Engquist Decl.), ¶ 5.
16 Without Mr. Engquist’s efforts and pursuit of the claims in this action, it is likely the improper taxation
17 would have gone undetected and perhaps never prosecuted. A \$20,000 service payment to Mr.
18 Engquist is therefore appropriate.

19 **VI. CONCLUSION**

20 For the foregoing reasons, Plaintiffs respectfully request the Court grant their motion in its
21 entirety.

22 DATED: December 8, 2020

23 Respectfully submitted,
24 By: Rachele R. Byrd
25 RACHELE R. BYRD

26 **WOLF HALDENSTEIN ADLER**
27 **FREEMAN & HERZ LLP**
28 RACHELE R. BYRD

13 “[A] court need not award all named plaintiffs the same incentive payment.” *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118052, at *61-62 (N.D. Cal. Sept. 2, 2015) (awarding service awards of between \$80,000 and \$120,000 per class representative) (citation omitted).

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