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Electronically  
**FILED**  
by Superior Court of California, County of San Mateo  
ON 2/21/2023  
By /s/ Vanessa Jimenez  
Deputy Clerk

6 Attorneys for Plaintiffs and Petitioners

9 **SUPERIOR COURT OF CALIFORNIA**

10 **COUNTY OF SAN MATEO**

11  
12 BRAD BARUH, KATHY BARUH,  
13 CHARLES BOLTON, ELDRIDGE GRAY,  
14 JOHN LOCKTON, DAVID MARQUARDT,  
15 PAUL ROCHESTER, ARTHUR  
16 STROMBERG, CHARLES SYERS,  
17 individually and on behalf of all others  
18 similarly situated,

19 Plaintiffs and Petitioners,

20 v.

21 TOWN OF HILLSBOROUGH and DOES 1-  
22 100, inclusive,

23 Defendants and Respondents.

Case No. 16CIV02284

**DECLARATION OF BEAU R.  
BURBIDGE IN SUPPORT OF  
PLAINTIFFS' MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT AND MOTION FOR  
ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES, AND  
SERVICE AWARD**

**Date: ~~March 20, 2023~~**

**Time: 3:00 p.m.**

**Dept.: Hon. V. Raymond Swope**

**Dept. 23**

24 I, Beau R. Burbidge, hereby declare:

25 1. I am counsel of record for Plaintiffs and Petitioners and I have been appointed as  
26 Class Counsel in this action. I have personal knowledge of the contents of this declaration, and if  
27 called upon to do so I could and would competently testify thereto.

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1           2.       I submit this declaration in support of (1) Plaintiffs’ Motion for Final Approval of  
2 Class Action Settlement; and (2) Plaintiff’s Motion for Attorneys’ Fees, Reimbursement of  
3 Expenses, and Service Award.

4 **Factual Background and Claims and Defenses**

5           3.       In order to provide the Court with a more complete understanding of the parties’  
6 claims and defenses, attached hereto as **Exhibit 2** is a true and correct copy of Plaintiffs’ Trial  
7 Brief, filed on July 1, 2021. Attached hereto as **Exhibit 3** is a true and correct copy of Defendant  
8 Town of Hillsborough’s (the “Town”) brief in opposition to Plaintiffs’ motion for issuance of writ  
9 of mandate, filed on May 29, 2018. This briefing provides both a factual background of the case  
10 as well as the various claims and defenses asserted.

11 **Procedural Summary of the Case**

12           4.       This case was filed on November 8, 2016, as a writ of mandate and class action.  
13 However, the beginning of the case predates the complaint by over half a year. Prior to filing suit,  
14 I, on behalf of my clients, necessarily brought a government claim against the Town in June 2016.  
15 In addition, at this same time, I contacted the Town by letter, detailing our concerns regarding the  
16 legality of the Town’s water rates and seeking an amicable resolution of those concerns. I also  
17 served a public records request on the Town, thereby obtaining and reviewing a substantial  
18 number of documents—many thousands of pages—regarding the Town’s water rate structure prior  
19 to bringing suit.

20           5.       Unfortunately, the disputes at issue were not resolvable at this early stage and we  
21 proceeded with the filing of this suit. Following the Town’s answer to the complaint, and as is  
22 standard in writ of mandate actions, the Town compiled an administrative record to serve as the  
23 evidentiary basis for the case. This administrative record took a substantial amount of time to  
24 compile and was not completed until early in 2018. The reason for this was that the record was  
25 voluminous. It was assembled in two parts—one covering the Town’s tiered water rates, and  
26 another covering its drought penalties. The tiered rate water record spanned 16 volumes and  
27 nearly 6,000 pages of documents. The drought penalty record spanned 77 volumes and nearly  
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1 30,000 pages.

2 6. Naturally, a thorough review and digestion of this amount of information required  
3 that I expend a great deal of time and effort. Once this review was completed was completed, by  
4 agreement of the parties and consent of the court, the parties then briefed the merits of the case  
5 (*i.e.*, whether the Town had violated Proposition 218) for the Court to hear on August 3, 2018.  
6 (Plaintiffs' Trial Brief, **Exhibit 2**, is a modification of this original merits brief. The Town's  
7 Opposition brief, **Exhibit 3**, is the brief that was filed at this time.)

8 7. Following the completion of this briefing, the hearing on the merits was continued  
9 numerous times due to the Court's schedule, and was not finally set to be heard until August 23,  
10 2019. At that hearing, the Court ruled that a writ of mandate was not procedurally appropriate  
11 given the lack of urgency (as new tiered rates had since been enacted by the Town) and thus that  
12 the parties should proceed with the class action procedure and seek class certification.

13 8. In response, the parties submitted a stipulation to the Court seeking a determination  
14 of the merits of the case prior to class certification and that procedure was agreed upon at the  
15 August 23, 2019, hearing. However, that procedure was subsequently modified by the Court on  
16 October 4, 2019, and the parties were ordered to proceed with moving for class certification.

17 9. The Court thus established a class certification briefing schedule and set a hearing  
18 for October 2020. Briefing on class certification was done and the parties prepared for the  
19 hearing. However, prior to the hearing the court issued an order requiring the parties to submit  
20 supplemental briefing on one of the defenses raised by the Town—regarding an asserted statutory  
21 prohibition against class actions—and thus continued the hearing until January 2021.

22 10. That supplemental briefing was completed and the Court heard the issue of class  
23 certification in January 2021, issuing a lengthy tentative ruling certifying both Plaintiffs' classes  
24 (one for the tiered rates and another for the drought penalties). However, at the hearing the Court  
25 asked for another round of supplemental briefing. Following this briefing, at the next hearing on  
26 certification, on May 17, 2021, and both Plaintiffs' classes were certified—with modifications by  
27 the Court—in an order dated May 20, 2021. The Court's Order on class certification is attached  
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1 hereto as **Exhibit 4**.

2 11. Following class certification, the parties and Court established a schedule for trial,  
3 whereby liability and remedies would be bifurcated with liability to be tried first based on briefing  
4 submitted by the parties and relying on the administrative record as the body of evidence. A trial  
5 on liability was scheduled for September 1, 2021, and Plaintiffs filed their opening brief on  
6 liability on July 1, 2021.

7 **Settlement Negotiations**

8 12. As the Court will recall, the parties attended a settlement conference with the Court  
9 early in the litigation, on March 28, 2018. Unfortunately, due the infancy of the case, neither of  
10 the parties was prepared to alter their positions substantially and the case proceeded along.

11 13. Following this settlement conference, the parties engaged in extensive work  
12 producing and reviewing an administrative record, briefing the merits of the case, conducting  
13 extensive discovery on potential remedies, and then extensively briefing the issue of class  
14 certification. While class certification was pending, and having had years of litigation behind  
15 them and understanding the case and positions more fully, the parties participated in a lengthy,  
16 ten-hour mediation with the Hon. Scott Snowden (Ret.) of JAMS on April 29, 2021. Attending  
17 the mediation for Plaintiffs were Beau R. Burbidge, counsel for Plaintiffs, and all named  
18 Plaintiffs—Charles Bolton, John Lockton, David Marquart, Paul Rochester, and Charles Syers.  
19 Attending for the Town were the Town’s counsel, Harriet Steiner and Kimberly Hood as well as  
20 the Town’s attorney, finance manager, and several Town councilmembers.

21 14. As the day wore on into the evening, the parties agreed to end the session but keep  
22 the mediation open and to continue negotiations using the insight and assistance of Judge  
23 Snowden. Over the next several months those negotiations continued, through the briefing of  
24 class certification and then after the hearing on class certification in which Plaintiffs’ classes were  
25 certified. During these negotiations, several rounds of proposals were exchanged over the course  
26 of many conversations between Judge Snowden and the parties.

27 15. Finally, in July, the parties were able to reach a settlement in principle that had  
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1 approval of both the Plaintiffs and the Town’s council. The parties thereafter negotiated and  
2 exchanged drafts of the Settlement Agreement and exhibits thereto and the Settlement Agreement  
3 was finalized on August 16, 2021.

4 **First Motion for Preliminary Approval**

5 16. Plaintiffs then filed a motion for preliminary approval on the settlement on August  
6 23, 2021, which motion was to be heard by the Court on September 20, 2021.

7 17. On September 17, 2021, the Court issued a tentative ruling denying the motion for  
8 preliminary approval on the ground that the settlement was construed to be an “opt-in class,”  
9 meaning that class members had to opt into the settlement to be included in the class. This was  
10 not the parties’ intention—they sought to make the settlement a claims-made settlement.  
11 However, they recognized that the settlement agreement and forms were not artfully phrased and  
12 needed to be revised.

13 18. Therefore, at the September 20, 2021, hearing on the motion, the parties thanked  
14 the Court for its analysis and represented to the Court that they would be re-working their  
15 settlement agreement and other paperwork to ensure that the settlement could not be construed as  
16 an “opt-in” settlement and that it fully complied with California’s class action requirements.

17 19. The parties thereafter re-worked the settlement agreement, forms, and settlement  
18 framework to work towards its compliance with California law.

19 **Second Motion for Preliminary Approval**

20 20. On or around October 18, 2021, the parties filed a renewed motion for preliminary  
21 settlement approval based on their re-worked settlement agreement. That motion was to be heard  
22 by the Court on November 22, 2021. However, on November 19, 2021, the Court issued a  
23 tentative ruling again denying the motion. In its tentative ruling, the Court laid out several  
24 identified deficiencies with the settlement that were significantly more complex and broader in  
25 scope than the issues identified in the Court’s first denial.

26 21. Rather than challenging the tentative ruling, the parties reviewed it carefully and  
27 then began negotiating and drafting a revised settlement agreement that would address the Court’s  
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1 issues with the prior settlement and align with the law. This was a slow process because of the  
2 significance of the changes required and because of various other commitments of all of the  
3 interested parties, including both counsel and clients. Nonetheless, by late February 2022, a  
4 Second Amended Settlement Agreement was finalized and all parties had signed it by March 9,  
5 2022. The parties worked hard on every aspect of this settlement agreement and were confident  
6 that all of the issues raised by the Court in its November 19, 2021, tentative ruling were fully  
7 addressed. A true and correct copy of this Settlement Agreement is attached hereto as **Exhibit 1**.

8 22. Plaintiffs then filed a renewed approval motion on April 6, 2022, to be heard on  
9 August 8, 2022. At that hearing, the Court granted its approval of the settlement following minor  
10 changes to the notice paperwork and the preliminary approval order was issued on August 24,  
11 2022. A true and correct copy of the Preliminary Approval Order is attached hereto as **Exhibit 5**.

12 **Refund Amounts Under the Settlement Are Fair And Reasonable**

13 23. Settlement payments in this case will take the form of refunds issued to the Town's  
14 water customers. These refunds are calculated based on negotiated Settlement Rates for water:  
15 \$11.09/hcf during the Rate Stabilization Period (when rates were greater) of February 10, 2016  
16 through November 16, 2016, and \$9.06/hcf during the rest of the refund period. The Settlement  
17 Rates are half way between the applicable Tier 2 and Tier 3 rates. These "hybrid" rates take into  
18 account that the Tier 2 rate was below the average cost of water while the Tier 3 rate was above  
19 the average cost of water. Customers who paid rates in excess of these negotiated Settlement  
20 Rates during this period (*i.e.*, customers paying in Tiers 3, 4, and 5) will be refunded the difference  
21 between their tiered rates and the negotiated Settlement Rates. (*See Exhibit 1*, Settlement  
22 Agreement ("SA"), Recital I, ¶ 6.3.) (A helpful explanation and illustrative example of these  
23 refunds may be found in Appendix 1 to the Settlement Agreement.)

24 24. These refunds are most easily conceptualized as follows: The parties are taking the  
25 Town's tiered rates at Tiers 3, 4 and, 5, and exchanging them for a negotiated Settlement Rate.  
26 Customers who paid above this Settlement Rate, that is, who paid in Tiers 3, 4, and 5, will thus be  
27 refunded any amount they paid for water in excess of this rate during the Refund Period. To  
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1 determine the fairness and adequacy of this Settlement Rate, I compared it to what the calculated  
2 “average rate” for water was during the Refund Period. This “average rate” represents what the  
3 Town would need to charge its customers, if it did not impose tiered rates, in order to recoup all of  
4 its costs. This “average rate” represents, in essence, the goal of the litigation—the removal of  
5 tiered rates—and is therefore a helpful comparison as the “best case scenario” if Plaintiffs should  
6 win at every stage and in every argument of the case. Here, based on my calculations and  
7 representations from the Town’s counsel, we calculated the “average rate” for water as \$10.70/hcf  
8 during the Rate Stabilization Period and \$8.77/hcf during all other times.

9         25. The Settlement Rates represent only an incremental increase over these “average  
10 rates” of \$0.39 and \$0.29, respectively. Thus, the settlement very nearly achieved what was  
11 calculated as a “best case scenario” in this litigation. The reason for the slight difference between  
12 the rates is simple: The settlement by necessity had to take into consideration (1) the risks that  
13 Plaintiffs would not succeed on the merits of the case; (2) the delay in providing benefits to class  
14 members if the case proceeded through trial and potential appeals; (3) the uncertainty of how and  
15 if refunds would be adjudicated at trial; and (4) the recognition of the Town’s right to impose  
16 tiered rates on its customers (and thus its right to not be subject to a simple “average rate”).  
17 Mitigating these risks, we believed, merited a slight deviation from the “best case scenario.”

18         26. Additionally, a very important benefit of these refunds is that they are being issued  
19 without any credit to the Town for amounts these customers underpaid for water at the lower Tiers  
20 1 and 2. In other words, while customers are being refunded for payments made in excess of the  
21 negotiated Settlement Rates, they are not being debited for amounts paid under the Settlement  
22 Rates at Tiers 1 and 2. This is important because if this case were to proceed through a trial on  
23 remedies, the Town would argue that such a debit is fair and reasonable as part of any remedy.  
24 And such a debit would substantially reduce the amount of refunds going to Town customers.  
25 Thus, in this way, the settlement represents a substantial benefit to the Class, perhaps over and  
26 above any benefit they would have received had this case proceeded all the way through trial.

27         27. Based on the number of notices sent, and the number of opt-outs received, I  
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1 understand that these refunds will benefit 3,066 class members (out of 3,083 total class members)  
2 in amounts ranging from a few to over ten-thousand dollars based on each customer's levels of  
3 water usage with total refunds amounting to \$771,386.38 (out of \$779,329 designated for refunds,  
4 the \$7,942.62 not payable due to opt-outs will be designated for a *cy pres* recipient). In addition to  
5 and on top of these refunds, the Town has paid \$450,000 into the dedicated settlement fund for  
6 Plaintiffs' attorneys' fees, costs, and Class Representative Service awards as may be awarded by  
7 the Court. This represents an additional benefit of the settlement. Rather than attorneys' fees and  
8 costs being deducted from the refunds to be given, those fees and costs are being paid by the Town  
9 in addition to and on top of full refunds for customers. This total settlement fund of \$1,229,329  
10 represents nearly 10% of the Town's entire yearly water budget during the years encompassing the  
11 Refund Period.

12 **Dismissal of Drought Penalty Claims**

13 28. As with the prior settlements, the Second Amended Settlement Agreement  
14 contemplated dismissal of the Drought Penalty Claims we have been pursuing in this action.  
15 Good cause exists for this dismissal, as will be discussed in more details below, for the following  
16 reasons:

- 17 • Following the narrowing of the Drought Penalty Class in the  
18 Court's Order on Class Certification, the size of this class went  
19 from 695 customers to 60 customers, and potential (best-case  
20 scenario) damages went from \$1,118,934 to only \$88,359.
- 21 • Hillsborough's defenses regarding the legality of drought penalties  
22 carried significant risks for Plaintiffs at trial.
- 23 • These Drought Penalty Class members are subsumed within the  
24 water rate class because they necessarily had to pay water rates in  
25 Tiers 3, 4, and 5 to be issued drought penalties. They will thus be  
26 benefitting from the settlement.
- 27 • It is not economically feasible to pursue the Drought Penalty Class  
28 claims through trial, or even a settlement if one were possible to  
reach, because the costs of doing so would most likely exceed the  
recovery (most likely by a significant amount).

29 29. The drought penalty class is perhaps more accurately depicted as a sub-class of the  
30 tiered rate class. There are a large group of citizens who paid water rates in Tiers 3, 4, and 5



1 during the Refund Period and they make up the ratepayer class (approximately 3,083 customers).  
2 Subsumed within this group is the smaller group of citizens (approximately 695 customers) who  
3 were also made to pay drought penalties during this period, the drought penalty class. These  
4 citizens necessarily are part of the ratepayer class as, to incur drought penalties, they had to use  
5 water in amounts that brought them to Tier 3, 4, or 5 rates. Thus, in this way, the drought penalty  
6 class is akin to a subclass of tiered rate payers.

7 30. The Town's arguments against class certification and the Court's Order on class  
8 certification severely diminished the size of this class drought penalty class. This diminished size  
9 is best understood by grouping drought penalty recipients into three types: (1) those who were  
10 issued penalties but did not pay them; (2) those who were issued penalties and paid them without  
11 appealing them; and (3) those who were issued penalties, appealed them, and paid them.

12 31. As to the first group, the Town argued and the Court held that this group could  
13 not be part of this class under the "pay first, litigate later," doctrine. *See Water Replenishment*  
14 *Dist. of So. California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465-1466. Thus, for  
15 example, Plaintiff David Marquardt was not made a representative of this class as he had not yet  
16 paid his drought penalties at the time of class certification. (*See Exhibit 4.*) This reduced the  
17 class by approximately 78 customers (or \$169,633 out of \$1,118,934 in penalties assessed).

18 32. As to the second group, the Town argued and the Court held that those customers  
19 who had not appealed their penalties had not exhausted their administrative remedies and were  
20 excluded from the class as well. This reduced the class even more substantially, by approximately  
21 452 customers (or \$570,074 out of \$1,118,934 in penalties assessed).

22 33. This left the third group, a substantially smaller number of customers both in  
23 number (approximately 166 customers) and in the dollar amount of penalties assessed. This is  
24 because the vast majority of those customers who had appealed drought penalties had had those  
25 penalties either waived completely (105 customers) or significantly reduced (52 customers) (in  
26 total 93% of appealed penalties were reduced or waived). These waivers and reductions  
27 represented another \$290,868 of the penalties assessed; meaning that out of \$1,118,934 in

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1 assessed penalties, only approximately \$88,359 paid by approximately 60 customers could be  
2 included in the class.

3 34. Recognizing this very real risk and balancing it against the substantially-reduced  
4 potential reward, my clients and I sought to utilize the drought penalty claims, while they  
5 remained pending, in settlement discussions to negotiate a more favorable settlement for all class  
6 members. The pendency of the drought penalty claim allowed us to negotiate for greater refunds  
7 that we would otherwise be likely to achieve had the drought penalty claims been dismissed,  
8 dropped, or even taken through the remedies phase of trial. Because customers receiving drought  
9 penalties were also ratepayer class members, these greater refunds inure to the benefit of all class  
10 members, including those who paid drought penalties.

11 35. An additional reason counsels in favor of dismissing the drought penalty class:  
12 With potential total damages of only \$88,359, pursuing the drought refund claims through trial, or  
13 administering a settlement for those claims, would simply not be feasible in terms of time, effort,  
14 or money spent. The costs incurred in going to trial over these claims and proving their amount,  
15 which would require the work and testimony of expert witnesses, would easily eclipse the amount  
16 that could be recovered under a best-case scenario. In fact, in my experience in these cases, the  
17 services of expert witnesses alone can easily exceed \$100,000. Put simply, even setting aside the  
18 real risks of trial and the issues of proving both liability damages for the drought penalty claims, it  
19 would not be feasible from an economic perspective to pursue these claims. Instead, because  
20 those paying drought penalties will be receiving a refund for water rates and thus be benefitting  
21 from the settlement, it is entirely reasonable to dismiss those claims.

22 **Attorneys' Fees and Expenses**

23 36. As part of the arms'-length negotiated settlement, the Town has agreed to pay into  
24 the settlement fund an additional \$450,000 on top of the refund amounts for a total settlement fund  
25 of \$1,229,329. (See **Exhibit 1** (SA, ¶¶ 2.1.33, 6.2, 13, 14).) From the settlement fund, Plaintiffs  
26 seek an attorneys' fees award of \$400,000, less than one-third of the settlement fund.

27 37. I have maintained contemporaneous time records in this case and have only entered  
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1 time necessary to successfully prosecute the case. Attached hereto as **Exhibit 6** is a true and  
2 correct copy of those time records.

3 38. Additionally, my colleagues Walter H Walker, III, and Peter J. Koenig, have  
4 expended significant amounts of time in prosecution of this case that has not been entered into the  
5 time records. As plaintiffs' attorneys who do not commonly have to track time, much of the time  
6 spent on this case went unrecorded. Similarly, I have spent significant time on this case that did  
7 not make it into my time records. This unrecorded time is nevertheless estimated to be over 100  
8 hours of work.

9 39. I estimate that I will expend at least another 25 hours preparing for and attending  
10 the fairness hearing, coordinating with the Claims Administrator and the Town regarding the  
11 distribution of funds, and filing distribution confirmation paperwork with the Court.

12 40. As discussed more fully in paragraphs 4 through 21 above, the work sought to be  
13 compensated includes, but is not limited to: reviewing and analyzing the Town's rate structure,  
14 resolutions and regulations, preparing the writ petition; assisting in the determining the scope of  
15 the Town's administrative record and then reviewing and analyzing the many volumes and many  
16 thousands of pages of that record; preparing and serving written discovery; preparing an opening  
17 brief on the writ petition and reviewing and analyzing the Town's opposition brief; revising and  
18 expanding the briefing on liability to include argument on remedies; drafting and revising briefing  
19 on the motion for class certification, reviewing the opposition brief to the motion, preparing a  
20 reply brief, attending the hearing on class certification, preparing supplemental briefing on class  
21 certification, and revising and editing the proposed order on class certification; preparing a  
22 settlement conference brief and then a mediation brief, and attending both a mandatory settlement  
23 conference and a mediation; negotiating and corresponding with Town's counsel on various  
24 settlement issues; preparing numerous drafts of the settlement agreement and exhibits; preparing a  
25 motion for preliminary approval of settlement; attending a preliminarily approval hearing;  
26 coordinating the implementation of notice program; drafting motion for final approval; and  
27 retaining and coordinating with the claims administrator. These hours do not include time spent  
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1 preparing this attorney's fee motion.

2 41. Given that this litigation has lasted nearly six years, my standard hourly rates have  
3 changed over that time period. Thus, for the first several years of the case (2016-2018), my  
4 standard hourly rate was \$450. For the latter years of the case (2019 – present), it is \$500. These  
5 rates reflect both my experience and expertise in litigation, and the successes I have achieved over  
6 the course of my career. My hourly rate of \$450 reflects my time as a junior partner at a  
7 successful San Francisco plaintiffs' law firm. Although I did not do much hourly work during that  
8 time, \$450 is the rate I sought if attorneys' fees were available, say in a discovery dispute or  
9 contractual case. This rate was on the low end of what other elite Bay Area lawyers charged, but I  
10 believe it was a fair measure of my skill and experience, and I further believe that rate was  
11 awarded to me on the occasions when fee recovery was merited. Since 2019, my practice has  
12 included a blend plaintiff's and defense hourly work, in addition to my plaintiff's contingency  
13 work. And my hourly rate charged to clients is \$500. Not only is this my reasonable rate, as  
14 demonstrated by my paying clients, but I also believe that it is on the low end of that charged by  
15 successful Bay Area attorneys.

16 42. For the period of this litigation, the hourly rates published in the Laffey Matrix  
17 (<http://www.laffeymatrix.com/>) for attorneys of my experience start from \$421 (for a 4-7 year  
18 attorney in 2016) to \$829 (for an 11-19 year attorney in 2023). The locality pay differential using  
19 the 9% cited in *In re HPL Technologies, Inc. Securities Lit.* 366 F.Supp.2d 912, 921 (N.D. Cal.  
20 2005), yields rates of \$459 to \$904 per hour.

21 43. The following table shows that hourly rate applied to the hours worked in the case.  
22 This table is a summary of **Exhibit 6**, attached hereto.

<b>Time Period</b>	<b>Hourly Rate</b>	<b>Hours Expended</b>	<b>Total Amount</b>
2016 - 2018	\$450	327.3	\$147,285.00
2019 – Present	\$500	536.8	\$268,400.00
To be Incurred	\$500	25.0	\$12,500.00
<b>TOTAL</b>		<b>889.1</b>	<b>\$428,185.00</b>

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1           44.     The following is a brief summary of my education, career, and successes submitted  
2 in support of my requested hourly rate.

3           45.     I graduated with a bachelor's degree, *cum laude*, from Georgetown University in  
4 2004. I received my J.D., *magna cum laude*, from the University of California Hastings College  
5 of the Law in 2009, and I was admitted to practice in California that same year. While at  
6 Hastings, I was inducted into the Thurston Honor Society for academic achievement and received  
7 numerous Witkin awards. Additionally, I was a member of the Hastings Moot Court Team and  
8 the Constitutional Law Quarterly law journal.

9           46.     Following my graduation from Hastings, I became a legal research assistant to  
10 Judge John Munter in the Complex Civil Division of the San Francisco Superior Court. I spent a  
11 year assisting the judge on employment, consumer, antitrust, and insurance cases. The cases that  
12 came before this department are, by definition, complex: involving numerous parties and novel  
13 and difficult legal questions. And the vast majority of those cases were class actions. I therefore  
14 had the opportunity to read, research, and write orders on numerous class motions including  
15 motions for class certification and motions for settlement approval, among others. I also attended  
16 and assisted with several trials of class action claims.

17           47.     After my year at the court, I spent two years as an associate at the national law firm  
18 Lewis, Brisbois, Bisgaard & Smith LLP, practicing civil litigation on the defense-side. In 2012, I  
19 became an associate at the law firm of Walker, Hamilton & Koenig, LLP. In 2016, I was made a  
20 partner of that firm, and I held that position until I resigned my partnership in 2019, to relocate my  
21 practice to Salt Lake City, Utah, where I am a partner at the firm Burbidge | Mitchell and  
22 specialize in complex commercial and catastrophic personal injury cases. I remain associated with  
23 Walker, Hamilton & Koenig, LLP, and with the firm am currently involved in numerous  
24 California cases.

25           48.     During my years of practice, I have tried eight cases to jury verdict, arbitrated  
26 several cases, argued before the California Court of Appeal, the Ninth Circuit Court of Appeals,  
27 and the Utah Court of Appeals. My practice primarily focuses on catastrophic personal injury,  
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1 complex commercial cases, and mass torts and class actions. During my career, I have achieved  
2 numerous seven-figure and eight-figure verdicts and settlements.

3 49. In 2018, I was named Trial Lawyer of the Year, along with my partners Walter  
4 Walker and Peter Koenig, by the San Francisco Trial Lawyers Association.

5 50. I previously served on the Board of Directors for the San Francisco Trial Lawyers  
6 Association and the AIDS Legal Referral Panel. I now serve on the Civil Rules Committee for the  
7 United States District Court for the District of Utah and the Legislative Committee for the Utah  
8 Association for Justice.

9 51. I have been recognized for my successes in practice and have been named one of  
10 Utah's Legal Elite for the years 2020-2022, and have been named a "Rising Star" and "Super  
11 Lawyer" by Super Lawyers in each of the past nine years.

12 52. I have a long-history of experience handling class actions. As already stated, I  
13 worked on various motions and issues in class action cases on a daily basis in the Complex  
14 Department at the San Francisco Superior Court. As a summer associate at the law firm of  
15 Cotchett, Pitre & McCarthy, LLP, I spent a substantial amount of my time helping pursue an  
16 action on behalf of the citizens of Bernard Parish, Louisiana, who had lost their homes and  
17 possessions in Hurricane Katrina. My work on the case included travelling to Louisiana to  
18 conduct discovery, meet with co-counsel, and speak with clients. As a summer associate at the  
19 law firm of Heller Ehrman, LLP, I was heavily involved in the case of *Kincaid v. City of Fresno*,  
20 Eastern District of California Case No. 06-1445, a class action involving the City's destruction of  
21 the personal property of hundreds of its homeless citizens. During my time with Walker,  
22 Hamilton & Koenig, LLP, I have worked on an led several other class action cases and mass tort  
23 cases.

24 53. My experience includes work on several Proposition 218 cases. The most recent  
25 one to come to resolution was the case of *Walker v. Marin Municipal Water District*, Marin  
26 Superior Court Case No. CIV 1501914, which settled in late 2021 after nearly six years of  
27 litigation, including an appeal, for nearly \$6 million.

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1           54.     I believe both the hours and fees requested from the Court here are eminently  
2 reasonable. This is especially so given the significant risk in pursuing this case, which has gone  
3 on for nearly six years. During this time, Plaintiffs and their counsel have faced many obstacles  
4 and setbacks, and either a court victory or settlement was never a sure thing—very far from it.  
5 This case was vigorously defended on all fronts, from the merits to class certification to damages.  
6 During all of this time, counsel has never received any payment. The opportunity costs of the  
7 work on this case have been significant and the prospects of a successful outcome have never been  
8 assured.

9           55.     Plaintiffs further seeks reimbursement of \$10,982.09 in litigation costs incurred in  
10 the litigation. Attached hereto as **Exhibit 7** is a true and correct copy of the accounting of these  
11 costs. All of these costs were reasonably and economically expended in pursuit of this litigation.

12           56.     My partners and I, as Class Counsel, have developed an expertise in Proposition  
13 218 cases and have prosecuted two such class action cases in addition to several other class  
14 actions. We have a proven and extensive track record of success. Drawing from these  
15 experiences, we advised our clients to execute the Settlement Agreement confident that it  
16 constitutes a fair and adequate outcome, and that it is in the best interests of the Class.

17           I declare under penalty of perjury under the laws of the State of California that the  
18 foregoing is true. Executed this 21st day of February, 2023, at Salt Lake City, Utah.

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By:           Beau R. Burbidge            
          Beau R. Burbidge

# **EXHIBIT 1**



Second Amended Settlement Agreement

**CLASS ACTION SETTLEMENT AGREEMENT**

This *Second Amended* Class Action Settlement Agreement is entered into in San Mateo County, California, effective as of the date of the last signature hereon, by and between Plaintiffs CHARLES BOLTON, JOHN LOCKTON, DAVID MARQUARDT, PAUL ROCHESTER, and CHARLES SYERS, individually and on behalf of all other similarly situated persons in the Classes (as defined below), on the one hand (“Plaintiffs”), and DEFENDANT TOWN OF HILLSBOROUGH (“Hillsborough”), on the other hand. Plaintiffs and Hillsborough may be individually referred to as “Party” and collectively referred to as “Parties.” As required by California Rules of Court, Rule 3.769, this Settlement Agreement is subject to approval by the Court pursuant to the notice process identified herein.

**RECITALS**

A. Whereas, on November 8, 2016, Plaintiffs filed a verified Class Action Complaint and Petition for Writ of Mandate against Hillsborough in San Mateo County Superior Court, Case No. 16C1V02284 (“Action”), alleging past, current, and ongoing violation of California law, including California Constitution, Article XIII D, also known as “Proposition 218” (“Claims”).

B. Whereas, the Action was brought on behalf of “All residential water service customers of the Town of Hillsborough who have received residential water service at any time from July 1, 1997 to the date of class certification” and a Subclass of “All residential water service customers of the Town of Hillsborough who were assessed and paid penalties pursuant to Town of Hillsborough Ordinance No. 725.”

C. Whereas, in the Action, Plaintiffs challenge, among other things, Ordinance No. 725, which was adopted by Hillsborough and went into effect on June 9, 2015, establishing a scheme of water rationing for water customers in the Town of Hillsborough; Ordinance No. 731, which was adopted by Hillsborough and went into effect on February 1, 2016, in part, establishing new water rates for residential water users in the Town of Hillsborough; and Hillsborough’s water rates that were in effect prior to the adoption of Ordinance No. 731.

## Second Amended Settlement Agreement

D. Whereas, in the Action, Plaintiffs contend that the drought penalties adopted in Ordinance No. 725 violate the procedural and substantive requirements of Proposition 218, that the water rates adopted in Ordinance No. 731 do not comply with Proposition 218, and that the water rates in effect prior to the adoption of Ordinance No. 731 also did not comply with Proposition 218.

F. Whereas, on or about December 14, 2016, Hillsborough filed an answer in the Action denying the Claims.

G. Whereas, on or about August 21, 2020, Plaintiffs filed a motion for class certification and on or about May 17, 2021, the Court granted class certification and issued an order certifying the following classes in connection with the Action (the “Classes”):

- Ratepayer Class: All residential water service customers of the Town of Hillsborough who have paid in excess of Tier 2 in a billing cycle during the time period from June 28, 2015 through April 30, 2017. Plaintiffs Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers were appointed Class Representatives of the Ratepayer Class (“Rate Class Representatives”).
- Drought Penalty Class: All residential water service customers of the Town of Hillsborough, who were assessed and paid penalties pursuant to Town of Hillsborough Ordinance No. 725 and exhausted their administrative remedies. Plaintiffs Charles Bolton, John Lockton, and Charles Syers were appointed Class Representatives of the Drought Penalty Class (“Drought Penalty Class Representatives”), but not Plaintiffs David Marquardt and Paul Rochester .

H. Whereas, the Court designated Attorneys Beau Burbidge, Walter H. Walker, III, and Peter J. Koenig of Walker, Hamilton & Koenig, LLP, as Class Counsel (“Class Counsel”) for both the Ratepayer Class and the Drought Penalty Class.

I. Whereas, on April 29, 2021, the Parties participated in mediation before the Honorable W. Scott Snowden (Ret.) (the “Mediator”). Through the mediation process, the Parties reached a proposed settlement, which is fully set forth below in this Agreement (“Settlement”).

## Second Amended Settlement Agreement

J. Whereas, the Settlement was the result of extensive arm's length settlement negotiations and discussions between the Parties and their respective counsel with the assistance of the Mediator.

L. Whereas, the Rate Class Representatives and Drought Penalty Class Representatives support and have approved the Settlement.

M. Whereas, the Parties now wish to resolve all disputes between them and the Classes arising out of, or relating to, the facts and circumstances giving rise to the Claims and Action, or arising out of, or relating to, those water rates imposed during the Refund Period and the drought penalties imposed pursuant to Ordinance No. 725.

**NOW, THEREFORE**, in consideration of the covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree as follows:

### **AGREEMENT**

#### **1. RECITALS.**

1.1. The aforementioned Recitals are material terms and conditions of this Agreement.

#### **2. DEFINITIONS.**

2.1. As used in this Agreement and the exhibits attached hereto (which are an integral and material part of this Agreement and incorporated in their entirety herein by reference), the following terms have the following meanings, unless this Agreement specifically provides otherwise. The plural of any defined term includes the singular, and the singular of any defined term includes the plural, as the case may be:

2.1.1. "Action" or "Lawsuit" shall mean the class action lawsuit presently captioned as *Baruh, et al. v. Town of Hillsborough*, filed in the Superior Court of California, County of San Mateo, Case No. 16C1V02284.

2.1.2. "Agreement" or "Settlement Agreement" means this Settlement Agreement and the exhibits attached hereto or incorporated herein, including any subsequent amendments and any exhibits to such amendments.

## Second Amended Settlement Agreement

- 2.1.3. “Attorneys’ Fees and Costs” means such funds as may be approved and awarded by the Court to Class Counsel to compensate them for conferring the benefits upon the Class under this Settlement Agreement and for their professional time, fees, costs, advances and expenses incurred in connection with the Action and the Agreement.
- 2.1.4. “Claim Form” shall mean the form that certain Class Members who are no longer Customers may submit to the Claims Administrator in the form attached hereto as **Exhibit C**.
- 2.1.5. “Claims Administrator” or “Settlement Administrator” shall mean Phoenix Settlement Administrators, or if not approved by the Court, any other qualified third-party administrator and agent agreed to by the Parties and approved and appointed by the Court in the Preliminary Approval Order to receive objections, opt-out notices, and to process claims for refunds of Class Members.
- 2.1.6. “Class” means the Ratepayer Class as defined in the above Recitals.
- 2.1.7. “Class Counsel” means Beau Burbidge, Walter H. Walker, III, and Peter J. Koenig of Walker, Hamilton & Koenig, LLP.
- 2.1.8. “Class Member” or “Settlement Class Member” means any member of the Class who does not timely and properly exclude themselves from the Class as provided in this Agreement.
- 2.1.9. “Class Notice” means the Summary Notice, Publication Notice, and Long Form Notice.
- 2.1.10. “Class Representatives” or “Plaintiffs” means Petitioners/Plaintiffs Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers.
- 2.1.11. “Court” means the Superior Court of California, County of San Mateo.
- 2.1.12. “Customers” means those persons and entities who held an account for water service with the Town of Hillsborough during the Refund Period.
- 2.1.13. “Defendant” or “Hillsborough” means the Respondent/Defendant Town of Hillsborough.

## Second Amended Settlement Agreement

- 2.1.14. “Distribution Plan” means the manner by which the Net Settlement Fund will be distributed to the Class as set forth in Paragraph 6.3 below.
- 2.1.15. “Effective Date” means 30 calendar days from the date on which the Court enters the Final Order and/or Final Judgment in this Action.
- 2.1.16. “Exclusion Deadline” means the date that falls on the day that is 60 calendar days after the Notice Date.
- 2.1.17. “Fairness Hearing” or “Final Approval Hearing” means the hearing that is to take place after the entry of the Preliminary Approval Order, the Notice Date, the Exclusion Deadline, and the Objection Deadline for purposes of: (a) entering the Final Order and Final Judgment; (b) determining whether the Settlement should be approved as fair, reasonable, and adequate; (c) ruling upon an application for Service Award by the Class Representative; (d) ruling upon an application by Class Counsel for Attorneys’ Fees and Costs; and (e) entering any final order awarding Attorneys’ Fees and Costs and Service Awards.
- 2.1.18. “Final Order and Final Judgment” means the Court’s order and judgment finally approving the Settlement.
- 2.1.19. “Long Form Notice” means the notice of the proposed class action that shall be posted on a settlement website in the form attached hereto as **Exhibit B**.
- 2.1.20. “Net Settlement Fund” means the Settlement Fund less (i) any Service Award awarded by the Court, and (ii) any Attorneys’ Fees and Costs awarded by the Court.
- 2.1.21. “Notice Date” means the date upon which the Summary Notice is mailed.
- 2.1.22. “Objection Deadline” means the date that falls on the day that is 60 calendar days after the Notice Date.
- 2.1.23. “Objection Form” means the form that Class Members may submit to lodge objections to the proposed Settlement Agreement, Service Award, and Attorney’s Fees and Costs substantially in the form attached hereto as **Exhibit E**.

Second Amended Settlement Agreement

- 2.1.24. “Opt-Out Form” means the form that Class Members may submit to request exclusion from the Class substantially in the form attached hereto as **Exhibit D**.
- 2.1.25. “Preliminary Approval Date” means the date the Court issues the Preliminary Approval Order.
- 2.1.26. “Preliminary Approval Order” means the order preliminarily approving the Settlement and proposed Class Notice.
- 2.1.27. “Publication Notice” means the notice of the proposed class action settlement to be published for two consecutive weeks in the San Mateo Daily Journal in the form attached hereto as **Exhibit F**.
- 2.1.28. “Release” means the release and waiver set forth in Section 7 of this Agreement and in the Final Order and Final Judgment.
- 2.1.29. “Released Claims” means any claims that were asserted, or that could reasonably have been asserted in the Action against the Released Parties as more fully described in Paragraph 7.2.
- 2.1.30. “Released Party” or “Releasee” means Hillsborough and all of its employees, council members, officers, representatives, attorneys, and agents.
- 2.1.31. “Refund Period” means June 28, 2015 through April 30, 2017.
- 2.1.32. “Service Award” means such funds as may be awarded by the Court to the Class Representatives in recognition of their time, effort, and service to the Class expended in pursuing the Action and in fulfilling their obligations and responsibilities as the Class Representatives.
- 2.1.33. “Settlement Fund” means the sum of \$1,229,329.00 that Hillsborough has agreed to pay to settle this matter pursuant to the terms and conditions set forth herein. The Settlement Fund consists of \$779,329.00 designated for customer refunds pursuant to the formula described *infra* in Paragraph 6.3 as well as Appendix 1, and \$450,000 for payment of Attorneys’ Fees and Costs and Service Awards as may be awarded by the Court.

## Second Amended Settlement Agreement

2.1.34. "Summary Notice" means the summary notice of the proposed class action settlement, substantially in the form attached hereto as **Exhibit A**, which shall be disseminated via U.S. Mail.

### 3. **EXHIBITS.**

3.1. This Agreement includes the following exhibits which are incorporated herein by reference:

- 3.1.1. Exhibit A – Summary Notice
- 3.1.2. Exhibit B – Long Form Notice
- 3.1.3. Exhibit C – Refund Claim Form
- 3.1.4. Exhibit D – Opt-Out Form
- 3.1.5. Exhibit E – Objection Form
- 3.1.6. Exhibit F – Publication Notice

### 4. **CONTINGENT SETTLEMENT.**

- 4.1. This Settlement is contingent upon final approval by the Court pursuant to California Rules of Court, Rule 3.769.
- 4.2. Following execution of this Agreement by the Plaintiffs and Hillsborough, the Parties shall submit the Settlement to the Court for preliminary approval and get authority to issue a Summary Notice, substantially in the form attached hereto as **Exhibit A**, to the Class Members.
- 4.3. The Parties will set a hearing and serve and file a written notice of motion for preliminary approval of the Settlement. The Settlement Agreement and a proposed notice to Class Members will be filed with the motion, and the proposed order lodged with the motion.
- 4.4. If the Court grants preliminary approval of the Settlement, the time, date, and place for a Final Approval Hearing will be set and notice will be given to the Class. Before final approval, the Court will conduct an inquiry into the fairness of the Settlement. If the Court approves the Settlement Agreement after the Final Approval Hearing, the Court will make

## Second Amended Settlement Agreement

and enter judgment. The judgment will include a provision for the retention of the Court's jurisdiction over the parties to enforce the terms of the judgment.

### 5. **COMPROMISE OF DISPUTED ISSUES.**

- 5.1. This settlement represents the compromise of highly-contested issues in the Action. Hillsborough has vigorously denied and continues to dispute all of the claims and contentions alleged in the Action, and denies any and all allegations of wrongdoing, fault, liability, or damage of any kind to Plaintiffs and/or both Classes.
- 5.2. The Parties recognize that there exist substantial and significant risks regarding their claims, defenses, and/or the ability of the Classes to recover and/or collect any settlement or judgment from Hillsborough, among other things, and therefore agree to the terms of this Settlement Agreement to resolve this hard-fought, highly-disputed Action and Claims in light of the risks and uncertainties faced by Plaintiffs, the Classes, and Hillsborough.
- 5.3. The Settlement was the result of extensive arms'-length settlement negotiations and discussions between the parties and their respective counsel with the assistance of the Mediator.

### 6. **SETTLEMENT CONSIDERATION.**

- 6.1. In consideration of the entry of the Final Order and Final Judgment in the Action and the Release of the Released Claims, as set forth in Section 7 below, Hillsborough will provide the following consideration and payments to the Class:
- 6.2. **Settlement Fund.** Within thirty (30) days after the Preliminary Approval Date, Hillsborough will deposit \$1,229,329.00 (the "Settlement Fund") into a separate interest-bearing bank account administered by the Settlement Administrator for the benefit of the Class. The Settlement Fund consists of \$779,329.00 designated for customer refunds pursuant to the formula described *infra* in Paragraph 6.3 as well as Appendix 1, and \$450,000 for payment of Attorneys' Fees and Costs and Service Awards as may be awarded by the Court. Within three (3) court days of the Effective Date, Hillsborough shall distribute the Settlement Fund as follows:



## Second Amended Settlement Agreement

6.2.1. First, to the Class Representatives in the amount approved as the Service Award by the Court in the Final Order.

6.2.2. Second, to Class Counsel in the amount approved as Attorneys' Fees and Costs ordered by the Court after the Final Approval Hearing.

6.2.3. Third, the balance ("Net Settlement Fund") according to the Distribution Plan set forth in Paragraph 6.3 below.

6.3. **Rate Refunds and Distribution Plan.** From the Net Settlement Fund, Hillsborough will pay refunds to Class Members. The amount of each Class Member's refund will be based upon the difference between the rates paid by the member of the Class for Tiers 3, 4, & 5 water and \$11.09/hcf during the Rate Stabilization Period [February 10, 2016 through November 14, 2016] and \$9.06/hcf during the rest of the Refund Period. (A full description and example of these refunds may be found in **Appendix 1**, which is incorporated as if fully set forth herein.) The calculation of the refunds due to each customer has been performed by Hillsborough and will be provided to the Settlement Administrator and Plaintiffs and included in the Summary Notice.

6.3.1. **Automatic Refunds for Current and Known Former Customers.** Current customers and former customers whose addresses can be located through a skip trace search performed by the Settlement Administrator will be paid refunds via check mailed by the Settlement Administrator in the amount calculated by Hillsborough and stated in the Summary Notice. Such payments shall be made automatically with no claim or claim form submission required. Any returned checks will be re-sent by the Settlement Administrator following a skip trace search performed by the Settlement Administrator. Any checks returned after this process will become part of the *cy pres* distribution described in Paragraph 6.3.4 below.

6.3.2. **Refund Claims Procedure for Former Customers Not Located.** Former Customers whose addresses cannot be located through the process described above and who want to receive a refund must submit a Refund Claim Form to the Settlement

## Second Amended Settlement Agreement

Administrator as set forth below. The Refund Claim Form must be mailed to the Settlement Administrator at the address provided on the Refund Claim Form, and postmarked by the Exclusion Deadline or submitted to an online claim portal by the Exclusion Deadline.

6.3.3. **Verification of Claims for Former Customers Not Located.** For each person who returns a timely and completed Claim Form, Hillsborough shall verify whether the person was a Customer and is entitled to a refund. For each valid refund claim, Hillsborough shall pay a refund via check through the Settlement Administrator in the amount calculated by Hillsborough and stated in the Summary Notice.

6.3.4. **Cy Pres Distribution of Unclaimed Funds.** The Parties recognize that there likely will be some amount of unclaimed funds after disbursement of the Net Settlement Fund, whether by checks returned as undeliverable or checks not cashed prior to their 90-day expiration period. The Parties agree any and all unclaimed funds remaining in the Net Settlement Fund after one-hundred-eighty (180) days from the Effective Date shall be distributed to *cy pres* recipients as set forth hereinafter. The portion of the Net Settlement Fund distributed to *cy pres* recipients shall be referred to as "Recipient's Share." The parties have agreed the unclaimed funds available for *cy pres* recipients shall be paid to the following organization: Water Education Foundation.

6.4. **Administration Cost.** All costs of settlement administration, including costs of providing notice, administering claims, objections, and opt-outs, and distributing refunds will be borne solely by Hillsborough and such costs shall not be paid from the Settlement Fund.

## 7. **DISMISSAL AND RELEASE OF CLAIMS.**

7.1. **Dismissal of Drought Penalty Claims.** Plaintiffs, as consideration for the Settlement, will seek Court approval to dismiss with prejudice the claims made by the Drought Penalty Class ("Drought Penalty Claims").

Second Amended Settlement Agreement

7.2. **Release.** In consideration for the Settlement, Plaintiffs and each member of the Class, on behalf of themselves and their heirs, executors, administrators, assigns, agents, servants, representatives, predecessors, and successors (hereafter collectively “Releasors”) fully release and discharge Hillsborough and all of the Releasees from all rights, claims, and actions they and any of the Releasors have had, now have, or may have in the future, against the Releasees arising out of, or relating to, the facts and circumstances giving rise to the Action or Claims, or arising out of, or relating to, those water rates imposed pursuant to Ordinance Nos. 725 or 731.

7.3. **Civil Code § 1542 Waiver.** The Parties acknowledge that they are releasing unknown claims related to the Action and any other claims, defenses, or causes of action related to the Action, and expressly waive all rights under California Civil Code section 1542. California Civil Code section 1542 provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

The Parties acknowledge, except for matters expressly represented or recited herein, the facts and law in relation to this matter and the claims released by the terms of this Agreement may turn out to be different from the facts or law as now known to each Party or their counsel. Each Party, therefore, expressly assumes the risk of the existence of different or presently unknown facts or law and agrees that this Agreement shall be in all respects effective and binding as to such Party, despite the possibility of new or different facts or law. *However, should the Court, in its order on preliminary approval or final approval of the Settlement, deem this waiver to be against the interests of absent Class Members, this waiver provision shall be deemed null and void and stricken from this Agreement.*

## Second Amended Settlement Agreement

7.4. Nothing in this Release shall preclude any action to enforce the terms of the Agreement, including participation in any of the processes detailed herein. Any motion or proceeding to enforce the terms of the Settlement Agreement, in whole or in part, shall be before the Court, which shall retain jurisdiction over the matter for such purposes.

7.5. Plaintiffs, members of the Class, and Class Counsel hereby agree and acknowledge that the provisions of this Release together constitute an essential and material term of the Agreement and shall be included in any Final Order and Final Judgment entered by the Court. The Release shall become effective on the Effective Date.

7.6. Persons who are not members of the Class do not release any claims they may have and such claims are reserved and unaffected by this Settlement.

### 8. **NOTICE OF SETTLEMENT.**

8.1. Within ten (10) calendar days of the Court's entry of the Preliminary Approval Order, Hillsborough, through the Settlement Administrator, shall send via first-class mail to all of its current Customers at the property address that receives water service and to all of its former Customers whose addresses can be located through a skip trace search performed by the Settlement Administrator or, if no address can be located, to the last known address, a Summary Notice substantially in the form attached hereto as **Exhibit A**, which shall reference a website in which Class Members may obtain further detailed information about the Settlement. This informational web page shall be created and maintained by Hillsborough through the Settlement Administrator.

8.2. Any returned notices will be re-sent by the Settlement Administrator following a skip trace performed by the Settlement Administrator.

8.3. Within ten (10) calendar days of the Court's entry of the Preliminary Approval Order, Hillsborough, through the Settlement Administrator, shall cause to be published in the San Mateo Daily Journal, a publication notice in the form attached hereto as **Exhibit F** on two dates that are seven (7) days apart. The costs of this publication notice shall be paid by Hillsborough as part of the costs of the Settlement Administrator.

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8.4. Hillsborough shall, no later than ten (10) calendar days after the Court enters the Preliminary Approval Order, cause a website to be created and published on the Internet that shall include a copy of this Agreement, a Summary Notice substantially in the form attached hereto as **Exhibit A**, a Long Form Notice substantially in the form attached hereto as **Exhibit B**, a Refund Claim Form for former customers whose addresses cannot be found substantially in the form attached hereto as **Exhibit C**, an Opt-Out Form substantially in the form attached hereto as **Exhibit D**, an Objection Form substantially in the form attached hereto as **Exhibit E**, and the Preliminary Approval Order. The website shall be updated with Class Counsel's application for Attorney's Fees and Reimbursement of Costs, the Motion for Final Approval of Settlement, and with any other information as required by the Court in its Preliminary Approval Order or as agreed to by the Parties. Class Counsel shall cause a portal through which Refund Claim Forms may be submitted by Class Members to be included on the website.

8.5. The Parties and/or their respective Counsel shall file an affidavit of compliance with these notice requirements no later than five (5) court days prior to the Fairness Hearing.

### 9. **OPT OUT OF CLASS & SETTLEMENT.**

9.1. Any Class Member who does not wish to participate in the Class and wishes to opt out of the Settlement may file an Opt Out Notice in the form attached hereto as **Exhibit D** with the Claims Administrator who shall notify Class Counsel, Hillsborough, and the Court of those who opt out. Any persons who opt out of the Class and the Settlement will not be entitled to a Refund, will not release any claims pursuant to this Settlement or be subject to the release set forth herein, and will reserve all claims he or she may have, and may not file an objection to the Settlement. Opt Outs must be postmarked no later than the Exclusion Deadline.

### 10. **OBJECTIONS TO THE SETTLEMENT.**

10.1. Any member of the Class who wishes to object to the fairness, reasonableness, or adequacy of the Settlement Agreement, or to the award of Attorneys' Fees and Costs, must

## Second Amended Settlement Agreement

deliver to the Settlement Administrator a completed Objection Form, in the form attached hereto as **Exhibit E** which shall include: (1) the full name of the objector; (2) the mailing address of the objector; (3) the property address where the objector has received domestic water service; and (4) the specific reason(s), if any, for the objection, including any legal support the Class Member wishes to bring to the Court's attention. Such objections must be postmarked no later than the Objection Deadline. The Settlement Administrator shall notify Class Counsel, Hillsborough, and the Court of those who object to the Settlement.

10.2. Any Class Member who files and serves a written objection may, but is not required to, appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member's own expense, to object to the fairness, reasonableness, or adequacy of this Agreement or the award of Attorneys' Fees and Costs.

10.3. Class Members or their attorneys who intend to make an appearance at the Fairness Hearing must deliver a notice of intention to appear to Class Counsel identified in the Class Notice and to Hillsborough's counsel, and file said notice with the Court, on or before the Objection Deadline. The notice of intention to appear must include copies of any papers, exhibits, or other evidence that the objecting Class Member (or the objecting Class Member's counsel) will present to the Court in connection with the Fairness Hearing.

10.4. Any Class Member who fails to timely submit an objection to the Settlement Agreement pursuant to and complying with the Provisions of Paragraphs 10.1-10.3 shall be deemed to have waived and forfeited any and all rights he or she may have to appear separately and/or to object at or during the Fairness Hearing or in any other proceeding in this Action, and shall be bound by all terms of this Agreement and by all proceedings, orders and judgments, including, but not limited to, the Release, the Final Order, and the Final Judgment in the Action.

10.5. The exclusive means for objecting to the Settlement shall be through the provisions of Paragraphs 10.1 to 10.3 of this Agreement.

## Second Amended Settlement Agreement

10.6. Any Class Member who objects to the Settlement shall be entitled to all benefits of the Settlement if this Agreement and the terms contained herein are approved, as long as the objecting Class Member complies with all requirements of this Agreement applicable to Class Members. Similarly, such objecting Class Member shall be bound by all the terms of this Agreement, including the Release.

### 11. **MODIFICATION OR TERMINATION OF THIS AGREEMENT.**

11.1. The terms and provisions of this Agreement may be amended, modified, or expanded by written agreement of the Parties and approval of the Court; provided, however, that after entry of the Final Order and Final Judgment, the Parties may by written agreement effect such amendments, modifications, or expansions of this Agreement and its implementing documents (including all exhibits hereto) without further notice to the Class or approval by the Court if such changes are consistent with the Court's Final Order and Final Judgment and do not limit the rights of Class Members under this Agreement.

11.2. In the event the terms or conditions of this Settlement Agreement, other than the terms pertaining to the Attorneys' Fees and Costs, are materially modified by any court, either party in its sole discretion to be exercised within fourteen (14) calendar days after such a material modification may declare this Settlement Agreement null and void and previously-complied with provisions will be unwound.

11.3. In the event that the Court refuses or fails to give final approval to the Settlement, or if a Party exercises his/its option to withdraw from and terminate this Settlement Agreement, then the Settlement proposed herein shall become null and void (with the exception of Paragraph 11.4 herein) and shall have no force or effect, the Parties and the Class shall not be bound by this Agreement, and the Action shall proceed to trial. In this event, the parties agree that the requirement that the Action be brought to trial within five years after commencement (Code of Civil Procedure sections 583.310, *et seq.*) will be extended by one year beyond the date of the Court's refusal or failure to give final approval to the Settlement or the date of termination of the Settlement Agreement, which extension

## Second Amended Settlement Agreement

is permitted pursuant to Code of Civil Procedure section 583.330(a). The Parties agree to meet and confer if the Settlement Agreement is terminated or not approved to determine how to proceed with the litigation, including setting of a new briefing schedule and trial date.

11.4. Notwithstanding the foregoing, if this Settlement Agreement is not approved by the Court, or the Settlement herein is declared null and void, Class Members, Plaintiffs, and Class Counsel shall not in any way be responsible or liable for any costs of notice incurred by Hillsborough associated with this Settlement and Hillsborough shall likewise not be responsible or liable in any way for any costs of notice incurred by Class Members, Plaintiffs or Class Counsel associated with the Settlement.

### **12. REVIEW, APPROVAL AND RELATED ORDERS.**

12.1. As soon as is practicable following the signing of this Settlement Agreement, Class Counsel shall apply to the Court for entry of the Preliminary Approval Order for the purpose of, among other things:

12.1.1. Approving the Class Notice, substantially in the form set forth at **Exhibits A & B**, the Refund Claim Form substantially in the form set forth at **Exhibit C**, the Opt Out Notice substantially in the form set forth at **Exhibit D**, and the Objection Form substantially in the form set forth at **Exhibit E**;

12.1.2. Scheduling the Fairness Hearing on a date ordered by the Court, provided in the Preliminary Approval Order, and in compliance with applicable law, to determine whether the Settlement should be approved as fair, reasonable, and adequate, and to determine whether a Final Order and Final Judgment should be entered;

12.1.3. Determining that the notice of the Settlement and of the Fairness Hearing, as set forth in this Agreement, complies with all legal requirements, including but not limited to the Due Process Clause of the United States Constitution;

12.1.4. Preliminarily approving the form of the Final Order and Final Judgment;



## Second Amended Settlement Agreement

12.1.5. Directing that Class Notice shall be given to the Class as provided in this Agreement;

12.1.6. Providing that any objections by any Class Member to the Settlement contained in this Agreement, and/or the entry of the Final Order and Final Judgment, shall be heard, and any papers submitted in support of said objections shall be considered by the Court, at the Fairness Hearing only if, on or before the date(s) specified in the Class Notice and Preliminary Approval Order, such objector submits to the Court a written objection, and otherwise complies with the requirements in Paragraph 8 of this Agreement;

12.1.7. Establishing dates by which the Parties shall file and serve all papers in support of the application for final approval of the Settlement and in response to any valid and timely objections;

12.1.8. Providing that all Class Members will be bound by the Final Order and Final Judgment unless such Class Members did elect to opt out of the Class in accordance with this Settlement Agreement and the Class Notice;

12.1.9. Directing the Parties, pursuant to the terms and conditions of this Agreement, to take all necessary and appropriate steps to establish the means necessary to implement the Settlement Agreement;

12.1.10. Pending the Fairness Hearing, staying all proceedings in the Action, other than proceedings necessary to carry out or enforce the terms and conditions of this Agreement and the Preliminary Approval Order;

12.1.11. Adopting all deadlines set forth herein; and

12.1.12. Issuing other related orders to effectuate the preliminary approval of the Settlement Agreement.

12.2. Following the entry of the Preliminary Approval Order, Class Notice shall be given in the manner directed and approved by the Court.

## Second Amended Settlement Agreement

- 12.3. Class Counsel will move for final approval and file such motion fourteen (14) days before the Fairness Hearing. The parties may file responses to any objections not less than five (5) court days before Fairness Hearing.
- 12.4. At the Fairness Hearing, the Parties will seek to obtain from the Court a Final Order and Final Judgment. The Final Order and Final Judgment shall, among other things:
- 12.4.1. Find that the Court has jurisdiction over all Plaintiffs and Class Members and that venue is proper;
- 12.4.2. Finally approve the Agreement and Settlement, pursuant to California Code of Civil Procedure sections 382, et seq., as fair, adequate and reasonable to the Class;
- 12.4.3. Find that the Class Notice and the Notice Plan comply with all laws, including, but not limited to, the Due Process Clause of the United States Constitution;
- 12.4.4. Dismiss all claims, including, but not limited to, the Released Claims of Plaintiffs, Class Representatives, and Class Members in the Action, with prejudice and without costs (except as provided herein as to costs);
- 12.4.5. Preserve all claims of persons not within the Class definition as well as those who have timely excluded themselves from the Class;
- 12.4.6. Adjudicate any objections that have been presented to the Settlement;
- 12.4.7. Incorporate the Releases set forth in the Agreement and make the Releases effective as of the date of the Final Order and Final Judgment;
- 12.4.8. Award Attorneys' Fees and Costs in amounts deemed fair, adequate and reasonable in the circumstances;
- 12.4.9. Authorize the Parties to implement the terms of the Agreement;
- 12.4.10. Retain jurisdiction relating to the administration, consummation, enforcement, and interpretation of the Agreement, the Final Order and Final Judgment, and for any other necessary purpose; and
- 12.4.11. Issue related Orders necessary to effectuate the final approval of the Agreement and its implementation.

## Second Amended Settlement Agreement

### 13. SERVICE AWARD

13.1. In recognition of the time and effort the Class Representatives have expended in pursuing the Action and fulfilling their obligations and responsibilities as Class Representatives, and of the benefits conferred on all Class Members by the Settlement, Class Counsel may ask the Court for payment of a Service Award to be paid to the Class Representatives.

13.2. It is Class Counsel's intention to apply to the Court for payment of a Service Award in amounts not exceeding the following: \$8,000.00 to John Lockton, \$8,000.00 to David Marquardt, \$5,000.00 to Charles Syers, \$5,000.00 to Charles Bolton, and \$5,000.00 to Paul Rochester. Hillsborough will not object to Service Awards in these amounts or less to the Class Representatives. No amount has been guaranteed or promised to the Class Representatives.

13.3. The Court shall determine the final amount of any Service Awards to the Class Representatives, in its discretion, based on the request filed by or on behalf of the Class Representatives. Such application will be made for determination at the Final Approval Hearing.

13.4. The Class Representatives acknowledge that they (i) support the Settlement as fair, adequate and reasonable to the Class, whether or not the Court awards any Service Awards; (ii) have not asserted any individual non-class claims against Hillsborough in the operative complaint; (iii) have not entered into any separate settlement agreement with Hillsborough; (iv) have not received any additional consideration from Hillsborough that other Class Members are not in a position to receive should this Settlement be approved, other than the Service Award, which the Court may, in its discretion, award to the Class Representatives; and (v) have reviewed and considered this Agreement.

13.5. The ability of the Class Representatives to apply to the Court for Service Awards is not conditioned on their support of the Settlement.

### 14. REQUEST FOR ATTORNEYS' FEES & COSTS.

## Second Amended Settlement Agreement

- 14.1. Class Counsel will make an application to the Court for an award of Attorneys' Fees and Costs.
- 14.2. It is Class Counsel's intention to apply to the Court for payment of Attorneys' Fees in an amount not to exceed thirty-three percent (33%) of the Settlement Fund.
- 14.3. It is Class Counsel's intention to apply to the Court for payment of Attorneys' Costs in an amount estimated to be \$20,000 but to be determined at the time of application, to be paid from the Settlement Fund.
- 14.4. This Settlement is inclusive of attorneys' fees, expenses and costs.
- 14.5. Any Attorneys' Fees and Costs awarded by this Settlement or the Court shall be deducted from the Settlement Fund. Such payment will be in lieu of statutory fees Plaintiffs, their attorneys, and/or Class Counsel might otherwise have been entitled to recover from Hillsborough.
- 14.6. The Attorney's Fees and Costs award amount shall be inclusive of all attorneys' fees, costs, advances and expenses incurred by the Class Members, the Class Representatives, or Class Counsel to be paid by Hillsborough and/or the Settlement Fund. Plaintiffs and Class Counsel agree that Hillsborough shall not pay, or be obligated to pay, in excess of any Court award of Attorneys' Fees and Costs, and that in no event shall Hillsborough be obligated to pay any amount in excess of the Settlement Fund.
- 14.7. Pursuant to California Rules of Court, Rule 3.769(b), Class Counsel is required to submit an application for the approval of attorney's fees and costs to the Court. Class Counsel will make an application to the Court as part of the application for final approval of settlement. Updated or supplemental application(s), by those making initial timely petitions only, limited to reporting new and additional professional time and expenses incurred in relation to the Settlement and claims administration process after the filing of the initial petition, shall be permitted to be filed after that date to ensure that the new attorneys' fees and costs on a going-forward basis in this Action are fairly accounted for by the Court and remain compensable, subject to the Court's approval.

## Second Amended Settlement Agreement

14.8. The procedure for, and the allowance or disallowance by the Court of, any application for attorneys' fees and expenses, or reimbursement to be paid to Class Counsel are not part of the settlement of the Released Claims as set forth in this Settlement and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement of the Released Claims as set forth herein. Any such separate order, finding, ruling, holding, or proceeding relating to any such applications for attorneys' fees and expenses, or any separate appeal from any separate order, finding, ruling, holding, or proceeding relating to them or reversal or modification of them, shall not operate to terminate or cancel this Settlement Agreement or otherwise affect or delay the finality of the Final Order and Final Judgment or the Settlement.

### **15. GENERAL MATTERS AND RESERVATIONS**

15.1. To protect the private information of Hillsborough's water customers, any data regarding the names and addresses of any Class Members shall be kept confidential by the Parties, their Counsel, and any third-parties retained to assist in the administration of the Settlement, and this information shall be used only as required by this Agreement. The Parties agree to enter into a stipulated protective order to protect the confidentiality of this information if one or more Parties determines such an order is necessary at any time.

15.2. Each Party to this Agreement hereby represents and warrants that no other Party, and no other person, has made any statement or representation to him or it other than as is set forth in this Agreement and each Party has not relied upon any statement, representation, or promise of any other Party or person in executing this Agreement in making the settlement provided for herein.

15.3. Each Party specifically acknowledges this Agreement, except as provided herein, supersedes any prior agreement between the Parties, whether written or oral, and this Agreement constitutes the entire, integrated understanding of the Parties. This Agreement may only be amended by a writing signed by all Parties. The Parties reserve the right,

## Second Amended Settlement Agreement

subject to the Court's approval, to agree to any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

- 15.4. The Class, Class Representatives, Class Counsel, Hillsborough and/or Hillsborough's Counsel shall not be deemed to be the drafter of this Agreement or of any particular provision, nor shall they argue that any particular provision should be construed against its drafter. All Parties agree that this Agreement was drafted by counsel for the Parties during extensive arm's length negotiations. No parole or other evidence may be offered to explain, construe, contradict, or clarify its terms, the intent of the Parties or their counsel, or the circumstances under which this Agreement was made or executed.
- 15.5. The Parties expressly acknowledge and agree that this Agreement and its exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, and correspondence, constitute an offer of compromise and a compromise within the meaning of California Evidence Code section 1152. In no event shall this Agreement, any of its provisions, or any negotiations, statements, or court proceedings relating to its provisions in any way be construed as, offered as, received as, used as, or deemed to be evidence of any kind in the Action or in any other action or proceeding, except in a proceeding to enforce this Agreement. Without limiting the foregoing, neither this Agreement nor any related negotiations, statements, or court proceedings shall be construed as, offered as, received as, used as, or deemed to be evidence of, an admission or concession of any liability or wrongdoing whatsoever on the part of the Released Parties, Plaintiffs, Hillsborough, or the Class, or as a waiver by the Released Parties, Plaintiffs, Hillsborough, or the Class of any applicable privileges, claims or defenses.
- 15.6. Each Party hereby represents and warrants he or it has not previously assigned or transferred, or purported to assign or transfer, any of the indebtedness, rights, claims, causes of action, or obligations disposed of by this Agreement.
- 15.7. This Agreement shall in all respects be interpreted, enforced, and governed exclusively by and under the laws of the State of California. Should any dispute arise

## Second Amended Settlement Agreement

concerning the enforcement or interpretation of this Agreement, the Parties agree that jurisdiction and venue of such dispute shall reside exclusively in the Superior Court for the County of San Mateo. The Parties further agree that this Agreement shall be enforceable under Code of Civil Procedure section 664.6, and that the Court shall have jurisdiction over the Parties and over this Agreement for that purpose.

15.8. This Agreement has been negotiated by and between parties of equal bargaining power, each represented or having the opportunity to be represented by independent counsel, and each has contributed to its drafting and it is not to be construed in favor of or against any Party hereto.

15.9. If any provision of this Agreement is found to be illegal or invalid, such provision shall be severed and such illegality or invalidity shall remain in full force and effect if the Parties so mutually agree in writing.

15.10. This Agreement affects the settlement and release of claims which are denied and contested, and nothing contained in this Agreement shall be construed as an admission by any of the Parties of any liability asserted in the Action or the Claims. The Parties further agree and acknowledge that this Agreement is intended to resolve differences between the Parties with respect to the Action and the Claims.

15.11. Each Party to this Agreement agrees to act in good faith and to do any and all acts, and execute any and all documents, reasonably necessary to implement the terms of this Agreement and promptly complete the Settlement as contemplated herein.

15.12. The Parties and their respective counsel will not make any public statement that disparages the Settlement or the Parties or their counsel with respect to the Action or Settlement.

15.13. Whenever this Agreement requires or contemplates that one of the Parties shall or may give notice to the other, notice shall be provided by e-mail and/or next-day (excluding Saturdays, Sundays and Federal Holidays) express delivery service as follows:




*Upon Class Counsel:*

Second Amended Settlement Agreement

WALKER, HAMILTON & KOENIG, LLP  
 Beau R. Burbidge  
[beau@whk-law.com](mailto:beau@whk-law.com)  
[serena@whk-law.com](mailto:serena@whk-law.com)  
 50 Francisco Street, Suite 460  
 San Francisco, California 94133  
 Telephone: (415) 986-3339  
 Facsimile: (415) 986-1618

*Upon Defense Counsel:*  
 BEST BEST & KRIEGER LLP  
 Harriet A. Steiner, Bar No. 109436  
[harriet.steiner@bbklaw.com](mailto:harriet.steiner@bbklaw.com)  
 James B. Gilpin, Bar No. 151466  
[James.Gilpin@bbklaw.com](mailto:James.Gilpin@bbklaw.com)  
 500 Capitol Mall, Suite 1700  
 Sacramento, California 95814  
 Telephone: (916) 325-4000  
 Facsimile: (916) 325-4010


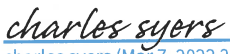
- 15.14. Upon compliance with the terms hereof, the Parties agree to execute and deliver all documents necessary to effectuate the purposes of this Agreement.
- 15.15. This Agreement may be signed in counterpart original, including facsimile/electronic signatures, each of which shall be deemed an original, and shall be deemed duly executed upon the signing of a counterpart by all Parties.

Dated: Mar 8, 2022	 <small>Charles Bolton (Mar 8, 2022 07:35 EST)</small> <hr/> CHARLES BOLTON
Dated: Mar 8, 2022	 <small>John Lockton (Mar 8, 2022 16:02 PST)</small> <hr/> JOHN LOCKTON
Dated: Mar 4, 2022	 <small>DFMarquardt (Mar 4, 2022 10:45 PST)</small> <hr/> DAVID MARQUARDT


j



Second Amended Settlement Agreement

Dated: Mar 8, 2022	 _____ PAUL ROCHESTER
Dated: Mar 7, 2022	 <small>charles syers (Mar 7, 2022 20:48 PST)</small> _____ CHARLES SYERS
Dated:	TOWN OF HILLSBOROUGH  By: _____ Town Manager

### Second Amended Settlement Agreement

Dated:	<hr/> PAUL ROCHESTER
Dated:	<hr/> CHARLES SYERS
Dated:	TOWN OF HILLSBOROUGH  DocuSigned by:  By: <hr/> BE9B46676D3C413... Town Manager

## Second Amended Settlement Agreement

### APPENDIX 1

The following provides a description of the refund procedure agreed to by this Settlement Agreement and an illustrative example meant to aid in interpretation of the Agreement.

The Refunds will be based upon the difference between the amounts customers paid for water at Tiers 3, 4, & 5 rates during the Refund Period and a negotiated settlement rate of \$11.09/hcf during Rate Stabilization Period [February 10, 2016 through November 16, 2016] and \$9.06/hcf during the rest of the Refund Period.

For water used by a customer during the Refund Period, the customer's Tier 3, 4, and 5 rates incurred by the customer at any time during the Refund Period will be recalculated by Hillsborough to one of the negotiated settlement rates (depending on the date of water usage, as described above). Any amount that customer paid for water in excess of these recalculated rates will be refunded to that customer, provided the customer has opted into the Class.

Thus, for example, if in August 2015, a customer used 105 units of water and was billed as follows:

<b>Tier</b>	<b>Monthly Use</b>	<b>Rate (per ccf)</b>	<b>Charge per Tier</b>
1	10	\$7.14	\$71.40
2	15	\$8.44	\$126.60
3	25	\$9.68	\$242.00
4	50	\$11.58	\$579.00
5	5	\$14.18	\$70.09
<b>TOTAL</b>	<b>CHARGE</b>	=	<b>\$1,089.90</b>

The customer's charges would be recalculated using the settlement rates as follows:

<b>Tier</b>	<b>Monthly Use</b>	<b>Rate (per ccf)</b>	<b>Charge per Tier</b>
1	10	\$7.14	\$71.40
2	15	\$8.44	\$126.60
3	25	\$9.06	\$226.50
4	50	\$9.06	\$453.00
5	5	\$9.06	\$45.30
<b>TOTAL</b>	<b>CHARGE</b>	=	<b>\$922.80</b>

Then the customer would be entitled to a refund for that month of the difference between \$1,089.90 and \$922.80, or \$167.10.

This calculation has been completed for every month (or portion thereof) of every customer's water usage during the Refund Period to calculate each customer's total refund.

# **EXHIBIT A**

**LEGAL NOTICE BY ORDER OF THE COURT**

***This Noticed was authorized by the San Mateo County Superior Court.  
It is not a solicitation from a lawyer.***

*Baruh et al. v. Town of Hillsborough*  
San Mateo County Superior Court Case No. 16CIV02284

**Notice of Class Action Settlement**

**IF YOU WERE A DOMESTIC WATER CUSTOMER OF THE TOWN OF HILLSBOROUGH DURING THE PERIOD JUNE 28, 2015 THROUGH APRIL 30, 2017, YOUR RIGHTS MAY BE AFFECTED BY THE SETTLEMENT OF THE CLASS ACTION LAWSUIT.**

This Notice advises you of your rights to participate in a proposed class action settlement (“Settlement”) with the Town of Hillsborough (“Hillsborough”). The class action lawsuit was filed in 2016 against Hillsborough and is currently pending in the Superior Court of California for the County of San Mateo. The lawsuit contends that the drought penalties adopted by Hillsborough in Ordinance No. 725 violate the procedural and substantive requirements of Proposition 218, and that the water rates during the period June 28, 2015 through April 30, 2017, including those adopted by Hillsborough in Ordinance No. 731, do not comply with Proposition 218 (collectively the “Claims”). Hillsborough has vigorously defended the lawsuit and the Settlement represents a compromise of highly-contested issues.

Under the terms of the Settlement, Hillsborough will pay refunds to domestic water customers who paid Tier 3, 4, or 5 rates for water between June 28, 2015 through April 30, 2017 (the “Refund Period”), based upon the difference between the rate paid for Tiers 3, 4, & 5 water and \$11.09/hcf during Rate Stabilization Period (February 10, 2016 - November 16, 2016) and \$9.06/hcf during the rest of the Refund Period.

***Under the terms of the Settlement, the amount of your refund is calculated to be \$*** [REDACTED]. Unless you choose to opt-out of the Settlement, this amount will be paid to you automatically and you do not need to take any further action. Your payment will be issued after the Court has held a Fairness Hearing (described below) and given final approval to the Settlement.

Additionally, under the terms of the Settlement the claims related to Hillsborough’s drought penalties will be dismissed with prejudice and class members will release all rights, claims, and actions arising out of or relating to the water rate claims, including those claims arising from Ordinance No. 731. Hillsborough has also agreed to pay up to **\$450,000.00** for attorneys’ fees, for expenses incurred by the plaintiffs, and for service awards to the class representatives. The Settlement is subject to Court approval and the full Settlement Agreement is available at: [INSERT WEBSITE].

If you do not wish to be part of the Settlement or receive a refund, you may choose to opt-out of the Settlement. Additionally, you have the right to object to the Settlement or any portion of the

Settlement. For more information on opting out of the Settlement or objecting to the Settlement, please go to [\[INSERT WEBSITE\]](#) and review the Long Form Class Notice posted there.

The Court has preliminarily approved the Settlement and has scheduled a Fairness Hearing for [\[INSERT DATE, TIME, PLACE\]](#). At the Fairness Hearing, the court will make a final determination whether the Settlement is fair, adequate and reasonable; and will also consider Class Counsel's request for attorney's fees and expenses and the request for a service award to the Class Representatives.

### **MORE INFORMATION**

This is a Short Form Notice that provides only partial information regarding the Settlement. A Long Form Class Notice with more details about the Settlement Agreement, the deadlines and procedures can be found on the internet at [\[INSERT WEBSITE\]](#).

### **PLEASE DO NOT CALL THE COURT OR HILLSBOROUGH FOR ADDITIONAL INFORMATION OR ADVICE.**

If you have additional questions, you may contact your own attorney, the Claims Administrator, or Class Counsel. The claims administrator can be contact at the following number: [\[INSERT NUMBER\]](#).

Class Counsel can be contacted at the following address:

WALKER, HAMILTON & KOENIG, LLP  
Beau R. Burbidge  
[bburbidge@whk-law.com](mailto:bburbidge@whk-law.com)  
50 Francisco Street, Ste. 460  
San Francisco, CA 94133  
Telephone: (415) 986-3339

# **EXHIBIT B**

*The Superior Court of California for the County of San Mateo*

**NOTICE OF PENDING CLASS ACTION SETTLEMENT  
WITH THE TOWN OF HILLSBOROUGH  
[ADD WEBSITE ADDRESS]**

**IF YOU WERE A DOMESTIC WATER CUSTOMER OF THE TOWN OF  
HILLSBOROUGH DURING THE PERIOD JUNE 28, 2015, THROUGH APRIL 30, 2017,  
YOUR LEGAL RIGHTS ARE BEING AFFECTED.**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>	
Refunds For Current Customers And Former Customers Whose Addresses Can Be Located	If you had a domestic water customer account with the Town of Hillsborough during the period June 28, 2015 through April 30, 2017, and paid for water in Tiers 3, 4, and 5, you are entitled to a refund based upon the difference between the rate you paid and an agreed upon settlement rate. Current customers and former customers whose addresses can be located through a skip trace search performed by the Settlement Administrator will be paid refunds via check mailed by the Settlement Administrator in the amount calculated by Hillsborough and stated in the Summary Notice. The amount of this refund was provided to you in the Summary Notice sent by mail to your address. If you wish to receive the refund and be part of the Settlement, you do not need to take any further steps.
Refunds for Former Customers Whose Addresses Cannot Be Located	If you had a domestic water customer account with the Town of Hillsborough during the period June 28, 2015 through April 30, 2017, and paid for water in Tiers 3, 4, and 5, but did not receive a notice by mail, you can receive a refund by submitting a Refund Claim Form to the Settlement Administrator. Refund Claim forms can be found by going to <b>[INSERT WEBSITE]</b> . The Refund Claim Form must be mailed or emailed to the Settlement Administrator, or can be made by calling the Settlement Administrator. Refund claims must be made by <b>[INSERT DATE]</b> .
Opt-Out of the Settlement	If you do not wish to participate in the Settlement or be part of the Class, you may opt out of the class action and will not be entitled to any refund from the Settlement. In order to opt out of the class action, you need to submit the attached Opt-Out Form before <b>[INSERT DATE]</b> .
Object to the Settlement	If you do not opt out of the Settlement, you have the right to file an objection to the Settlement and Class Counsel's application for attorney's fees and reimbursement of expenses with the Court. The Settlement will be considered by the Court on <b>[INSERT DATE]</b> . The deadline to file objections with the Court is <b>[INSERT DATE]</b> .



## **CASE AND SETTLEMENT OVERVIEW**

### **BRIEF EXPLANATION OF THE CASE**

This Notice advises you of your rights to participate in a proposed class action Settlement with the Town of Hillsborough (“Hillsborough” or “Town”).

On November 8, 2016, Plaintiffs Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers, individually and on behalf of all other similarly situated persons (“Plaintiffs”) filed a Class Action Complaint and Petition for Writ of Mandate against Hillsborough in the Superior Court of California for the County of San Mateo (the “Court”) as Case No. 18CIV02284 (the “Action” or “Lawsuit”). The Honorable V. Raymond Swope is presiding over the Action.

In the Action, Plaintiffs challenged Ordinance No. 725, which was adopted by Hillsborough and went into effect on June 9, 2015, and established a scheme of water rationing for water customers in the Town (“Drought Penalty Ordinance”), and Ordinance No. 731, which was adopted by Hillsborough and went into effect on February 1, 2016, and, in part, established new water rates for residential water users (“Rate Ordinance”). Plaintiffs contend the drought penalties adopted in Ordinance No. 725 violate the procedural and substantive requirements of Proposition 218, and that the water rates adopted in Ordinance No. 731 do not comply with Proposition 218 and that the water rates in effect prior to and after the adoption of Ordinance No. 731 also did not comply Proposition 218 (collectively, the “Claims”). Hillsborough filed an answer and has vigorously defended the drought penalties and water rates.

In 2020, the Court approved a Ratepayer Class made up of “All residential water service customers of the Town of Hillsborough who have paid in excess of Tier 2 in a billing cycle during the time period from June 28, 2015 through April 30, 2017” and a Drought Penalty Class made up of “All residential water service customers of the Town of Hillsborough, who were assessed and paid penalties pursuant to Town of Hillsborough Ordinance No. 725, and exhausted their administrative remedies.” Petitioners Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers were appointed as the Class Representatives of the Ratepayer Class (“Rate Class Representatives”). Petitioners Charles Bolton, John Lockton, and Charles Syers were appointed as the Class Representatives of the Drought Penalty Class (“Drought Penalty Class Representatives”). The Court designated Attorneys Beau Burbidge, Walter H. Walker, III, and Peter J. Koenig of Walker, Hamilton & Koenig, LLP, as Class Counsel (“Class Counsel”).

### **EXPLANATION OF THE SETTLEMENT**

After years of litigating, the parties participated in mediation and have negotiated a proposed Settlement (the “Settlement”) of the Lawsuit. The Settlement is contingent upon final approval by the Court pursuant to California Rules of Court, Rule 3.769. The full Settlement Agreement is available at: [\[INSERT WEBSITE\]](#).

The Settlement represents the compromise of highly-contested issues in the Lawsuit. Hillsborough has vigorously denied and continues to dispute all of the claims and contentions alleged in the Lawsuit, and denies any and all allegations of wrongdoing, fault, liability, or damage of any kind. Hillsborough further denies that it acted improperly or wrongfully in any way, and believes that the Lawsuit and Claims have no merit. Nonetheless, Hillsborough has carefully considered the risks and rewards of further litigation, and concluded that it is in the best interest of the Town to enter into this Settlement.

Class Counsel, who has substantial experience in Proposition 218 litigation, carefully reviewed the record, considered the risks and rewards of further litigation, and concluded that it was in the best interest of the Class to enter into this Settlement. The Rate Class Representatives and Drought Penalty Class Representatives support and have approved the Settlement.

Under the terms of the Settlement Agreement, Hillsborough will pay refunds automatically to all Class Members whose addresses are known or can be located through a search in the National Change of Address Database. Any Class Members who cannot be located may submit a claim form to receive a refund. The amount of each Class Member's refund will be based upon the difference between the rate paid by the member of the Settlement Class for Tiers 3, 4, & 5 water and \$11.09/hcf during the Rate Stabilization Period (February 10, 2016-November 16, 2016) and \$9.06/hcf during the rest of the Refund Period.

All refunds, and all opt-outs and objections for the Settlement will be administered by a third-party claims administrator, Phoenix Settlement Administrators. If the Settlement is approved by the Court, the claims administrator will cause the refunds to be distributed to the Settlement Class as directed by the Court. Following approval of the Settlement, the claims related to the Drought Penalties will be dismissed with prejudice and all rights, claims, and actions arising out of, or relating to, the facts and circumstances giving rise to the Lawsuit's water rate claims will be released.

Under the Settlement, Hillsborough has agreed to pay up to **\$450,000.00** for attorney fees, for expenses incurred by the Plaintiffs, and for service awards to the Class Representatives. Class Counsel will be seeking court approval for payment of a service award in the amount of \$5,000 to \$8,000 to be paid to each of the Class Representatives, and for approval of the balance of the \$450,000 to be paid for attorneys' fees and costs incurred by the Plaintiffs.

## **PRELIMINARY COURT APPROVAL OF SETTLEMENT**

The Settlement is subject to Court approval. The Court has made a preliminary determination that the Settlement might be fair, adequate, and reasonable, and has preliminarily approved the Settlement. The Settlement must now be approved by the Court after notice to the Class and an opportunity for class members to object.

## **FINAL APPROVAL HEARING**

The Court has scheduled a final approval hearing to be held on [REDACTED] at [REDACTED] in Department 23 of the San Mateo County Superior Court located at 400 County Center, Redwood

City, CA 94063 (“Fairness Hearing”). At the Fairness Hearing, the parties will seek approval from the Court and a final determination whether the Settlement is fair, adequate, and reasonable.

The date and time of the Fairness Hearing is subject to change. If there is a change, the new date and time will be posted on the website [www.sanmateocourt.org](http://www.sanmateocourt.org). You are advised to check the website before you appear at the Fairness Hearing.

### **YOUR OPTIONS**

#### **AUTOMATIC REFUNDS FOR CURRENT AND LOCATED FORMER CUSTOMERS**

Under the settlement, domestic water customers of Hillsborough during the period June 28, 2015 to April 30, 2017 (“Refund Period”), who paid in excess of Tier 2 water rates in a billing cycle during the Refund Period, are considered members of the Class and are entitled to refunds. For Class members who are current customers, and for those who are former customers and whose addresses could be located, a Notice was sent to each customer explaining the Settlement and stating the amount of each customer’s refund. These refunds will be issued automatically and no additional action is needed. Refunds will be issued upon final approval of the Settlement by the Court.

#### **ALTERNATE PROCESS TO CLAIM A REFUND**

Former customers who are members of the Class and who did not receive a Notice and/or whose addresses could not be located can still receive a refund under the Settlement by submitting a claim form. If you are a former customer and did not receive a Notice in the mail, you must take the following steps to participate in the Settlement and be eligible for a refund:

1. **Download and complete a Refund Claim Form (available at [INSERT WEBSITE]) and mail it to the Claims Administrator at the below address, by first-class United States Mail, postage paid, and postmarked no later than [DATE];**
2. **Download and complete a Refund Claim Form (available at [INSERT WEBSITE]) and email it to the Claims Administrator at the below email address no later than [DATE]; or**
3. **Call the Claims Administrator at the below number to submit a claim by phone no later than [DATE].**

**[CLAIMS ADMINISTRATOR ADDRESS, EMAIL, and PHONE]**

***NOTE: Your personal information will be kept confidential and will not be used for any purpose other than the administration of this Settlement.***

Following submission of a claim, the claimant’s membership in the Class and their entitlement to a refund will be verified. Refunds will then be issued to verified Class members upon final approval of the Settlement.

## OPTING OUT OF THE SETTLEMENT

If you do not wish to receive a refund or participate in the Settlement or this class action, you may opt out of the Settlement and class action by submitting an Opt-Out Form, which may be found at [\[INSERT LINK\]](#). By submitting this form, you will not be entitled to receive money from the class Settlement and you will not be bound by the terms of the Settlement. If you wish to assert any claims related to those set forth in the lawsuit, you will have to do so separately. Opt-Out Forms must be submitted to the Claims Administrator and must be postmarked by [\[INSERT DATE\]](#) (the “Exclusion Deadline”).

## OBJECTION TO SETTLEMENT

If you do not opt out of the Settlement, you will have the right to object to the fairness, adequacy, or reasonableness of the Settlement. You also have a right to object to Class Counsel’s application for attorney’s fees and expenses and the request for a service award.

If you wish for the Court to consider your objection(s), you must complete an objection form, which may be found at [\[INSERT LINK\]](#), and then deliver the objections to the claims administrator, Class Counsel, Hillsborough’s Counsel by first class United States mail, postage paid, and postmarked no later than [\[INSERT DATE\]](#). Objections must also be filed with the Court no later than [\[INSERT DATE\]](#).

The address of the claims administrator is as follows:

[\[INSERT ADDRESS\]](#)

The addresses for counsel and the Court are as follows:

<i>Class Counsel</i>	<i>Hillsborough’s Counsel</i>	<i>Court</i>
WALKER, HAMILTON & KOENIG, LLP Beau R. Burbidge 50 Francisco Street, Suite 460 San Francisco, California 94133 Telephone: (415) 986-3339	BEST BEST & KRIEGER LLP Harriet A. Steiner James B. Gilpin 500 Capitol Mall, Suite 1700 Sacramento, California 95814 Telephone: (916) 325-4000	Superior Court of California, County of San Mateo Department 23 400 County Center Redwood City, California 94063 Telephone: (650) 261-5123

If you submit a timely and proper objection, you may appear at the Fairness Hearing personally or through an attorney at your own expense. You are not required to appear at the Fairness Hearing to object. If you fail to comply with these requirements, you shall be deemed to have waived and forfeited any and all rights you may have to appear at the Fairness Hearing or to object to the Settlement, award of attorneys’ fees and expenses, and service award.

If the Court deems the Settlement to be fair, reasonable, and adequate, it will enter a Final Order and Judgment approving the Settlement. Following approval by the Court and entry of the Final Order and Judgment, under the terms of the Settlement, all Class Members will be deemed to have

released and forever discharged Hillsborough from any and all water rates claims alleged in the Lawsuit.

### **MORE INFORMATION**

The best way to obtain more information about this Settlement is to review the documents posted on the website **[INSERT WEBSITE]**. Other papers related to this lawsuit may be obtained from the Court at 400 County Center, Redwood City, CA 94063 during its regular business hours, or on the Court's website: [www.sanmateocourt.org](http://www.sanmateocourt.org).

### **PLEASE DO NOT CALL THE COURT OR HILLSBOROUGH FOR ADDITIONAL INFORMATION OR ADVICE**

If you have additional questions, you may contact the claims administrator, Phoenix Settlement Administrators, your own attorney, or Class Counsel.

Phoenix Settlement Administrators can be contacted at the following address:

**[INSERT ADDRESS AND PHONE]**

Class Counsel can be contacted at the following address:

WALKER, HAMILTON & KOENIG, LLP  
Beau R. Burbidge  
50 Francisco Street, Suite 460  
San Francisco, California 94133  
Telephone: (415) 986-3339

# **EXHIBIT C**

**REFUND CLAIM FORM**

*Baruh et al. v. Town of Hillsborough*  
San Mateo County Superior Court Case No. 16CIV02284

**MUST BE SUBMITTED BY [INSERT DATE]**

If you did not receive a Summary Notice regarding your refund and want to participate in the Class and be eligible to receive a refund, you need to do one of the following:

1. Download and complete a Refund Claim Form (available at [INSERT WEBSITE]) and mail it to the Claims Administrator at the below address, by first-class United States Mail, postage paid, and postmarked no later than [DATE];
2. Download and complete a Refund Claim Form (available at [INSERT WEBSITE]) and email it to the Claims Administrator at the below email address no later than [DATE]; or
3. Call the Claims Administrator at the below number to submit a claim by phone no later than [DATE].

[CLAIMS ADMINISTRATOR ADDRESS, EMAIL, and  
PHONE]

Upon receipt of your Form, your entitlement to a refund will be verified and if you are found to be a member of the class and entitled to a refund, one will be issued to you by mail upon final approval of the settlement.

*NOTE: Your personal information will be kept confidential and will not be used for any purpose other than the administration of this settlement.*

---

**REFUND CLAIM FORM**

I wish to participate in the Settlement in the above-referenced case. I understand that under the terms of the proposed Settlement that I may be entitled to a refund and Settlement benefits, and if so that I will be bound by the terms of the Settlement Agreement.

**NAME:** \_\_\_\_\_

**MAILING ADDRESS:** \_\_\_\_\_  
(Where your refund will be sent.)

**PROPERTY ADDRESS:** \_\_\_\_\_  
(Where your domestic water service is/was received.)

I confirm that I received or paid for domestic water service from the Town of Hillsborough during the refund period June 28, 2015 to April 30, 2017.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Signature



# **EXHIBIT D**

**OPT-OUT FORM**

*Baruh et al. v. Town of Hillsborough*  
San Mateo County Superior Court Case No. 16CIV02284

**This is NOT a Claim Form. It EXCLUDES you from this Class Action.  
DO NOT use this Form if you wish to remain IN this Class Action.**

**NAME:** \_\_\_\_\_

**MAILING ADDRESS:** \_\_\_\_\_  
(Your current address)

**PROPERTY ADDRESS:** \_\_\_\_\_  
(Where your domestic water service is/was received.)

*I understand that by opting out of this Class Action, I will be excluded from the settlement in the above-captioned case. I understand I will not receive money from the class settlement. I understand that by signing this side of the form, I voluntarily choose to “opt out” of the proposed Settlement of this Class Action. I understand that by opting out, I may not accept any money allocated for me in the proposed Settlement. On the other hand, I also understand that if I wish to assert any claims related to those set forth in this lawsuit, I will have to do so separately. I understand that any such claims are subject to strict time limits, known as statutes of limitations, which restrict the time within which I may file any such action. I understand that I should consult with an attorney if I wish to obtain advice regarding my rights with respect to this Settlement or my choice to opt out of the Settlement.*

DATED: \_\_\_\_\_  
Signature \_\_\_\_\_

**This form must be postmarked to the claims administrator NO LATER THAN [INSERT DATE], at the addresses below, or else you will lose your right to opt out.**

**[INSERT CLAIMS ADMINISTRATOR ADDRESS]**

# **EXHIBIT E**

**OBJECTION FORM**

<b>San Mateo County Superior Court</b>	
<b>Case Name: <i>Baruh v. Town of Hillsborough</i></b>	<b>OBJECTION TO CLASS SETTLEMENT</b>
<b>Case No. 16CIV02284</b>	

**IF YOU WISH TO OBJECT TO THE CLASS SETTLEMENT, YOU MUST COMPLETE AND FILE THIS FORM WITH THE SAN MATEO COUNTY SUPERIOR COURT AT THE FOLLOWING ADDRESS NO LATER THAN [INSERT DATE]:**

San Mateo Superior Court  
Attn: Dept. 23  
400 County Center  
Redwood City, California 94063

**YOU MUST ALSO SEND COPIES OF THIS OBJECTION FORM TO EACH OF THE FOLLOWING AT THE INDICATED ADDRESS BY FIRST-CLASS UNITED STATES MAIL, POSTAGE PAID, AND POSTMARKED NO LATER THAN [INSERT DATE].**

<i>Claims Administrator</i>	<i>Class Counsel</i>	<i>Hillsborough's Counsel</i>
[INSERT ADDRESS]	WALKER, HAMILTON & KOENIG, LLP Beau R. Burbidge 50 Francisco Street, Suite 460 San Francisco, California 94133	BEST BEST & KRIEGER LLP James B. Gilpin james.gilpin@bbklaw.com 500 Capitol Mall, Suite 1700 Sacramento, California 95814

<b>REQUIRED INFORMATION</b>	
<b>YOUR NAME:</b>	
<b>MAILING ADDRESS:</b> (Where you wish to be contacted)	
<b>PROPERTY ADDRESS:</b> (Where you received water service from the Town of Hillsborough between June 28, 2015 through April 30, 2017)	

**DO YOU INTEND TO APPEAR AT THE FAIRNESS HEARING?**

- Yes
- No

**STATE THE NATURE OF ANY OBJECTION(S) YOU HAVE TO THE CLASS SETTLEMENT INCLUDING LEGAL AUTHORITY:** (You may attach additional pages if necessary. You may also submit any evidence in support of your objection(s).)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_

# **EXHIBIT F**

**NOTICE: IF YOU WERE A DOMESTIC WATER CUSTOMER OF THE TOWN OF HILLSBOROUGH DURING THE PERIOD JUNE 28, 2015 THROUGH APRIL 30, 2017, YOUR RIGHTS MAY BE AFFECTED BY THE SETTLEMENT OF THE CLASS ACTION LAWSUIT. GO TO [INSERT WEBSITE] FOR MORE INFORMATION.**

This Notice advises you of your rights to participate in a proposed class action settlement with the Town of Hillsborough. The class action lawsuit was filed in 2016 against Hillsborough and is currently pending in the Superior Court of California for the County of San Mateo. The Lawsuit contends that the Drought Penalties adopted by Hillsborough in Ordinance No. 725 violate the procedural and substantive requirements of Proposition 218 and that the Water Rates during the period June 28, 2015 through April 30, 2017, including those adopted by Hillsborough in Ordinance No. 731, do not comply with Proposition 218. Hillsborough has vigorously defended the Lawsuit and the Settlement represents a compromise of highly-contested issues.

Under the terms of the Settlement, Hillsborough will pay refunds to domestic water customers who paid Tier 3, 4, or 5 rates for water between June 28, 2015 through April 30, 2017 (the “Refund Period”), based upon the difference between the rate paid for Tiers 3, 4, & 5 water and \$11.09/hcf during Rate Stabilization Period (February 10, 2016 - November 16, 2016) and \$9.06/hcf during the rest of the Refund Period. Hillsborough has agreed to create a Settlement Fund of **\$779,329.00** designated for customer refunds pursuant to the formula described above. Estimated customers refunds range as follows :

<b>Refund Range</b>	<b>Estimated Number of Customers</b>
\$1-\$250	2,402
\$251-\$500	347
\$501-\$1,000	210
\$1,001-\$2,500	115
\$2,501-\$5,000	40
\$5,001-\$10,000	10
Over \$10,001	2
Total	3,126

Additionally, under the terms of the Settlement the claims related to the Drought Penalties will be dismissed with prejudice and class members will release all rights, claims, and actions arising out of, or relating to the water rate claims, including those claims arising from Ordinance No. 731. Hillsborough has also agreed to pay up to **\$450,000.00** for attorneys’ fees, for expenses incurred by the Plaintiffs, and for service awards to the Class Representatives. Unclaimed refunds will be paid to the following organization as a *cy pres* recipient: Water Education Foundation. The Settlement is subject to Court approval and the full Settlement Agreement is available at: [INSERT WEBSITE].

## MAKING A REFUND CLAIM

If you were a domestic water customer of the Town of Hillsborough during the period June 28, 2015, through April 30, 2017, your rights may be affected by this Settlement. If you received a Notice of this Settlement in the mail, a refund will be issued you automatically and you do not need to take further action. However, if you were a customer during the Refund Period and have not received a Notice in the mail, you will need to submit a Claim Form in order to be eligible for a refund. To learn about your rights, your ability to receive a refund, and to make a claim, please go to [\[INSERT WEBSITE\]](#) or contact the Settlement claims administrator at [\[INSERT CONTACT INFORMATION\]](#). *All claims must be submitted no later than [\[INSERT DATE\]](#).*

## OTHER OPTIONS

Members of the class also have the option to opt out of the Settlement. By opting out, Class members will not receive a refund and will not be bound by the Settlement. Additionally, Class members may object to the Settlement or to Plaintiffs' request for attorneys' fees, expenses, or service awards to the class representatives. For more information on opting out or objecting to the Settlement, please go to [\[INSERT WEBSITE\]](#) or contact the Settlement claims administrator at [\[INSERT CONTACT INFORMATION\]](#). *All opt outs and objections must be submitted no later than [\[INSERT DATE\]](#).*

## MORE INFORMATION

For more information on the Settlement, your options, and important deadlines, please go to [\[INSERT WEBSITE\]](#) or contact the Settlement claims administrator at [\[INSERT CONTACT INFORMATION\]](#).



# **EXHIBIT 2**

1 Beau R. Burbidge (SBN 267267)  
2 WALKER, HAMILTON & KOENIG, LLP  
3 50 Francisco Street, Ste. 460  
4 San Francisco, CA 94133  
5 Telephone: (415) 986-3339  
6 Facsimile: (415) 986-1618  
7 Email: [beau@whk-law.com](mailto:beau@whk-law.com)

8 Attorneys for Plaintiffs and Petitioners

9 **SUPERIOR COURT OF CALIFORNIA**

10 **COUNTY OF SAN MATEO**

11 BRAD BARUH, KATHY BARUH,  
12 CHARLES BOLTON, ELDRIDGE GRAY,  
13 JOHN LOCKTON, DAVID MARQUARDT,  
14 PAUL ROCHESTER, ARTHUR  
15 STROMBERG, CHARLES SYERS,  
individually and on behalf of all others  
similarly situated,

16 Plaintiffs and Petitioners,

17 v.

18 TOWN OF HILLSBOROUGH and DOES 1-  
19 100, inclusive,

20 Defendants and Respondents.

Case No. 16CIV02284

**PLAINTIFFS' TRIAL BRIEF ON  
LIABILITY**

**Date: September 1, 2021**

**Time: 9:00 a.m.**

**Dept.: Hon. V. Raymond Swope**

**Dept. 23**

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1 Pursuant to the Court’s June 10, 2021, Order Bifurcating Trial and Setting Trial on  
2 Liability, Plaintiffs submit the following Trial Brief on Liability for the September 1, 2021, trial  
3 on liability to be held before this Court.

4 **I. INTRODUCTION**

5 The provisions of the California Constitution “are mandatory and prohibitory, unless by  
6 express words they are declared to be otherwise.” Cal. Const., Art. I, § 26. As confirmed by our  
7 Supreme Court, “Under this provision, all branches of government are required to comply with  
8 constitutional directives,” and “every constitutional provision is self-executing to this extent, that  
9 everything done in violation of it is void.” *Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th  
10 300, 306-07 (citations omitted).

11 Article XIII D, Section 6, which imposes procedural and substantive requirements for fees  
12 and charges imposed for water service, is one such mandatory constitutional provision. It cannot  
13 simply be disregarded when a government entity determines that following it would be difficult or  
14 inadvisable. Yet that is precisely what the Town of Hillsborough (the “Town”) has done here, in  
15 not one but two different instances.

16 In the first instance, the Town imposed on its water customers a tiered rate system by  
17 which customers using more water paid a higher rate per unit of water than customers using less.  
18 While such a tiered rate structure can be legal, the Constitution requires that those tiered rates be  
19 correlated to the actual cost of providing water service to customers at the various tiers. The  
20 Town, however, imposed its tiered rates without making any attempt to align them with the cost of  
21 service. Then, after a Court of Appeal decision made it clear that such a tiered rate structure was  
22 illegal, the Town waited two years before doing anything about it.

23 In the second instance, the Town imposed a drought penalty on its water customers who  
24 used in excess of a set monthly allotment of water. Not only did this drought penalty clearly  
25 violate the Constitution’s requirement that water rates reflect the cost of service, but the Town also  
26 ignored both statutory and constitutional procedural strictures in its hasty passage of the penalty  
27 ordinance. Compounding these offenses is the fact that at the time the penalty ordinance was  
28 passed, the Town had met and exceeded its water use reduction targets. Thus, not only was this

1 ordinance illegal, it was wholly unnecessary.

2 Plaintiffs here are a group of homeowners and water customers of the Town who seek  
3 relief from the Town's illegal water rates and drought penalties. By this litigation, they do not  
4 seek to challenge the Town's desire for water conservation. In this era of climate change and  
5 drought, all Californians must be conscious of and seek to reduce their water use. Nor does this  
6 litigation seek to challenge the use of tiered water rates, or even penalties (if properly approved),  
7 to motivate customers to conserve water. Many experts opine that such economic incentives are  
8 effective in promoting conservation. Instead, this litigation challenges *the means* by which the  
9 Town imposed its tiered rates and penalties on its customers. Specifically, in imposing these  
10 conservation schemes, the Town ignored procedural and substantive constitutional mandates  
11 meant to protect ratepayers. Ignoring laws meant to protect citizens and taxpayers is simply  
12 impermissible, even when the goal is something as important as promoting conservation. Noble  
13 ends cannot justify improper means.

14 In this brief, after a short discussion of the facts underlying the Town's tiered water rates  
15 and drought penalties (Section II, *infra*), and after a discussion of the applicable law (Section III,  
16 *infra*), Plaintiffs will conclusively demonstrate the illegality of these schemes imposed by the  
17 Town (Sections IV, V, and VI, *infra*).

18 **II. STATEMENT OF FACTS**

19 This statement of facts will provide a brief overview of the Town's water rates from 2015  
20 through 2017, the relevant time period of this litigation, and the Town's drought penalties,  
21 imposed from 2015 to 2016. The discussion will begin with an outline of how the Town's water  
22 rates are structured and a review of the Town's rates in 2015, the Town's cost of service study  
23 performed in 2015 and 2016, and the Town's rate increases in 2016 and 2017. It will then provide  
24 an outline and timeline of the Town's drought penalties, from the Town's water conservation  
25 efforts and successes prior to the enactment of the penalties, to the adoption of the penalties, to the  
26 modification and then abandonment of the penalties.

27 ///

28 ///



1           **A. Facts Relevant to the Town’s Tiered Rate Structure.**

2                   1.       An Introduction to the Town’s Tiered Rate Structure at Issue.

3           The Town of Hillsborough’s sole source of water is the Hetch Hetchy system, owned and  
4 operated by the City and County of San Francisco.<sup>1</sup> The Town pays San Francisco a fixed rate for  
5 this water. In the fiscal year 2014/15, it paid \$2.93 per hundred cubic feet of water (“ccf” or  
6 “unit”).<sup>2</sup> This rate does not vary with the Town’s water use; it pays the same rate whether it  
7 purchases 1 ccf, 100 ccfs, or 1,000 ccfs of water.

8           After purchasing water from San Francisco, the Town then sells that water to its  
9 customers, the Town’s residents. The Town’s water rates charged to customers are composed of  
10 both a fixed and variable component. The fixed component is a set monthly charge to all  
11 customers (also called a “service charge”). The variable component is a charge that fluctuates  
12 based on the amount of water used by a customer (also called a “volumetric charge”). The focus  
13 of this litigation is on the variable component of the Town’s rates and any mention of rates will be  
14 in reference to that component unless otherwise stated.

15           During the time period at issue in this litigation, 2015 through 2017, the Town employed a  
16 five-tier rate structure for residential customers (also called an “inclining block structure”). This  
17 structure was implemented by the Town in order to promote conservation: “The rate per tier unit  
18 increases with water use in order to encourage conservation and efficient water use.”<sup>3</sup>

19           In this tiered rate structure, customers pay increasing amounts per unit of water as their  
20 water usage increases. Thus, for example, in 2015, a customer in Tier 1, using between 0 and 10

21 \_\_\_\_\_  
22 <sup>1</sup> See Water Rate Record (“WRR”), Vol. 5, Tab 90, W-1445.

23       **NOTE:** All pages cited in both plaintiffs’ and defendants’ briefs may be found in the parties’  
24 Joint Appendices, which will be submitted to the Court on August 13, 2021. All documents  
25 from the Administrative Record cited by the parties in their briefs are included in the Joint  
Appendices.

26       The pages cited in this brief may be located in the Joint Appendices by turning to the  
27 appropriate page number (*e.g.*, W-1445) or by using the Joint Appendix Index at the front of  
each Joint Appendix.

28 <sup>2</sup> *Id.* at W-1445, W-1498.

<sup>3</sup> WRR, Vol. 2, Tab 11, W-512.

1 units of water per month, would pay \$7.14 per unit. That customer would then pay the Tier 2 rate,  
2 \$8.44 per unit, for using between 10.1 and 25 units of water. These rates would increase through  
3 Tier 3 for usage from 25.1-50 units (\$9.68 per unit), Tier 4 for usage from 50.1-100 units (\$11.58  
4 per unit), and Tier 5 for usage over 100 units (\$14.18 per unit).<sup>4</sup>

5 The residential water rates enacted in 2015 (applicable to all customers save for public  
6 schools) were as follows<sup>5</sup>:

7

<b>Tier</b>	<b>Monthly Use</b>	<b>Rate (per ccf)</b>
1	0-10	\$7.14
2	10.1-25	\$8.44
3	25.1-50	\$9.68
4	50.1-100	\$11.58
5	Over 100	\$14.18

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12 2. The Town Retains a Consultant to Conduct a Rate Study.

13 On August 11, 2014, the Town retained a firm called HF&H Consultants, LLC to conduct  
14 a rate study.<sup>6</sup> The study focused on three different types of rates: wastewater rates, storm drain  
15 rates, and water rates. Because only water rates are at issue here, discussion of the study will  
16 focus solely on its water rates section and any reference to the study will be to its analysis of water  
17 rates.

18 This was the first study the Town had conducted since 2011, when it had adopted a five-  
19 year schedule of water rates pursuant to Government Code section 53756.<sup>7, 8</sup> Because the five-  
20 year schedule of rates would end in 2015, the Town had commissioned the study in order to  
21 implement a new five-year schedule of rates.

22 Per its contract for services, HF&H was to “prepare simple spreadsheet models” for water  
23 service, with revenue from current rates serving as the baseline for planning the Town’s water

24 <sup>4</sup> WRR, Vol. 2, Tab 11, W-512; WRR, Vol. 3, Tab 43, W-890; WRR, Vol. 4, Tab 73, W-1199.

25 <sup>5</sup> *Id.*

26 <sup>6</sup> WRR, Vol. 2, Tab 10, W-495-508.

27 <sup>7</sup> WRR, Vol. 3, Tab 49, W-951.

28 <sup>8</sup> That Section allows a water agency to set a schedule of fees or charges with automatic adjustments, if that schedule does not exceed five years. Gov’t Code § 53756.

1 revenue requirements. These revenue requirements would be mapped out on a five-year horizon  
2 for planning water rates.<sup>9</sup> The revenue requirements would then serve as the basis for updating  
3 the Town’s current rates and for suggesting alternative rate designs.<sup>10</sup> HF&H would review the  
4 results of this study with the Town and then assist the Town in implementing the new rates  
5 through the Proposition 218 *procedural* processes (*i.e.*, providing notice to ratepayers of the  
6 proposed new rates and holding a public hearing on the proposed rates, which are separate and  
7 apart from the Proposition 218 substantive requirements at issue here).<sup>11</sup>

8 HF&H embarked on its study with a kick-off meeting with Town officials,<sup>12</sup> and as early  
9 as December 2014, it had developed a preliminary recommendation to raise water rates to cover  
10 increased capital expenses and depleted revenues from water conservation.<sup>13</sup> By March 9, 2015,  
11 HF&H had completed a preliminary draft report.<sup>14</sup>

12 Then, on April 20, 2015, the Fourth District Court of Appeal issued its decision in  
13 *Capistrano Taxpayers’ Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.  
14 As discussed in Section III(C), *infra*, the *Capistrano* court invalidated the City of San Juan  
15 Capistrano’s tiered water rate structure because the city had failed to correlate its tiered rates with  
16 the actual cost of providing water service to the different tiers of usage.

17 The Town took note of this decision. At a July 21, 2015, meeting of the Town’s Financial  
18 Advisory Committee, HF&H summarized the decision in a presentation: “*San Juan Capistrano*  
19 Decision / Tiered rates should correspond to costs / Under review by Supreme Court<sup>15</sup> / Basis for  
20 Hillsborough’s rate structure needs support.”<sup>16</sup> In discussing factors to consider for water rate

21 \_\_\_\_\_  
22 <sup>9</sup> WRR, Vol. 2, Tab 10, W-504.

23 <sup>10</sup> *Id.* at W-505.

24 <sup>11</sup> *Id.* at W-505-506.

25 <sup>12</sup> *See* WRR, Vol. 2, Tab 11, W-510-516.

26 <sup>13</sup> *See* WRR, Vol. 2, Tab 12, W517-537; Vol. 2, Tab 17, W-564-578.

27 <sup>14</sup> WRR, Vol. 2, Tab. 20, W-586-628.

28 <sup>15</sup> This statement is incorrect. The *Capistrano* decision was never under review by the Supreme Court.

<sup>16</sup> WRR, Vol. 3, Tab 39, W-803.

1 setting, the presentation stated: “Evaluate rate structure in light of *San Juan Capistrano* / Size of  
2 tiers and rate per tier need to be documented.”<sup>17</sup> Yet, despite realizing its tiered rates were not in  
3 compliance with the *Capistrano* decision, the Town did not suspend those tiered rates pending a  
4 new study nor did it expedite a new study. Instead, it opted to follow HF&H’s recommendation to  
5 push off a new study: “Review tier structure in winter 2016 / document principles for tiered rate  
6 design.”<sup>18</sup>

7 The review of the rate structure in light of the *Capistrano* decision was thus designated as  
8 a “phase two” of the rate study in an August 10, 2015, presentation by HF&H.<sup>19</sup> The Town  
9 formalized this plan in November 2015, when it approved an amendment to its contract with  
10 HF&H.<sup>20</sup> By this amendment, HF&H would conduct a second cost of service study “to assist in  
11 evaluating the existing tiered rates for compliance with the *San Juan Capistrano* decision, which  
12 requires that increasing block water rates reflect the cost of service across the range of usage.”<sup>21</sup>

13 In short, the Town immediately realized the significance of the *Capistrano* holding, and it  
14 also realized the deficiencies in the its tiered rate structure given that holding. Bur rather than  
15 reacting to immediately correct that rate structure, the Town opted to push off any change to the  
16 structure for at least a year.

17 3. The Town Proposes and Adopts New Rates in 2016.

18 On October 12, 2015, HF&H presented an updated draft report on its “*phase one*” rate  
19 study—that is, the one it had been working on during 2015 and that did not account for the  
20 *Capistrano* decision. As summarized in the Town’s Agenda Staff Report, this report “outlines the  
21 rate increases needed to support the projected revenue requirements for the water and sewer rate  
22 enterprise. It is recommended that the Town adopt five years of future rate increases pursuant to

23 \_\_\_\_\_  
24 <sup>17</sup> *Id.* at W-807.

25 <sup>18</sup> *Id.* at W-808; *see also, id.* at W-818: “Review rate structure in winter of 2016 / Implementation  
26 date depends on whether rate increases are adopted for one or two years / Establish rationale for  
tier structure.”

27 <sup>19</sup> WRR, Vol. 3, Tab 41, W-849, W853.

28 <sup>20</sup> WRR, Vol. 4 Tab 57, W-1074.

<sup>21</sup> *Id.* at 1077.

1 the procedural requirements of Proposition 218.”<sup>22</sup> The report noted that these recommended rate  
2 increases made no change to the already-in-place tier structure: “The proposed volume charges are  
3 structured in increasing blocks, which were previously established.”<sup>23</sup> Instead, these rate increases  
4 would take the form of a “revenue stabilization charge,” which would be added “to the existing  
5 increasing block rates” and could be “adjusted to offset the revenue lost due to demand  
6 cutbacks.”<sup>24</sup> In other words, the “revenue stabilization charge” would be a per-unit charge tacked  
7 on to existing rates to make up for lost revenue caused by lower water demands. This revenue  
8 stabilization charge was calculated simply as a 22% increase to the current rates in each of the  
9 tiers.<sup>25</sup> Thus, the proposed charge would increase current rates by \$1.60 in Tier 1, \$1.88 in Tier 2,  
10 \$2.17 in Tier 3, \$2.60 in Tier 4, and \$3.18 in Tier 5.<sup>26</sup>

11 The Town agreed with HF&H’s recommendations and authorized the mailing of a  
12 Proposition 218 notice to its ratepayers, pursuant to Section 6(a), which was sent out in October  
13 2015.<sup>27</sup> At the November 9, 2015, City Council meeting, the Town provided a draft ordinance  
14 reflecting the water rate increases based on the revenue stabilization charge.<sup>28</sup> The public hearing  
15 on these increases was scheduled for December 2015, and, if appropriate, the increases were  
16 scheduled to be adopted at the January 2016, meeting.<sup>29</sup>

17 As scheduled, a public hearing on the Town’s proposed rate increase was held on  
18 December 14, 2015.<sup>30</sup> Then, at the January 11, 2016, meeting, the City Council adopted  
19 Ordinance No. 731, which enacted the rate increases and set a five-year schedule of maximum  
20

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21  
22 <sup>22</sup> WRR, Vol. 3, Tab 49, W-931.

23 <sup>23</sup> *Id.* at W-942.

24 <sup>24</sup> *Id.* at W-951, W-964-965.

25 <sup>25</sup> *Id.* at W-964

26 <sup>26</sup> *Id.*

27 <sup>27</sup> WRR, Vol. 3, Tab 52, W-997-998; *see also* WRR, Vol. 4, Tab 58, W-1081.

28 <sup>28</sup> WRR, Vol. 4, Tab 58, W-1081-1088.

29 <sup>29</sup> *Id.* at W-1081.

30 <sup>30</sup> WRR, Vol. 4, Tab 63, W-1100-1111; Tab 64, W-1112-1125.

1 rates.<sup>31</sup> The Council further adopted Resolution No. 16-01, in which the Town officially set its  
2 2016 water rates, to be effective in February 2016.<sup>32</sup> Strangely, HF&H’s final cost of service  
3 study report was not released until the next day, January 12, 2016.<sup>33</sup>

4 4. The Town Enacts New Rates in May 2017.

5 Although not reflected in the Town’s administrative record, it is not disputed that HF&H  
6 continued its work in 2016 on “phase two” of its rate study and finalized a report on this phase of  
7 the study on December 12, 2016.<sup>34</sup> The Town then implemented the report’s recommendations  
8 when it adopted Ordinance No. 744 on March 13, 2017, with the ordinance’s new rates going into  
9 effect on May 1, 2017.<sup>35</sup> This marks the end of the relevant period in the case.

10 **B. Facts Applicable to the Town’s Drought Penalties.**

11 1. The Town’s Water Conservation Successes Prior to the Drought Penalties.

12 In January 2014, Governor Brown declared a State of Emergency in California due to  
13 severe drought conditions and called for a voluntary reduction in water use by 20% from 2013  
14 levels.<sup>36</sup> The Town responded to that call, reducing its water use by 16% from January to June  
15 2014.<sup>37</sup> As 2014 continued and drought conditions worsened, the California Water Resources  
16 Control Board (“WRCB”) called for water waste prohibitions.<sup>38</sup> The Town again responded,  
17 adopting Urgency Ordinance No. 717 on August 11, 2014, by which the Town prohibited certain  
18

19 <sup>31</sup> WRR, Vol. 4, Tab 71, W-1164-1167; *see also* Vol. 4, Tab 67, W-1137-1142 (Agenda Staff  
20 Report).

21 <sup>32</sup> WRR, Vol. 4, Tab 72, W-1168-1169; *see also* Vol. 4, Tab 68, W-1143-1146 (Agenda Staff  
22 Report).

23 <sup>33</sup> WRR, Vol. 4, Tab 73, W-1170-1219.

24 <sup>34</sup> *See* Burbidge Decl., Exh. A.

25 <sup>35</sup> *See* <https://www.hillsborough.net/DocumentCenter/View/2679>

26 <sup>36</sup> Drought Penalty Record (“DPR”), Vol. 1, Tab 18, D-229.

27 **Note:** As stated above, the pages from the Drought Penalty Record to which plaintiffs cite  
28 may be found in the Joint Appendix on the drought penalties, which will be provided to the  
Court on August 13, 2021.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

1 water wasting activities and imposed a fine for violations.<sup>39</sup>

2 In January 2015, the Town issued a drought update memo in which it reported a 21%  
3 reduction in water use over the past year from the same period in 2013, with water use down by  
4 51% in November and December of 2014, versus the same months in 2013.<sup>40</sup> The memo also  
5 discussed at length the Town's impressive efforts to promote water conservation.<sup>41</sup>

6 In a February 2015, presentation, the Town reported a 22% decrease in water use during  
7 the past year (from the same period in 2013), and an impressive 38% decrease in December 2014  
8 and January 2015.<sup>42</sup> In this same presentation, the Town began to discuss a proposed water  
9 rationing ordinance and further proposed the creation of a subcommittee to study and make  
10 recommendations on such an ordinance.<sup>43</sup>

11 In April 2015, in response to the WRCB's extension of its 2014 water conservation  
12 resolution, the Town adopted Urgency Ordinance No. 724, which prohibited landscape watering  
13 after rainfall, prohibited serving drinking water at restaurants, and provided for customer  
14 notification of possible leaks.<sup>44</sup>

15 In an April 13, 2015, presentation, the Town discussed an April 1 Executive Order calling  
16 for water use restrictions to achieve a statewide 25% reduction in water use.<sup>45</sup> The presentation  
17 also discussed an expected WRCB resolution that would require a 35% reduction in the Town's  
18 water use.<sup>46</sup> The presentation mapped out a timeline for the resolution, noting a June 1 date by  
19 which the reduction requirements would take effect.<sup>47</sup>

20 On May 5, 2015, the WRCB issued a resolution requiring the Town to cut water use by

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21 <sup>39</sup> DPR, Vol. 1, Tab 21, D-259-261.

22 <sup>40</sup> DPR, Vol. 1, Tab 24, D-264.

23 <sup>41</sup> *Id.* at D264-265.

24 <sup>42</sup> DPR, Vol. 1, Tab 27, D-281.

25 <sup>43</sup> *Id.* at D-274-287.

26 <sup>44</sup> DPR, Vol. 1, Tab 30, D-304-317; Vol. 1, Tab 34, D-374-376.

27 <sup>45</sup> DRP, Vol. 1, Tab 32, D-353.

28 <sup>46</sup> *Id.* at D-356.

<sup>47</sup> *Id.* at D-362.

1 36% from its 2013 levels.<sup>48</sup> At its May 11, 2015, meeting, the City Council discussed this  
2 resolution and further discussed the details of a contemplated mandatory rationing ordinance at  
3 this meeting.<sup>49</sup> Yet instead of presenting an ordinance for discussion at that meeting and then  
4 adoption at the next meeting—as is the normal procedure for ordinances (*see* Gov’t Code §  
5 36934)—the Council opted to present and adopt the rationing ordinance as an urgency ordinance  
6 at the next meeting on June 8.<sup>50</sup>

7 2. The Town Needlessly Passes a Water Rationing Ordinance and Imposes  
8 Drought Penalties.

9 On June 8, 2015, the Town presented and then passed Urgency Ordinance No. 725.<sup>51</sup> This  
10 ordinance enacted a scheme of water rationing by which residential parcels were allotted a certain  
11 amount of water on a monthly basis. Beginning on July 1, parcels that used more than that  
12 allotment would be penalized \$30 per unit of water used in excess of the allotment.<sup>52</sup> The  
13 ordinance further provided that continued excessive water use “shall be cause for the Town to  
14 either install a water flow restrictor at the water meter or disconnect water service to the customer .  
15 . . . .”<sup>53</sup>

16 Strangely, neither the May or June Staff Agenda Reports or meeting presentations make  
17 any mention of the Town’s then-current level of water conservation.<sup>54</sup> In other words, when faced  
18 with a mandatory 36% water reduction, and when contemplating imposing draconian water  
19 rationing penalties, the Town never took stock of how well its already-in-place conservation  
20 measures were working, or how much water it was actually conserving.

21 Had the Town looked at this information before passing a strict water rationing penalty

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22  
23 <sup>48</sup> DPR, Vol. 2, Tab 38, D-398-399; DPR, Vol. 5, Tab 141, D-1734-1744.

24 <sup>49</sup> DPR, Vol. 2, Tab 38, D-389-399, D-408-411.

25 <sup>50</sup> *Id.* at D-413.

26 <sup>51</sup> DPR, Vol. 2, Tab 44, D-507-511; *see also* DPR, Vol. 2, Tab 40, D-424-436 (Agenda Staff  
27 Report).

28 <sup>52</sup> *Id.* at D-509-510.

<sup>53</sup> *Id.* at D-510.

<sup>54</sup> *See* DPR, Vol. 2, Tab 38, D-383-419; Vol. 2, Tab. 40, D424-441; Vol. 2, Tab 42, D459-495.



1 ordinance, it would have found that in May 2015, the Town had reduced its water use by 43%.<sup>55</sup>  
2 In other words, in the month the WRCB reduction targets were set, and the month before the  
3 Town imposed its water rationing ordinance, the Town had exceeded its mandated water reduction  
4 goal by 7%.

5 By June 2015, the month the water rationing ordinance was passed and the month prior to  
6 its taking effect, the Town had reduced its water use by 47%, or 11% beyond its mandated  
7 target!<sup>56</sup> This was the largest reduction among the many water agency customers of San  
8 Francisco, and the third-largest reduction among Bay Area water agencies.<sup>57</sup> In July 2015, the  
9 Town reduced its use by 42.5% compared to July 2013, despite the fact that July 2015 had been a  
10 warmer month than July 2013.<sup>58</sup> In August, the Town had reduced water use by 40.9%, despite  
11 another warmer than average month, for a cumulative June through August (summer month)  
12 reduction of 43.6%.<sup>59</sup> The Town would continue to maintain an above-40% cumulative reduction  
13 through March 2016.<sup>60</sup>

14 3. The Town Modifies its Water Rationing Ordinance and then Does Away  
15 with It.

16 Perhaps indicative of Ordinance No. 725's hasty and ill-conceived adoption, the Town  
17 proceeded to make a series of modifications to the ordinance. On September 15, 2015, the Town  
18 adopted Ordinance No. 727, which slightly modified the appeals provision of the water rationing  
19 ordinance.<sup>61</sup> On October 12, 2015, the Town adopted Ordinance No. 729, which modified the  
20 compliance period by which the water allotment targets under the water rationing ordinance were  
21 measured.<sup>62</sup>

22 \_\_\_\_\_  
23 <sup>55</sup> DPR, Vol. 2, Tab 46, D-516.

24 <sup>56</sup> DPR, Vol. 2, Tab 51, D-554.

25 <sup>57</sup> DPR, Vol. 2, Tab 53, D-565-566.

26 <sup>58</sup> DPR, Vol. 2, Tab 56, D-596.

27 <sup>59</sup> DPR, Vol. 2, Tab 59, D-612, D-617.

28 <sup>60</sup> DPR, Vol. 3, Tab 89, D-924.

<sup>61</sup> DPR, Vol. 2, Tab 61, D-650-651; *and see* Vol. 2, Tab 57, D-597-601 (Agenda Staff Report).

<sup>62</sup> DPR, Vol.2, Tab 67, D-691-692; *and see* Vol. 2, Tab 64, D-656-660 (Agenda Staff Report).

1 On May 9, 2016, the Town adopted Ordinance No. 735, which lengthened a water  
2 rationing compliance period from five to thirteen months.<sup>63</sup> The Town also adopted Ordinance  
3 No. 736, which reduced the water rationing penalty from \$30 to \$10 per unit and did away with  
4 penalties of less than \$250.<sup>64</sup>

5 Finally, on June 11, 2016, the Town adopted Ordinance No. 737, which eliminated the  
6 mandatory rationing scheme after May 31, 2016, and which eliminated drought penalties incurred  
7 from October 1, 2015 through May 31, 2016.<sup>65</sup> As stated in the supporting staff materials, the  
8 purpose of this ordinance was “to eliminate the existing mandatory water rationing and the  
9 penalties attributable thereto.”<sup>66</sup>

10 Despite the fact that they existed only for a year, the Town’s drought penalties were  
11 significant. As of March 2016, the Town had issued 696 penalties to its residents in the amount of  
12 \$1,119,342.<sup>67</sup> Of these penalties, \$548,456 had been paid to the Town while \$425,874 had been  
13 appealed.<sup>68</sup>

14 **III. PROPOSITION 218 AND ITS EFFECT ON WATER RATES**

15 **A. Proposition 218, its Passage, and its Provisions.**

16 On November 5, 1996, California voters approved Proposition 218, which was added to  
17 the California Constitution as Article XIII D and came into effect on July 1, 1997. The language  
18 of Proposition 218 makes its purpose clear:

19 The people of the State of California hereby find and declare that  
20 Proposition 13 was intended to provide effective tax relief and to  
21 require voter approval of tax increases. However, local  
22 governments have subjected taxpayers to excessive tax,  
assessment, fee and charge increases that not only frustrate the  
purposes of voter approval for tax increases, but also threaten the  
economic security of all Californians and the California economy

23  
24 <sup>63</sup> DPR, Vol. 3, Tab 98, D-1016-1017; *and see* Vol. 3, Tab. 94, D-968-972 (Agenda Staff Report).

<sup>64</sup> DPR, Vol. 3, Tab 99, D-1018-1019; *and see* Vol. 3, Tab 95, D-974-984 (Agenda Staff Report).

25 <sup>65</sup> DPR, Vol. 3, Tab 114, D-1173-1174; *and see* Vol. 3, Tab 108, D-1068-1073 (Agenda Staff  
26 Report).

27 <sup>66</sup> DPR Vol. 3, Tab 108, D-1068.

<sup>67</sup> DPR, Vol. 3, Tab 85, D-873.

28 <sup>68</sup> *Id.*

1                    **itself. *This measure protects taxpayers by limiting the methods***  
2                    ***by which local governments exact revenue from taxpayers***  
3                    ***without their consent.***

4                    1996 Cal. Legis. Serv. Prop. 218 (West) (Sec. 2, “Findings and Declarations”) (emphasis added).

5                    This case seeks to enforce the provisions of Section 6 of Article XIII D (hereinafter, simply  
6                    “Section 6”), which governs property-related fees and charges (such as charges for water service).  
7                    Subsection (b)(3) of Section 6 (hereinafter simply “Subsection (b)(3)”) imposes substantive  
8                    requirements for property related fees and charges:

9                                       (b) Requirements for Existing, New or Increased Fees and  
10                                       Charges. A fee or charge shall not be extended, imposed, or  
11                                       increased by any agency unless it meets all of the following  
12                                       requirements:

13                                       . . .

14                                       (3) The amount of a fee or charge imposed upon any parcel or  
15                                       person as an incident of property ownership shall not exceed the  
16                                       proportional cost of the service attributable to the parcel.

17                    Cal. Const., Art. XIII D, § 6(b)(3). Subsection (b)(3) thus prohibits a fee imposed on a property  
18                    from exceeding the cost of providing the service to that property.

19                    In addition to its substantive provisions, Section 6 also contains procedural requirements,  
20                    found in its Subsection (a). These include a requirement that for any proposed new or increased  
21                    fee, an agency must provide written notice to ratepayers describing the amount of the new or  
22                    increased fee, the basis upon which it was calculated, and the reason for the fee or increase. The  
23                    notice must also state the date, time and location for a public hearing on the proposed fee. Cal.  
24                    Const., Art. XIII D, § 6(a)(1). The agency then must conduct a public hearing at which it  
25                    considers all protests to the proposed fee. If written protests against the fee are presented by a  
26                    majority of ratepayers, the agency cannot impose the fee. Cal. Const., Art. XIII D, § 6(a)(2); *see*  
27                    *also Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.

28                    For plaintiffs’ challenge to the Town’s tiered water rate structure, only Section 6’s  
substantive provisions, and specifically Subsection (b)(3), are applicable. However, for plaintiffs’  
challenge to the Town’s drought penalties, both the substantive provisions and the procedural  
provisions of Section 6 apply.

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1           **B.     The Provisions of Proposition 218 Must Be Liberally Construed to Effectuate**  
2           **its Purpose of Making it Easier for Taxpayers to Win Lawsuits, and the Town**  
3           **Bears the Burden to Demonstrate Compliance.**

4           As explained by the Supreme Court in *Silicon Valley Taxpayers' Assn, Inc. v. Santa Clara*  
5           *County Open Space Authority* (2008) 44 Cal.4th 431, 448, “We must enforce the provisions of our  
6           Constitution and may not lightly disregard or blink at a clear constitutional mandate. In so doing,  
7           we are obligated to construe constitutional amendments in a manner that effectuates the voters’  
8           purpose in adopting the law.” This principal of interpretation is important here because the  
9           language of Proposition 218 makes the voters’ intent abundantly clear: “The provisions of this act  
10           shall be liberally construed to effectuate its purposes of limiting local government revenue and  
11           enhancing taxpayer consent.” 1996 Cal. Legis. Serv. Prop. 218 (West) (Sec. 5, “Liberal  
12           Construction”). And, as the Court in *Silicon Valley* noted, “the ballot materials explained to the  
13           voters that Proposition 218 was designed to: . . . make it easier for taxpayers to win lawsuits; and  
14           limit the methods by which local governments exact revenue from taxpayers without their  
15           consent.” 44 Cal.4th at 448.

16           One method by which Proposition 218 effectuates this purpose is by placing the burden on  
17           an agency to demonstrate compliance with Proposition 218 in any legal action contesting the  
18           validity of a property related fee. Cal. Const., Art. XIII D, § 6(b)(5). The Court in *Silicon Valley*,  
19           quoting the Legislative Analyst’s assessment of Proposition 218, explained that this provision  
20           represents a shift of the traditional standard of review:

21                     Currently, the courts allow local governments significant flexibility  
22                     in determining fee and assessment amounts. In lawsuits  
23                     challenging property fees and assessments, the taxpayer generally  
24                     has the ‘burden of proof’ to show that they are not legal. ***This***  
25                     ***measure shifts the burden of proof in these lawsuits to local***  
26                     ***government.*** As a result, it would be easier for taxpayers to win  
27                     lawsuits, resulting in reduced or repealed fees and assessments.

28           44 Cal.4th at 445 (emphasis added) (citation omitted).

          Another way Proposition 218 effects its purpose is by requiring courts to conduct an  
independent review of a challenged action. As stated by the Court in *Silicon Valley*, “Because  
Proposition 218’s underlying purpose was to limit government’s power to exact revenue and to  
curtail the deference that had been traditionally accorded legislative enactments on fees,  
assessments, and charges, a more rigorous standard of review is warranted.” *Id.* at 448. This more

1 rigorous standard requires a court “to make an independent review of local agency decisions”  
2 rather than giving deference to the agency involved. *Id.* at 437.

3 The court in *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015)  
4 235 Cal.App.4th 1493, summarized the major changes brought on under Proposition 218:

- 5 (1) An agency bears the “burden of proof of demonstrating  
6 compliance with Proposition 218;”
- 7 (2) A court must “apply an independent review standard, not  
8 the traditional, deferential standards usually applicable in  
9 challenges to governmental action;” and
- 10 (3) “[I]t is not enough that the agency have substantial  
11 evidence to support its action. That substantial evidence  
12 must itself be able to withstand independent review.”

13 *Id.* at 1506-07; *see also City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926,  
14 933.

15 **C. The *Capistrano* Decision and the Effect of Proposition 218 on Tiered Water  
16 Rates.**

17 Water service is considered a “property related service” subject to the provisions of  
18 Proposition 218. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *see*  
19 *also City of Palmdale, supra*, 198 Cal.App.4th at 934. Those provisions, when applied to water  
20 providers like the Town here, require that water rates reflect the “cost of the service attributable”  
21 to a given parcel of property. *Bighorn*, 39 Cal.4th at 221, n.8. When water rates are tiered, an  
22 agency has “to correlate its tiered prices with the actual cost of providing water at those tiered  
23 levels.” *Capistrano*, 235 Cal.App.4th at 1506.

24 The *Capistrano* decision is still the most recent and remains the controlling decision  
25 regarding tiered water rates in the context of Proposition 218.<sup>69</sup> There, the City of Capistrano  
26 (referred to by the court as “City Water”) had hired a consultant to perform a cost of service study

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27 <sup>69</sup> The *Capistrano* decision is by now well-known among water agencies and their counsel, and it  
28 has been much maligned. But despite the controversy it has created, it has withstood an effort to  
have it depublished and it has been cited as authority by other courts of appeal. There can be no  
question that it is now the binding authority on Proposition 218’s application to tiered water rates.  
As the Supreme Court has held, decisions of every division of the court of appeal are binding on  
all superior courts of the state. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*  
(1962) 57 Cal.2d 450, 455.

1 and set a rate structure, and that rate structure was implemented by City Water in 2010. The cost  
2 of service and rate-setting process was summarized by the court as follows:

3 City Water followed a pattern generally recommended by a manual  
4 used by public water agencies throughout the western United  
5 States known as the “M-1” manual. It first ascertained its total  
6 costs, including things like debt service on previous infrastructural  
7 improvements. It then identified components of its costs, such as  
8 the cost of billing and the cost of water treatment. Next it  
9 identified classes of customers, differentiating, for example,  
10 between “regular lot” residential customers and “large lot”  
11 residential customers, and between construction customers and  
12 agricultural customers. Then, in regard to each class, City Water  
13 calculated four possible budgets for water usage, based on  
14 historical data of usage patterns: low, reasonable, excessive and  
15 very excessive. The four budgets were then used as the basis for  
16 four distinct “tiers” of pricing.

17 *Id.* at 1498-1499. In other words, City Water, after distributing costs among its various customer  
18 classes, split those customer classes into tiers based on predetermined usage budgets (low,  
19 reasonable, excessive, and very excessive). *Id.* at 1498. City Water then set inclining rates based  
20 on those tiers.

21 After City Water implemented its new rate structure, the Capistrano Taxpayers Association  
22 (“CTA”) filed suit contending that the tiers used in the new structure violated Subsection (b)(3)’s  
23 prohibition on fees exceeding “the cost of service attributable to the parcel.” *Id.* at 1501. On a  
24 writ of mandate proceeding, after reviewing City Water’s rate structure, the trial court held that it  
25 was not compliant with Subsection (b)(3), finding there was a lack of any evidence to support the  
26 inequality between the tiers. *Id.* at 1501. The trial court’s decision was then appealed by City  
27 Water.

28 On appeal, the court conducted its own examination of City Water’s rate structure. It  
found that “the difference between tier 1 and tier 2 is a tidy one-third extra, the difference between  
tier 2 and 3 is a similarly exact one-half extra, and the difference between tier 3 and tier 4 is  
precisely five-sixths extra.” *Id.* at 1504-05. In its initial analysis the court noted, “This fractional  
precision suggested to us that City Water did not attempt to correlate its rates with cost of service.  
Such mathematical tidiness is rare in multidecimal-point calculations.” *Id.* And in fact, City  
Water admitted to the court that it had “not tried to correlate the incremental cost of providing  
service at the various incremental tier levels to the prices of water at those levels.” *Id.* at 1505.

1 Instead, “City Water merely used what it thought was its legislative, discretionary power to  
2 attribute percentages of total costs to the various tiers.” *Id.* at 1507.

3 The court found this approach to be invalid:

4 It seems to us that to comply with the Constitution, City Water had  
5 to do more than merely balance its total costs of service with its  
6 total revenues—that’s already covered in subdivision (b)(1). **To**  
7 **comply with subdivision (b)(3), City Water also had to correlate**  
8 **its tiered prices with the actual cost of providing water at those**  
9 **tiered levels. Since City Water didn’t try to calculate the actual**  
10 **costs of service for the various tiers, the trial court’s ruling on**  
11 **tiered pricing must be upheld simply on the basis of the**  
12 **constitutional text.**

13 *Id.* at 1506 (emphasis added).

14 In conclusion, the court held that “if a local government body chooses to impose tiered  
15 rates unilaterally without a vote, those tiers must be based on cost of service for the incremental  
16 level of usage, not predetermined budgets.” *Id.* The court elaborated, stating:

17 [W]e see nothing [Subdivision (b)(3)] that is incompatible with  
18 water agencies passing on the true, marginal cost of water to those  
19 consumers whose extra use of water forces water agencies to incur  
20 higher costs to supply that extra water. Precedent and common  
21 sense both support such an approach. **However, we do hold that**  
22 **above-cost-of-service pricing for tiers of water service is not**  
23 **allowed by Proposition 218 and in this case, City Water did not**  
24 **carry its burden of proving its higher tiers reflected its costs of**  
25 **service.** In fact it has practically admitted those tiers do not reflect  
26 cost of service, as shown by their tidy percentage increments and  
27 City Water’s refusal to defend the calculations.

28 *Id.* at 1516 (emphasis added). It thus affirmed the trial court’s judgment. *Id.*

#### 29 **IV. THE TOWN’S TIERED RATE STRUCTURE IS UNCONSTITUTIONAL**

30 Pursuant to Section 6 and the *Capistrano* decision, the Town bears the burden of proving  
31 that it attempted to correlate its tiered rates with the cost of providing water service at the varying  
32 tiers. A review of the Town’s administrative record reveals that it cannot meet this burden. In  
33 fact, the Town’s administrative record is rife with admissions that the Town never tried to  
34 correlate its tiered rates with the cost of service. For this reason, the Town’s tiered rate structure  
35 must be held to violate the Constitution.

36 ///

37 ///

1           **A.     The Town Fails to Provide Any Evidence whatsoever in Support of its Rates**  
2           **in Effect from June 2015 Through January 2016.**

3           The first period at issue in this case runs from June 28, 2015 (one-year prior to the  
4 submission of Plaintiffs’ government claim (*see* Gov’t Code § 911.2))<sup>70</sup> through January 31, 2016  
5 (the last day before the Town’s 2016 water rates, enacted through Ordinance No. 731, took  
6 effect).<sup>71</sup> As already discussed, the Town bears the burden of proving its compliance with Section  
7 6. *Silicon Valley, supra*, 44 Cal.4th at 445. Yet the Town has not presented an administrative  
8 record for its rates in effect during this period. The Town has thus failed to provide any  
9 information as to how those rates were calculated, any information on the basis for its tiered rate  
10 structure in use during this period, or any information showing that its tiered rates correspond to  
11 the cost of providing service to the various tiers. The Town cannot meet its burden of proof for its  
12 rates in effect during this period and those therefore must be found to violate the Subsection  
13 (b)(3).

14           **B.     The Town and its Rate Consultant Concede That the Tiered Rates in Effect**  
15           **from February 2016 Through April 2017 Were Not Based on the Cost of**  
16           **Providing Service to the Various Tiers.**

17           The second period at issue in this case runs from February 1, 2016 (the first day the rates  
18 enacted through Ordinance No. 731—the 22% revenue stabilization charge—took effect) through  
19 April 30, 2017 (the last day before the rates enacted through Ordinance No. 744 took effect, and  
20 the end of the applicable period in this case). It is this period on which the Town’s administrative  
21 record primarily focuses.

22           Yet despite its volume, this administrative record fails to offer any proof that the Town  
23 attempted to correlate its tiered rates with the cost of providing service at the various tiers. To the  
24 contrary, the record contains numerous admissions that such an effort had not taken place. These  
25 admissions come from both HF&H, hired to perform a rate study for the Town, and from the  
26 Town itself. They provide conclusive evidence that the Town’s rate structure during this period  
27 does not meet the standards of Subsection (b)(3) as set forth in *Capistrano*. The following is a

28 \_\_\_\_\_  
<sup>70</sup> *See* paragraph 4 of Plaintiffs’ Verified Class Action Complaint and Petition for Writ of  
Mandate, filed November 8, 2016.

<sup>71</sup> WRR, Vol. 4, Tab 71, W-1164-1167.



1 partial list of these admissions:

- 2 • HF&H’s July 21, 2015, presentation to the Town reviews the  
3 *Capistrano* decision and states that the “[b]asis for Hillsborough’s  
4 *rate structure needs support*”<sup>72</sup>;
- 5 • In the same presentation, HF&H acknowledges that the Town’s rate  
6 structure should be evaluated in light of the *Capistrano* decision and  
7 that the “size of tiers and rate per tier need to be documented”<sup>73</sup>;
- 8 • In the same presentation, HF&H sets a rate review schedule in which it  
9 plans to review the Town’s tiered rate structure and document  
10 principles for tiered rate design in the winter of 2016<sup>74</sup>;
- 11 • In the same presentation, HF&H again sets forth a schedule to  
12 “[r]eview rate structure in winter of 2016,” and “[e]stablish rationale  
13 *for tier structure*”<sup>75</sup>;
- 14 • The August 10, 2015, presentation by HF&H again contemplates a  
15 phase two of its rate study in which it will “[e]valuate rate structure in  
16 light of *San Juan Capistrano*”<sup>76</sup>;
- 17 • The August 25, 2015, Town Rate Study Review Meeting Agenda  
18 proposes a review of “existing rates per tier and breakpoint locations  
19 between tiers,” and acknowledges there is, “*No documentation for  
20 existing structure until review is complete*”<sup>77</sup>
- 21 • The September 15, 2015, memo from the Town’s Finance Director  
22 regarding the water rate study addresses the proposed rate increases of  
23 2016 and states: “No change in volumetric tiered rates with this 218  
24 notice . . . tiered rates will be reviewed in phase two. It is not  
25 recommended that the Town change the tiered pricing until the phase  
26 two analysis is completed”<sup>78</sup>
- 27 • The October 12, 2015, draft report by HF&H acknowledges that its  
28 proposed volume charges are based on “increasing blocks, which were  
previously established,” states that the proposed revenue stabilization  
charge is to be added on to these existing rates, and further states that  
“[t]he Town proposes to review the volume charge structure when  
time permits to determine any modifications that are needed to

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23 <sup>72</sup> WRR, Vol. 3, Tab 39, W-803.

24 <sup>73</sup> *Id.* at W-807.

25 <sup>74</sup> *Id.* at W-808.

26 <sup>75</sup> *Id.* at W-818 (emphasis added).

27 <sup>76</sup> WRR, Vol. 3, Tab 41, W-853.

27 <sup>77</sup> WRR, Vol. 3, Tab 42, W-885; Tab 43, W-886 (emphasis added).

28 <sup>78</sup> WRR, Vol. 3, Tab 45, W-903.

ensure that the structure is based on the current cost of service”<sup>79</sup>

- A statement in the same report reads, “***The Town intends to conduct a follow-up review of the volumetric water rate structure to determine whether it currently reflects the cost of providing service.*** This review will evaluate the size of each tier and the rate per tier. Based on the results of the review, subsequent modifications to the increasing block rate structure may be warranted. It is expected that this review will be completed in 2016”<sup>80</sup>;
- HF&H’s November 3, 2015, letter to the Town summarizes the scope of its current study: “***To date, we have updated water and sewer rates for adoption in January 2016. The water rate update results in the addition of a drought stabilization surcharge with no change to the existing tiered rate structure***”<sup>81</sup>
- HF&H, in that same letter, discusses a proposal for additional work: “***The Town has now requested HF&H to assist in evaluating the existing tiered rates for compliance with the San Juan Capistrano decision, which requires that increasing block water rates reflect the cost of service across the range of usage***”<sup>82</sup>; and
- Also in that same letter, HF&H requests an amended contract to allow it to do “additional work to evaluate the tiered rate structure” described as: “***The additional work required to evaluate the existing rate structure for compliance with the San Juan Capistrano decision*** will involve working with existing customer billing data to analyze base and extra capacity demands, which will be used for sizing tiers and allocating costs. We will perform a cost of service analysis to allocate costs between the fixed and quantity charges and to allocate the quantity charge portion among the tiers.”<sup>83</sup>

And perhaps the Town’s most definitive admission comes from its 2016 comprehensive cost of service study, which led to the change in rate structure imposed in 2017: “The 2015 rate study was limited to updating the revenue requirement analysis and making adjustments that would stabilize revenue. ***A cost-of-service analysis was not conducted at that time.*** The analysis was limited to updating the revenue requirement projections and making adjustments that would

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<sup>79</sup> WRR, Vol. 3, Tab 49, W-947-948 (emphasis added). This is also reflected in the final report of January 12, 2016. WRR, Vol. 4, Tab 73, W-1184.

<sup>80</sup> *Id.* at W-951. This is also reflected in the final report of January 12, 2016. WRR, Vol. 4, Tab 73, W-1188.

<sup>81</sup> WRR, Vol. 4, Tab 57, W-1077 (emphasis added).

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at W-1077-1078 (emphasis added).

1 stabilize revenue against the revenue shortfall that was caused by conservation.”<sup>84</sup>

2 In summary, following the issuance of the *Capistrano* decision, HF&H and the Town  
3 realized that neither their current rate study nor any previous one had made an attempt to correlate  
4 the Town’s tiered prices with the cost of providing service to those tiers. HF&H acknowledged  
5 this deficiency and acknowledged the requirements set forth in the *Capistrano* decision. It also  
6 acknowledged that the rate changes it recommended for 2016—*i.e.*, the imposition of a flat  
7 revenue stabilization charge—utilized the old, unsupported tier structure. It therefore proposed  
8 conducting a “phase two” to its study to attempt to comply with the *Capistrano* decision and  
9 correlate the Town’s tiered rates with the cost of providing service. And, as discussed, HF&H  
10 completed this study in late 2016 and rates new rates were adopted in May 2017.

11 The Town became aware of the *Capistrano* decision almost immediately after it came  
12 down in April 2015. The Town further knew that its tiered rate structure did not meet the  
13 requirements of Section 6. Yet instead of promptly modifying that rate structure, instead of  
14 temporarily suspending its tiers, instead of offering relief to ratepayers who were being charged  
15 illegal rates, the Town punted, taking no action for two years. While the Town was right to  
16 commission a cost of service study to attempt to bring its tiered rates in compliance with Section 6  
17 and the *Capistrano* decision, that does not excuse it from knowingly charging its customers illegal  
18 rates while it waited for that study to be completed.

19 The Town concedes that its rate structure during this period did not comply with Section 6,  
20 and it is not disputed that the Town did nothing to change that structure until May 2017. While  
21 the Town could have taken steps to suspend its illegal rate structure during this period, it chose not  
22 to. Thus, for this period, the Town’s rate structure must be found to violate Section 6.

23 **C. Regardless of its Concessions, the Town’s Water Rate Study Demonstrates**  
24 **that Its Tiered Rates Do Not Meet the Requirements of Subsection (b)(3).**

25 The Town’s and HF&H’s concessions provide clear and incontrovertible proof of the  
26 inadequacy of the Town’s tiered water rate structure. However, even if these concessions were  
27 disregarded, a review of HF&H’s rate study confirms that the rates enacted by the Town in

28 <sup>84</sup> Burbidge Decl., Exh. A, p. 3.

1 2016—the revenue stabilization charges—did not meet the requirements of Subsection(b)(3).<sup>85</sup>

2 This deficiency of HF&H’s study is readily apparent as its methodology is simple and  
3 straightforward. HF&H looked to the Town’s anticipated future water use and predicted a  
4 continued reduction in water demand as the California drought continued.<sup>86</sup> Because of the  
5 Town’s reliance on volume charges, reduced demand would lead to reduced revenue. Thus,  
6 HF&H aimed to determine by what amount the Town would need to increase rates to make up for  
7 this lost revenue.

8 After reviewing the Town’s operating expenses, projected capital expenses, projected  
9 demand, and water fund reserves, HF&H recommended imposing a revenue stabilization charge  
10 for water customers, which would be added to existing volume charges and applied to the already-  
11 established tiered rate structure.<sup>87</sup> In other words, the only change to water rates proposed by  
12 HF&H was an additional charge tacked onto the Town’s existing rate structure. As stated in the  
13 study’s introduction, the only objective of the study with regard to volumetric water charges was  
14 to “add a revenue stabilization charge to the existing increasing block rates that can be adjusted to  
15 offset revenue lost due to demand cutbacks.”<sup>88</sup>

16 This revenue stabilization charge was calculated based on HF&H’s projection of a \$2  
17 million shortfall in the Town’s water revenue caused by a reduction in water demand.<sup>89</sup> HF&H  
18 calculated that a 22% surcharge on the Town’s current volume charges would increase revenue by  
19 about \$1.5 million while an increase in the fixed meter charge would make up the remaining  
20 \$500,000.<sup>90</sup> Thus, the revenue stabilization charge was calculated as 22% of the current rate at  
21 each tier (e.g., the \$1.60 charge was 22% of the \$7.14 Tier 1 rate; the \$3.18 charge was 22% of the

22 \_\_\_\_\_  
23 <sup>85</sup> Recall, as discussed above, that the Town provided no administrative record for the first period  
24 at issue—the rates in place prior to this time, from 2015-2016. By failing to provide any support,  
the Town all but concedes liability as to these rates.

25 <sup>86</sup> WRR, Vol. 4, Tab 73, W-1183.

26 <sup>87</sup> *Id.* at W-1184-1185.

27 <sup>88</sup> *Id.* at W-1188.

28 <sup>89</sup> *Id.* at W-1201.

<sup>90</sup> *Id.* at W-1200-1201

1 \$14.18 Tier 4 rate).<sup>91</sup> And, as discussed, this revenue stabilization charge was adopted by the  
2 Town in Ordinance No. 731.<sup>92</sup>

3 By simply estimating lost revenue, and then proposing a surcharge to tack onto existing  
4 tier rates to make up for that lost revenue, HF&H’s study did not come close to the level of  
5 analysis necessary to support a tiered rate structure in compliance with Subsection (b)(3). The fact  
6 that its proposed rates simply utilized the existing rate structure, a structure with unknown origins  
7 and bases, demonstrates that the Town failed to analyze the cost of providing service to the  
8 various tiers within the customer classes. In other words, because the Town’s prior rate structure  
9 is not justified—a point essentially conceded by the Town, which has presented no administrative  
10 record supporting it—this new revenue stabilization charge similarly cannot be justified.

11 As held by the court in *Capistrano*, “To comply with subdivision (b)(3), [an agency must]  
12 correlate its tiered prices with the actual cost of providing water at those tiered levels.” 235  
13 Cal.App.4th at 1506. The Town’s study here did not do this and therefore it did not put the Town  
14 in compliance with Subsection (b)(3).

15 **D. The Town Failed to Comply with Subsection (b)(3) in Setting Its Rates and**  
16 **They Are Thus Illegal.**

17 When all of the facts concerning the Town’s water rate structure, cost of service study, and  
18 rate setting process are viewed together, a clear picture of its rates forms. And that picture  
19 definitively confirms that in setting its rates, the Town violated the constitution.

20 The Town has employed a tiered pricing structure for many years, going back far enough  
21 that the Town’s administrative record lacks any information as to the reasons that structure came  
22 about, how it was formed, or the bases for setting the tiers. Even the Town’s rate consultant,  
23 HF&H, did not appear to know about the origins of that rate structure.

24 Although Plaintiffs’ refund claim goes back to June 2015, the Town’s administrative  
25 record lacks any records on the rate structure in place at this time. Instead, the record focuses on  
26 the Town’s rate study commissioned in 2014 and completed in early 2016, and on the rates—or,

27 <sup>91</sup> *Id.*

28 <sup>92</sup> WRR, Vol. 4, Tab 71, W-1164-1167.

1 more accurately, the revenue stabilization add-on charges—adopted in early 2016 based on that  
2 study. Yet that study, which was ongoing at the time of the *Capistrano* decision, readily admitted  
3 both that the Town’s current rate structure could not meet the constitutional requirements set forth  
4 in *Capistrano* and that the study would not attempt to bring the Town in line with those  
5 requirements. Instead, HF&H proposed a second phase to the study, to be conducted later in  
6 2016, that would focus on the constitutional requirements applicable to tiered rates.

7 This new study would not be completed until December 2016, and the new rates derived  
8 from it would not be implemented until May 2017, two years after the *Capistrano* decision. Thus,  
9 for two years the Town knowingly continued to utilize a rate structure that did not pass  
10 constitutional muster and continued to charge its customers rates it knew were illegal.

11 To make its rates constitutional the Town must have either abandoned (at least  
12 temporarily) its tiered rate structure or it must have examined and aligned its tiered rates with the  
13 actual cost of providing water to the various tiers. *Capistrano*, 235 Cal.App.4th at 1506. For two  
14 years, the Town failed to do either of these things. Instead, knowing that its rate structure was  
15 illegal, the Town implemented a revenue stabilization charge in 2016 which utilized that structure.  
16 The Town’s water rates during the two periods at issue, both before and after its adoption of the  
17 stabilization charge, were clearly unconstitutional.

18 **V. THE TOWN’S DROUGHT PENALTIES VIOLATE SECTION 6(B)(3) AND ARE**  
19 **UNCONSTITUTIONAL.**

20 As previously discussed, on June 8, 2015, the Town adopted Urgency Ordinance No.  
21 725.<sup>93</sup> This ordinance established a scheme of water rationing for the Town’s water customers  
22 enforced through “penalties” of \$30 per unit of water used in excess of a customer’s allotted  
23 ration. By imposing this additional charge for water on its customers without any attempt to  
24 correlate it to the cost of providing water service, the Town blatantly violated Section 6,  
25 Subsection (b)(3).  
26  
27

28 <sup>93</sup> DPR, Vol. 2, Tab 44, D-507-511.

1 The Town, having already been educated as to the requirements of that Subsection by the  
2 *Capistrano* decision, cannot have failed to recognize the illegality of this action.<sup>94</sup> Aggravating  
3 that blatant illegality was the fact that this water rationing scheme, and its attendant penalties, was  
4 entirely unnecessary and excessive: By the time the Town had started contemplating such a  
5 scheme, it had already met and exceeded its water use reduction targets.

6 The Town labels its \$30 per unit charge as a “penalty” and thus contends that the strictures  
7 of Proposition 218 do not apply.<sup>95</sup> Yet simply applying that label to a charge for water does not  
8 remove the charge from the purview of Proposition 218. Contrary to the Town’s assertions, its  
9 “penalty” is in fact a charge for a property-related service falling squarely within Proposition  
10 218’s scope.

11 Case law is clear that any charge for water falls within the scope of Proposition 218.  
12 “Proposition 218 restricts the power of public agencies to impose a ‘[f]ee’ or ‘charge,’ defined as  
13 any ‘levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency  
14 upon a parcel or upon a person *as an incident of property ownership*, including a user fee or  
15 charge for a property[-]related service.” *Crawley v. Alameda County Waste Management*  
16 *Authority* (2015) 243 Cal.App.4th 396, 406 (quoting Cal. Const., Art. XIII D, § 2(e)) (emphasis in  
17 original). “The phrase “[p]roperty-related service’ [is] defined to mean ‘a public service *having a*  
18 *direct relationship to property ownership*.” *Id.* (quoting Cal. Const., Art. XIII D, § 2(h))  
19 (emphasis in original). With these definitions in mind, the Supreme Court has held that “a water  
20 service fee is a fee or charge under article XIII D if . . . it is imposed ‘upon a person as an incident

21 \_\_\_\_\_  
22 <sup>94</sup> The Town has previously argued that Water Code section 377(i) (permitting the imposition of a  
23 volumetric penalty to enforce water use limitations) gives it authority to charge drought penalties.  
24 Of course, the statutory Water Code cannot and does not take precedence over the Constitution,  
25 and if this provision contradicts or contravenes Proposition 218, it is invalid. Additionally, this  
26 provision was enacted *weeks after* the Town’s Drought Penalty Ordinance and therefore thus  
27 cannot have provided the Town with legal authority for its penalties. To that end, the version of  
28 Section 377 authorizing the imposition of volumetric penalties was not enacted until June 24,  
2015. *See* 2015 Cal. ALS 27, 2015 Cal. SB 88, 2015 Cal. Stats. ch. 27. Urgency Ordinance No.  
725 was enacted several weeks before that on June 8, 2015. Thus, Section 377’s penalty language  
was not in existence when the Town’s drought penalties were enacted.

<sup>95</sup> *Id.* at D-509-510.

1 of property ownership.” *Richmond v. Shasta Cmty. Servs. Dist.* (2004) 32 Cal.4th 409, 427. As  
2 summarized by the Supreme Court in *Bighorn-Desert View Water Agency, supra*, 39 Cal.4th at  
3 217 (emphasis added):

4 [D]omestic water delivery through a pipeline is a property-related  
5 service within the meaning of [Article XIII D, § 2(e)].  
6 Accordingly, once a property owner or resident has paid the  
7 connection charges and has become a customer of a public water  
8 agency, ***all charges for water delivery incurred thereafter are  
charges for a property-related service***, whether the charge is  
calculated on the basis of consumption or is imposed as a fixed  
monthly fee.

9 Here, the Town’s drought “penalties” were very clearly for a “property-related service”  
10 because they had a direct relationship to the property owner and how much water that owner used.  
11 As provided in Ordinance No. 725:

12 From and after the effective date of this ordinance, water use for  
13 ***each residential and non-residential parcel shall be limited to the  
water allotment for such parcel. . . .*** During any monthly billing  
14 period commencing July 1, 2015, ***a customer with water use in  
excess of the customer’s monthly target shall incur a penalty of  
\$30 per unit of water, or portion thereof, used in excess of the  
applicable target.***<sup>96</sup>

15 In other words, the Town placed a limit on each resident’s water usage and then charged  
16 residents \$30 per unit of water used above that limit. This is not a “penalty” as one might  
17 envision, such as a speeding ticket. A customer wanting to use one unit above his or her allotment  
18 does not violate any law by doing so. Nothing in Ordinance No. 725 makes use above the  
19 allotment illegal. Nor does the Town cut off a customer’s water once the allotment is used.  
20 Instead, if the customer wants to use that extra unit, he or she only needs to pay an added charge,  
21 what the Town tacks on and labels a “penalty.” If the customer is willing to pay that “penalty,” he  
22 or she can have that extra unit of water delivered without issue. Thus, the Town’s drought  
23 penalties were an additional charge for water use, working in essence as an additional tier.

24 Additionally, these “penalties” fall within Proposition 218’s definition of a “fee” or  
25 “charge.” The scope of Proposition 218 is very broad. Cal. Const., Art. XIII D, § 1, provides that  
26 “the provisions of this article shall apply to all assessment, fees and charges, whether imposed  
27

28 <sup>96</sup> *Id.* at D-509-510 (emphasis added).



1 pursuant to state statute or local government charter authority.” (Emphasis added.) And the terms  
2 “fee” and “charge” are defined very broadly as “any levy other than an ad valorem tax, a special  
3 tax, or an assessment imposed by an agency upon a parcel or upon a person as an incident of  
4 property ownership, including a user fee or charge for a property related service.” Cal. Const.,  
5 Art. XIII D, § 2(e). In other words, any levy by a government related to property ownership is  
6 considered a “fee” or “charge” under Proposition 218 unless it is an ad valorem tax, a special tax,  
7 or an assessment on property.

8 The Town has never and cannot argue that its “penalties” are an ad valorem tax, a special  
9 tax, or an assessment. Article XIII D’s definition of a “fee” or “charge” is intentionally broad, and  
10 the Town cannot escape its bounds simply by calling such a fee or charge a “penalty.”<sup>97</sup>

11 In the *Capistrano* case, the City of San Juan Capistrano attempted to make the same  
12 argument the Town makes here: that excessive water use penalties should not be considered  
13 charges within the scope of Proposition 218. The court of appeal firmly rejected that argument:

14 A final justification City Water gives for not tying tier prices to  
15 cost of service is to say it doesn’t make any difference because the  
16 higher tiers can be justified as penalties not within the purview of  
17 Proposition 218 at all. . . .

18 ***But City Water’s penalty rate theory is inconsistent with the  
19 Constitution. It would open up a loophole in article XIII D,  
20 section 6, subdivision (b)(3) so large it would virtually repeal it.***

21 All an agency supplying any service would need to do to  
22 circumvent article XIII D, section 6, subdivision (b)(3), would be  
23 to establish a low legal base use for that service, pass an ordinance  
24 to the effect that any usage above the base amount is illegal, and  
25 then decree that the penalty for such illegal usage equals the  
26 incrementally increased rate for that service. Such a methodology

---

27 <sup>97</sup> The Town *has* previously made an argument that Proposition 218 itself differentiates a penalty  
28 from a tax or charge. It bases this contention on language in Section 1 of Article XIII C (one of  
the two Articles adopted by Proposition 218, Article XIII D being the one at issue here) which  
excludes penalties from its definition of a tax. But the Town fails to mention that that section also  
states: “The local government bears the burden of proving by a preponderance of the evidence that  
a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover  
the reasonable costs of the governmental activity, and that the manner in which those costs are  
allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits  
received from, the governmental activity.” Cal. Const., Art. XIII C, § 1. The Town cannot make  
any showing that its drought penalties meet these criteria and thus, if anything, this Section further  
demonstrates why the Town’s drought penalties fall within Proposition 218’s purview.

1 could easily yield rates that have no relation at all to the actual cost  
2 of providing the service at the penalty levels. *And it would make a  
3 mockery of the Constitution.*

4 *Capistrano*, 235 Cal.App.4th at 1514-15 (emphasis added).

5 While the Town may attempt to distance its “penalties” from this discussion of penalty  
6 rates in *Capistrano*, any such distinction would be of semantics, not substance. That is, the  
7 Town’s drought penalties are clearly an additional tier placed on ratepayers. As with the other  
8 tiers, when customers use over a certain amount of water, they are made to pay a higher amount  
9 for water—\$30 per unit under the drought penalty ordinance. If the Town were permitted to  
10 exempt these “penalties” from Proposition 218, it is not hard to imagine the Town (and then many  
11 other water agencies around California) adopting “penalties” in place of their illegal and  
12 invalidated tiered rate systems. That, of course, was the “loophole” to which the *Capistrano* court  
13 referred and then ensured would not be opened.

14 Proposition 218 is expansive in its scope and it can and does apply to the Town’s  
15 “penalties” here. The definition of a “fee” or “charge” in Article XIII D is very broad and provides  
16 no exception for the imposition of “penalties.” Under the plain language of Article XIII D, the  
17 Town’s drought “penalties” are in fact “fees” or “charges.” As such, they are required to comply  
18 with the provisions of Article XIII D, including Section 6(b)(3). Yet as the administrative record  
19 makes clear, these “penalties” were enacted solely for the purpose of encouraging conservation  
20 and they have no tie whatsoever to the cost of providing water service to Town customers. These  
21 drought “penalties” therefore violate the Constitution.

22 **VI. THE TOWN’S DROUGHT PENALTIES WERE ILLEGALLY ENACTED IN**  
23 **VIOLATION OF THE CONSTITUTION AND STATUTE.**

24 Ordinance No. 725 was passed as an urgency ordinance, pursuant to Government Code  
25 sections 36934 and 36937,<sup>98</sup> because it purportedly was necessary “for the immediate preservation  
26 of the public peace, health, or safety.”<sup>99</sup> See Gov’t Code § 36937. Therefore, no notice was given

27 <sup>98</sup> These sections allow an urgency ordinance to be passed immediately upon introduction rather  
28 than after a five-day minimum waiting period (Gov’t Code § 36934) and allow urgency ordinance  
to take effect immediately rather than 30 days after their passage (Gov’t Code § 36937).

<sup>99</sup> DPR, Vol. 2, Tab 44, D-507.

1 to ratepayers prior to its passage and it was passed immediately upon introduction.<sup>100</sup>

2 Procedurally, Ordinance No. 725 suffers from two fatal problems. First, it violates the procedural  
3 requirements of Article XIII D, Section 6(a). Second, it does not meet the legal requirements for  
4 an urgency ordinance.

5 As already discussed, Section 6(a) contains procedural requirements that must be followed  
6 prior to the imposition of property-related fees or charges. These include a written notice by mail  
7 of the proposed fee or charge to each property owner setting forth the basis for the fee or charge,  
8 and a public hearing following the notice at which time property owners may protest the proposed  
9 fee or charge. Cal. Const., Art. XIII D, § 6(a)(1) and (2). Thus, since the “penalties” that  
10 Ordinance No. 725 adopted are considered “fees” or “charges” within the meaning of Section 6,  
11 the Town was required to comply with the article’s procedural requirements. The Town failed to  
12 do so and its drought “penalties” are therefore procedurally unlawful.

13 Ordinance No. 725 also fails as an urgency ordinance within the meaning of Government  
14 Code sections 36934 and 36937. An urgency ordinance is required to state “relevant **and**  
15 **persuasive** facts necessitating the legislative action.” *Parr v. Municipal Court* (1971) 3 Cal.3d  
16 861, 865. Ordinance No. 725 does not do this. The ordinance states, as its factual justification,  
17 that “urgent action is needed to comply with the requirement that the new regulations adopted by  
18 the Water Resources Control Board be implemented by local jurisdictions by June 1, 2015, and the  
19 Town’s future water allocation is likely to be reduced significantly if water consumption is not  
20 reduced now.”<sup>101</sup>

21 But compliance with the new WRCB regulations did not require mandatory water  
22 rationing and water penalties. The regulations never even discussed rationing or penalties as a  
23 means to reduce water use.<sup>102</sup> What they did require of water suppliers was a reduction in water  
24 use from 2013 levels—36% in Hillsborough’s case.<sup>103</sup> And Hillsborough had already met and

25  
26 <sup>100</sup> See DPR, Vol. 2, Tab 40, D-424-425.

27 <sup>101</sup> DPR, Vol. 2, Tab 44, D-507.

28 <sup>102</sup> See DPR, Vol. 5, Tab 141, D-1734-1744.

<sup>103</sup> DPR, Vol. 2, Tab 38, D-399.

1 exceeded that requirement by the time the WRCB regulations were adopted. Water usage in May  
2 2015 was 43% below 2013 levels, and in June 2015 it was 57% below 2013 levels.<sup>104</sup> Obviously,  
3 the Town’s already-in-place conservation measures had been wildly successful by the time the  
4 urgency ordinance was passed.

5 Strangely, and as already discussed, the Town’s administrative record on Ordinance No.  
6 725 contains no information or analysis regarding the Town’s water reduction achievements.<sup>105</sup> In  
7 pushing through Ordinance No. 725, the Town provided no information to the public or the City  
8 Council as to how much the Town had reduced its water use compared to 2013 levels. When  
9 preparing to impose stringent water-use restrictions, it would seem necessary for the Town to  
10 examine and understand how successful the its conservation efforts had been up to that point. Yet  
11 the Town neglected to do this. Of course, had the Town examined this information, it would have  
12 discovered that it had already met its water-saving target and then some.

13 There simply is no persuasive argument that Ordinance No. 725 was needed “for the  
14 *immediate* preservation of public peace, health, and safety,” and no persuasive argument that the  
15 ordinance could not have been enacted under normal procedures. For this reason, too, the Town’s  
16 drought penalties were unlawfully enacted.

17 **VIII. CONCLUSION**

18 For the foregoing reasons, Plaintiffs respectfully request that this Court find that the Town  
19 is liable: that its tiered water rates during the applicable period and that its drought penalties were  
20 illegal in violation of Proposition 218.

21 DATED: July 1, 2021

WALKER, HAMILTON & KOENIG, LLP

22  
23 By: Beau R. Burbidge  
24 Beau R. Burbidge  
25 Attorneys for Plaintiffs

26  
27 <sup>104</sup> DPR, Vol. 2, Tab 46, D-516.

<sup>104</sup> DPR, Vol. 2, Tab 46, D-516; DPR, Vol. 2, Tab 51, D-554.

28 <sup>105</sup> See DPR, Vol. 2, Tab 38, D-383-419; Vol. 2, Tab 40, D-424-441; Vol. 2, Tab 42, D-459-495.

1 **PROOF OF SERVICE**

2 ***Baruh, et al. v Town of Hillsborough***  
3 San Mateo County Superior Court Case No. 16CIV02284

4 My business address is 50 Francisco Street, Suite 460, San Francisco, California 94133. I  
5 am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18  
6 years and not a party to the within cause. On the date set forth below, I served the foregoing  
document(s) described as:

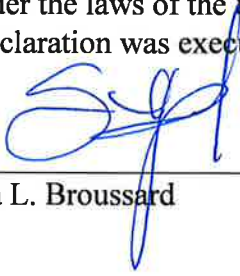
7 **PLAINTIFFS' TRIAL BRIEF ON LIABILITY**

8 on the following person(s) in this action by placing a true copy thereof enclosed in a sealed  
9 envelope addressed as listed below.

10  
11 **[X]** **BY E-MAIL** On **July 1, 2021**, Based on the *April 17, 2020 emergency Rule #12 of the*  
12 *Judicial Counsel's Appendix I, Emergency Rules Related to Covid-19, Governor*  
13 *Newsom's March 19, 2020 EXECUTIVE ORDER N-33-20, and in accordance with*  
14 *C.C.P. §1010.6*, I caused this document to be sent to the parties at the electronic  
15 notification address(es) listed below as an attachment in pdf form. I did not receive,  
16 within a reasonable time after the transmission, any electronic message or other indication  
that the transmission was unsuccessful. This document will be deemed served unless an  
electronic message or other indication that the transmission was unsuccessful was  
received within 24 hours after the transmission.

17 Harriet A. Steiner, Esq. 18 BEST BEST & KRIEGER LLP 19 500 Capitol Mall, Suite 1700 20 Sacramento, CA 95814 21 Tel: (916) 325-4000 22 Fax: (916) 325-4010 <b><i>Attorneys for Defendant Town of Hillsborough</i></b>	<a href="mailto:harriet.steiner@bbklaw.com">harriet.steiner@bbklaw.com</a>
---	--

23 I declare under penalty of perjury under the laws of the State of California that the  
24 foregoing is true and correct, and that this declaration was executed on **July 1, 2021**, at San  
25 Francisco, California.

26 By:   
Serena L. Broussard

# **EXHIBIT 3**

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN MATEO  
11

12 BRAD BARUH, KATHY BARUH,  
CHARLES BOLTON, ELDRIDGE GRAY,  
13 JOHN LOCKTON, DAVID MARQUARDT,  
PAUL ROCHESTER, ARTHUR  
14 STROMBERG, CHARLES SYERS,  
individually and on behalf of all others  
15 similarly situated,

16 Plaintiffs and Petitioners,

17 v.

18 TOWN OF HILLSBOROUGH and DOES 1-  
100, inclusive,  
19

20 Defendants and Respondents.  
21  
22  
23  
24  
25  
26  
27  
28

**Exempt from Filing Fees Pursuant  
to Gov. Code § 6103**

Case No. 16CIV02284

**OPPOSITION BY  
RESPONDENT/DEFENDANT TOWN  
OF HILLSBOROUGH TO MOTION  
FOR ISSUANCE OF WRIT OF  
MANDATE**

Writ Hearing: August 18, 2018

Time: 2:00 p.m.

Dept.: 23

Judge: Hon. V. Raymond Swope

Petition Filed: November 8, 2016

LAW OFFICES OF  
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SACRAMENTO, CALIFORNIA 95814

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1 **I. INTRODUCTION**

2 Petitioners acknowledge the drought emergency that plagued the State at the time the  
3 water rates and drought penalties at issue were implemented, but dismiss the Town's efforts as  
4 illegal based primarily on a single case – *Capistrano Taxpayers Ass'n v. City of San Juan*  
5 *Capistrano*, 235 Cal. App. 4th 1493 (2015). However, nothing in *Capistrano* negated the  
6 constitutionality of tiered water rates like those the Town adopted nor mandated a uniform rate  
7 system like that Petitioners seem to prefer. *Capistrano* emphasized the need to comply with  
8 Proposition 218's cost of service and proportionality requirements in implementing such rates,  
9 but also made clear that "tiered water rate structures and Proposition 218 are thoroughly  
10 compatible." 235 Cal. App. 4th at 1499 n.6.

11 Under a tiered rate structure a proportionately greater share of the cost of providing water  
12 service is borne by those who place proportionately greater demands on an agency's water system  
13 and sources of supply. Thus, tiered rate structures more accurately attribute water service and  
14 more accurately apportion the cost of providing service to individual consumers in harmony with  
15 the constitutional obligation to promote water conservation. Cal. Const., art. X, §2. The Town,  
16 like many other water suppliers, found that the simple solution of allocating the cost of water  
17 service by using a single unit price neither adequately encourages conservation by discouraging  
18 unreasonable use, nor fairly apportions the cost of the service attributable to higher volume users.

19 Petitioners accuse the Town of dragging its feet following *Capistrano* to adopt new rates  
20 with revised tiers based upon an updated, post-*Capistrano* rate study. However, Petitioners filed  
21 this action in November 2016, challenging the Town's tiered water rates, despite that the Town  
22 was already well-underway with a new rate study and extensive public process that resulted in the  
23 adoption of new water rates in March 2017 – rates Petitioners are not challenging – thus, mooted  
24 Petitioners' challenge to the prior water rates. But that change in structure does not mean the  
25 water rates adopted prior to March 2017 were invalid. Setting water rates is a forward looking  
26 exercise and one which involves fluctuation in costs and revenues from customers depending  
27 upon changes in use. Such fluctuations and changes may result, as they did here, in a tiered rate  
28 structure change.

1           The 2015/2016 rates at issue consist of five tiers that proportionally allocate the  
2 incremental costs of service. Although Petitioners seem to assert that tiers cannot satisfy  
3 Proposition 218 when the Town has only one source of water, having to purchase more expensive  
4 sources of water is just one incremental cost that may be allocated to higher users. Increased  
5 system capacity necessary to serve peak use has long been recognized as a valid cost of service  
6 that may be proportionally allocated to higher users via tiered rates. Likewise, in times of  
7 drought while water demands may decrease, the costs of providing service do not go down  
8 commensurately with such demands and the water suppliers require some means of increasing  
9 revenues without dangerously depleting reserves. The Town added a revenue stabilization charge  
10 to its tiered rates in January 2016 to be implemented during such periods of demand reduction.  
11 As borne out by the evidence in the record, the Town has satisfied its burden of proof to establish  
12 that its tiered water rates are commensurate with its costs of service while more accurately  
13 apportioning the incremental costs of the system's capacity to high volume customers.

14           Petitioners may not be satisfied with the Town's chosen rate structure, but that is not the  
15 standard of review. While Proposition 218 shifted the burden of establishing the constitutionality  
16 of the rates to the Town, it did not permit independent judgment review to allow Petitioners or  
17 others to substitute their own judgment for the judgment of the City Council. As long as the  
18 Town presents evidence that its rates do not exceed the costs of service and proportionally  
19 allocates those costs, no further review is appropriate.

20           The standard of review for the drought penalties is more deferential. For such quasi-  
21 legislative acts not subject to Proposition 218, the court "does not concern itself with the wisdom  
22 underlying the agency's action any more than it would were the challenge to a state or federal  
23 legislative enactment." *Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 230 (1991).  
24 Instead, the court confines itself to a determination whether the agency's action has been  
25 "arbitrary, capricious, or entirely lacking in evidentiary support." *Id.*

26           In contrast to the tiered water rates at issue in *Capistrano*, which the city there tried to  
27 justify as penalties, the Town's penalties were true penalties implemented to gain compliance  
28 with mandatory State rationing regulations that required the Town to conserve 36%,

1 cumulatively, as compared to the same time period in 2013, or face fines of up to \$10,000 per  
2 day. The emergency state regulations were adopted on May 5, 2015 and went into effect June 1,  
3 2015, leaving the Town little time to act with summer quickly approaching. In concert with the  
4 State's emergency regulations, the Town amended its water shortage ordinance on June 8, 2015,  
5 the first meeting date after the State's emergency regulations went into effect, with its own  
6 emergency ordinance to implement volumetric drought penalties based on the evidence it had  
7 available to it at the time, which showed that the Town's water reduction under voluntary  
8 conservation measures was around 20% in the first part of 2015 and less than 25% when looking  
9 at 2014 cumulative consumption as compared to 2013 under voluntary conservation measures.  
10 As the Town received monthly consumption data reflecting more significant conservation  
11 indicating the Town was on track to meet the 36% conservation target, the Town again amended  
12 its water penalty provisions and eventually lifted the penalties altogether on June 13, 2016 –  
13 before Petitioners first filed their claim and some five months before this action was filed.

14 The drought penalties were implemented pursuant to water shortage contingency planning  
15 measures and not as part of the tiered water rates. The Town billed the penalties separately and  
16 endeavored via an appeals process to waive or reduce penalties for customers who presented valid  
17 reasons for high water use or repaired leaks responsible for the high water use. Indeed, 93% of  
18 penalties were either waived or significantly reduced as part of the appeal process. The intent of  
19 the penalties was not to raise revenue for the water utility but to attain compliance with the State's  
20 36% conservation standard and avoid State-imposed penalties. The Town acted well within its  
21 discretion and statutory authority to implement the drought penalties as evidenced by the record.

22 **II. THE 2016 WATER RATES AT ISSUE**

23 **A. Standard of Review**

24 California Constitution, article XIII D, section 6(b)(5), added by Proposition 218 in 1996,  
25 concerning property-related fees provides that “[i]n any legal action contesting the validity of a  
26 fee or charge, the burden shall be on the agency to demonstrate compliance.” The court employs  
27 its independent judgment in reviewing the Administrative Record to determine whether the City's  
28 water rates comply with article XIII D, section 6. *City of Palmdale v. Palmdale Water Dist.*,

1 198 Cal. App. 4th 926, 933 (2011). Though the trial court is required to exercise its independent  
2 judgment on the evidence, this “does not mean that the preliminary work performed by the  
3 [Town] in sifting the evidence and in making its findings is wasted effort. ... [I]n weighing the  
4 evidence the courts can and should be assisted by the findings of the [City Council].” *Fukuda v.*  
5 *City of Angels*, 20 Cal. 4th 805, 812 (1999) (explaining independent judgment review in context  
6 of an administrative writ of mandate proceeding). As explained below, the Town has satisfied its  
7 burden with respect to its challenged water and sewer service fees as shown in its extensive  
8 Administrative Record.

9 **B. Statement of Facts**

10 The Town purchases treated wholesale water from the San Francisco Public Utilities  
11 Commission (“SFPUC”), which currently represents the Town’s sole water supply.  
12 {4:73:W-1189} The Town provides water service to its customers through a complex water  
13 distribution system that includes at least 108 miles of water mains, 10 water storage facilities  
14 consisting of 18 water tanks, 14 water pump stations, and over 7,500 assets, such as valves,  
15 hydrants, and meters. {2:17:W-574}<sup>1</sup> The Town has to pay to store and pump the water it  
16 purchases from SFPUC to push the water through steep elevation changes. {4:73:W-1203}

17 The vast majority of the Town’s water customers are residential. {4:73:W-1213; *see also*  
18 2:38:D-400, D-468} In addition, the Town has larger residential lots with much higher per capita  
19 water usage than in most communities. {4:73:W-1213} A significant portion of its water storage  
20 facilities, are necessary to ensure sufficient system capacity to meet the peak demands of these  
21 highest water users. {4:73:W-1199; 7:138:W-2199}

22 On August 11, 2014, the Town’s City Council approved a contract with HF&H  
23 Consultants LLC (HF&H) to conduct a cost of service analysis and rate study. {2:8:W-472} The  
24 purpose of this study was to determine the revenue requirements to cover operations and  
25 maintenance costs and capital improvements for the Town’s water system for the succeeding five  
26 years. {2:8:W-471-472} This rate study was conducted in the midst of the Statewide drought

27  
28 <sup>1</sup> Citations to the Administrative Record are as follows: {Volume #:Tab#:Page #} (Page numbers beginning with a  
“W” refer to the water rate record and page numbers beginning with “D” refer to the drought penalty record.)



1 and mandatory water cutbacks. {2:20:W-587} Mandatory cutbacks in water demand were  
2 projected to result in a nearly \$2.1 million revenue shortfall that jeopardized the Town's bond  
3 rating. {4:73:W-1198, W-1201, W-1208}

4 Additionally, the Town's Capital Improvement Plan identified significant infrastructure  
5 improvements necessary to meet the demands placed on the Town's water system by its  
6 customers, including replacement of aging water mains and rehabilitation and restoration of water  
7 tanks. {2:20:W-587-588; 2:17:W-574-575; 4:63:W-1110; 3:W-1197} Approximately \$12 million  
8 of water projects were projected to be required over the five-year period to be covered by the rate  
9 study, with \$1.4 million per year projected for ongoing capital spending. {*Id.*} The costs of many  
10 of these projects were attributable to high water users. {7:138:W-2199; 7:140:W-2204}

11 The rate structure in effect when HF&H was conducting its rate study consisted of a fixed  
12 charge and a volume charge, which were based upon a 2011 rate study with a five-year rate  
13 structure. {2:11:W-512; 2:20:W-604} The fixed service charge was designed to recover a  
14 portion of the Town's fixed costs, which include those costs that the Town will incur regardless  
15 of how much water is delivered. {*Id.*} The volume charge recovered the remaining portion of  
16 the Town's fixed costs, in addition to the variable costs associated with delivering water, such as  
17 the cost of water supply. {*Id.*} The volume charge was divided into inclining block tiers. {*Id.*}

18 The HF&H rate study demonstrated that the Town needed to take action to protect against  
19 unpredictable revenue losses caused by mandatory water cutbacks. {4:56:W-1068-69} In  
20 consultation with its consultant, the Town determined to shift a larger portion of the Town's fixed  
21 costs onto the fixed cost component of the rates by increasing the fixed charge component of the  
22 water rates. {4:63:W-1100-11; 4:73:W-1170-1219} The Town maintained the existing rate  
23 structure with an increase in the fixed "service charge," which Petitioners are not challenging, and  
24 no change in the volume charge, which was based on the proportional cost of service per tier.  
25 {4:73:W-1199; 7:138:2199} However, to capture the current cost of service of the Town, which  
26 required additional review, the Town determined to continue analyzing the volumetric charge  
27 during phase two of the water rate analysis. {4:63:W-1100}

28 The Town also determined a revenue stabilization charge should be implemented during a

1 drought or other periods of reduced water demand, and hence water revenues, to be lifted when  
2 no longer necessary. {4:63:W-1100; 4:73:W-1189} The revenue stabilization charge was added  
3 to the tiered volume charge in the maximum amount of 22% of the current rate for the volume  
4 charge in each tier, but could be charged at a lower rate to correspond to the level of mandatory  
5 cutbacks. {4:73:W-1201} The revenue stabilization charge was implemented to offset revenue  
6 shortfalls caused by conservation in each tier during a drought or other periods of water shortage.  
7 As such, the revenue stabilization charge was designed to be revenue neutral and not a means of  
8 increasing rate revenue beyond that projected under non-water shortage conditions. {*Id.*}

9 The Town noticed a public hearing more than 45 days prior to the date of the public  
10 hearing on the water rates, which was held on December 14, 2015. {4:63:W-1110-11} The  
11 notice explained that the proposed adjustment to water rates would fund \$10.7 million in water  
12 system improvements and capital improvement projects, including pipeline replacements and  
13 other projects necessary to improve reliability of delivery of water, as well as maintain water  
14 quality and improve operations. {*Id.*}

15 The Town held numerous public forums for the community to be involved in discussions  
16 on the water rates. For example, the water rates were discussed at a November 4, 2015 public  
17 meeting, in which the public was invited to ask questions and learn about the proposed rates.  
18 {*See, e.g.*, 4:53:W-999-1062; 4:54:W-1063-64} At the December 14, 2015 public hearing, the  
19 Town invited the public to make comments and file written protests against the water rates.  
20 {4:65:W-1130} Although there were a total of 4,028 property owners within the Town's service  
21 area eligible to file written protests, only 13 written protests were received. {*Id.*} No comments  
22 were made during the public hearing. {*Id.*} The City Council unanimously waived the first  
23 reading of Ordinance No. 731, which was adopted upon its second reading on January 11, 2016.  
24 {4:67:W-1137} The revised water rates were effective February 1, 2016. {4:71:W-1164-67}

25 C. **Petitioners' Challenge to the Town's Water Rates is Moot and Petitioners'**  
26 **Challenge to the Pre-2016 Rates is Further Barred by Laches.**

27 A case or cause of action becomes moot, such that it no longer presents a justiciable  
28 controversy, "when a court ruling can have no practical effect or cannot provide the parties with

1 effective relief.” *People v. Dunley*, 247 Cal. App. 4th 1438, 1445 (2016); *Jacobs Farm/Del*  
2 *Cabo, Inc. v. Western Farm Service, Inc.*, 190 Cal. App. 4th 1502, 1519 (2010). Courts typically  
3 do not decide moot questions, as they have a duty to avoid making determinations that cannot  
4 affect a matter in issue in the cases before them. *Colony Cove Properties, LLC v. City of Carson*,  
5 187 Cal. App. 4th 1487, 1509 (2010). Moot cases are those in which an actual controversy did  
6 exist but, by the passage of time or a change in circumstances, ceased to exist.” *Wilson & Wilson*  
7 *v. City Council of Redwood City*, 191 Cal. App. 4th 1559, 1573-1574 (2011).

8 Here, Petitioners’ motion seeks a writ of mandate “invalidating the tiered water rate  
9 structure imposed by the [Town] from June 28, 2015 through April 30, 2017 ....” Pets’ Notice of  
10 Motion and Motion, pg. 2:1 – 2:2. Petitioners have based the date on the filing of their claim  
11 under Government Code section 911.2, thus attempting to reach back to challenge the water rates  
12 the City had in place in June 2015 through the adoption of the updated rates in January 2016 and  
13 the rates that were then in place from January 2016 until the Town completed a new rate study  
14 and adopted a revised rate structure with Ordinance No. 744, effective May 1, 2017. See Town’s  
15 Request for Judicial Notice (“RJN”) filed with this brief, Exh. A. But what they fail to  
16 acknowledge is that the court cannot invalidate rates that have already been superseded.  
17 “Because mandamus must operate in the present, an intervening change in law may moot or  
18 otherwise make such relief unavailable.” *Torres v. City of Montebello*, 234 Cal. App. 4th 382,  
19 403 (2015). The rate structure adopted in Ordinance No. 744 is based on an entirely new water  
20 rate study and new Proposition 218 notice. RJN, Exh. A. As such, there is no actual controversy  
21 that can be resolved by issuing a writ of mandamus invalidating these prior rates.<sup>2</sup>

22 Petitioners’ challenge to the 2015 rates in effect prior to those adopted by Ordinance  
23 No. 731 on January 31, 2016 is further barred by the equitable doctrine of laches. Equitable  
24 defenses may be raised in mandamus actions. See *Schellinger Brothers v. City of Sebastopol*,  
25 179 Cal. App. 4th 1245, 1267-68 (2009). Laches is a court-made, equitable doctrine based on the  
26

27 <sup>2</sup> The parties stipulated to bifurcation of this action with Phase I to determine whether Petitioners’ motion for writ of  
28 mandate should be granted. Only if the Court finds that Petitioners are entitled to writ relief will the parties move to  
Phase II to determine the remedy due, such as a refund, though compensatory damages are not recoverable.  
See Gov’t Code § 860.2.

1 “principle that those who neglect their rights may be barred from obtaining relief in equity.”  
2 *Feduniak v. California Coastal Com’n*, 148 Cal. App. 4th 1346, 1381 (2007). Laches is based on  
3 the following elements: (1) Unreasonable delay; and (2) Acquiescence in the act about which  
4 plaintiff complains or prejudice to the defendant resulting from the delay. *Johnson v. City of*  
5 *Loma Linda*, 24 Cal. 4th 61, 68 (2000). Petitioners ask this court to issue a writ of mandate that  
6 invalidates rates that were not even in place when Petitioners filed this action and had been  
7 replaced more than a year earlier. The record reflects that the Town was well underway with the  
8 rate update that resulted in the Ordinance No. 731 rates in 2014 – a process that took more than  
9 one year. {2:8:W-471, 2:10:W-495} Yet Petitioners waited to file this action seeking not only  
10 relief as to the rates in effect at that time, but rates that were in place some six months earlier and  
11 had been in effect since January 1, 2015 – more than a year and a half before Petitioners filed  
12 their claim. {See 4:73:W-1197} The Town approved payment up to \$48,350 to the rate  
13 consultant, HF&H, which was then increased to \$97,500 on June 8, 2015. {2:8:W-471;  
14 3:35:W-762} Petitioners were aware of these commitments of public funds before they filed their  
15 claim and the lengthy process that was underway to the detriment of the Town and the public.  
16 The results of that rate study revealed that the Town faced a \$2,089,000 shortfall in revenue if  
17 rates were not increased in 2016. {4:73:W-1197-98} Petitioners cannot wait for more than one  
18 year while public funds and resources are spent on an updated cost of service analysis and then  
19 seek a writ to set-aside the prior rates.

20 Moreover, to the extent Petitioners seek refunds of the rates in place from June 28, 2015  
21 through January 31, 2016, their claim is barred as will be shown in Phase II of this action if such  
22 proceedings are necessary, based upon the evidence in the Administrative Record affirming that  
23 these rates did not exceed the cost of service. The projections in the original 2011 rate study is  
24 irrelevant to what the Town’s finances showed when it updated the rates in January 2016. The  
25 Town actually needed to increase its fixed charges and implement a revenue stabilization charge  
26 to cover a nearly \$2.1 million revenue shortfall. {4:73:W-1198, W-1201, W-1208} The  
27 volumetric tiers Petitioners take issue with were not changed with the 2016 update. Without an  
28 increase in rates and continued conservation, the Town faced significantly reduced reserves

1 available for debt service, which could in turn result in a downgrade of the Town's bond rating.  
2 {4:73:W-1197-98} Capital improvement projects identified in the comprehensive Water Master  
3 Plan and Seismic Study were also in jeopardy unless the Town increased revenues with increased  
4 fixed service charges and revenue stabilization charges during periods of water cutbacks. {*Id.*}  
5 Any effort by Petitioners to go back in time to the prejudice of the Town's actual financial  
6 position based upon those 2015 rates constitutes unreasonable delay and shows that Petitioners  
7 are not entitled to writ relief as the Town did not exceed its costs of service.

8 **D. The Town's Water Rates Comply with Proposition 218**

9 The Town established its water rates in compliance with a complex legal framework  
10 involving requirements to protect and preserve water resources, and allocated costs based on  
11 industry standards.

12 **1. Changing Regulation Created Uncertainty in Rate-Setting and**  
13 **Required Effective Planning for Future Drought**

14 Public agencies in California have long been faced with the challenge of fairly distributing  
15 water through periods of surplus and scarcity. In recognition of this challenge, article X,  
16 section 2 was added to the California Constitution ("Article X") in 1928. Article X provides, in  
17 relevant part, that water resources of the State "shall be put to a beneficial use to the fullest extent  
18 of which they are capable, and that the waste or unreasonable use or unreasonable method of use  
19 of water be prevented." Article X further provides that the right to reasonable and beneficial use  
20 of water "does not extend to [its] waste or unreasonable use...."

21 Since Article X was added to the California Constitution, California has been subject to  
22 population growth coupled with periods of extended drought and unpredictable precipitation. As  
23 such, lawmakers have taken steps to protect California's water resources. Effective January 1,  
24 2010, a package of water bills known as Senate Bill 7X7 (2009-2010 7th Ex. Sess.) required  
25 urban water suppliers and agricultural water suppliers to develop specific plans for reducing water  
26 use, and take numerous other actions relating to meeting reduction goals.

27 As discussed in Section III of this brief regarding the drought penalties, the Governor  
28 declared a drought state of emergency in January 2014 as result of record-low water levels in

1 California's rivers and reservoirs as well as an abnormally small snowpack. Additional  
2 emergency declarations followed culminating in the implementation of water reduction plans to  
3 reduce potable water usage and the adoption of emergency regulations by the State Water  
4 Resources Control Board ("SWRCB") relating to water conservation. Based on Governor  
5 Brown's mandate, the SWRCB approved regulations assigning mandatory water conservation  
6 standards ranging from 4 percent to 36 percent to individual water agencies based on their per  
7 capita water use in 2013. The Town was required to reduce its water consumption by 36% as a  
8 result of these regulations. In response, the Town ended voluntary water conservation measures  
9 and implemented mandatory water rationing until the SWRCB lifted the mandatory rationing  
10 requirements in May 2016.

11 The shifting regulation and mandatory water cutbacks demonstrates the difficulty the  
12 Town has in providing a reliable water supply while covering its costs of providing service.

## 13 2. The Town's Tiered Water Rates and Revenue Stabilization Charges 14 Are Constitutional

15 In November of 1996, Proposition 204 was adopted by the legislature, which added  
16 section 78500.2 to the California Water Code. Section 78500.2 reiterated that California's  
17 limited water resources must be protected and conserved, and conservation is essential to  
18 California's long-term economic and environmental sustainability.

19 On that same ballot, the California voters adopted Proposition 218, which amended the  
20 California Constitution by, among other things, adding article XIII D. Article XIII D, section 6  
21 added a new category of property-related fees and charges, which were subject to unique  
22 procedural and substantive limitations. Fees and charges for water service have been found to be  
23 property-related. *Bighorn-Desert View Water Agency v. Virjil*, 39 Cal. 4th 205 (2006); *Richmond*  
24 *v. Shasta Cmty. Services Dist.*, 32 Cal. 4th 409 (2004).

25 Water service fees and charges must meet five substantive requirements: (1) revenues  
26 derived from the fee or charge shall not exceed the funds required to provide water service;  
27 (2) revenues derived from the fee or charge shall not be used for any purpose other than that for  
28 which the fee or charge was imposed; (3) the amount of the fee or charge must not exceed the

1 proportional cost of service attributable to the person or parcel charged; (4) no fee or charge may  
2 be imposed for a service unless the service is actually used by, or immediately available to, the  
3 owner of the property in question; and (5) the fee or charge may not be imposed for general  
4 government services. Cal. Const., art. XIII D, §6(b).

5 Petitioner cannot and does not allege that the Town is generating revenue in excess of the  
6 amount necessary to provide water service, nor is Petitioner disputing the purposes for which the  
7 revenues are spent. Petitioner further cannot allege that, by establishing revenue stabilization  
8 charges as safeguards to avoid revenue shortfalls in the face of mandatory reduction, the Town  
9 would receive a windfall in excess of its cost of service. Petitioners' challenge to the Town's  
10 water rates revolves exclusively around Petitioner's disagreement with the Town's methodology  
11 in allocating costs to its customers. Pets.' Memorandum in Support of Writ, pg. 13:13 – 13:17.

12 **a. The Town has Discretion in Apportioning and Allocating Costs.**

13 “Apportionment is not a determination that lends itself to precise calculation.” *Griffith v.*  
14 *Pajaro Valley Water Mgmt. Agency*, 220 Cal. App. 4th 586, 601 (2013), disapproved on other  
15 grounds by *City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191 (2017).  
16 Article XIII D, section 6 does not prohibit the allocation of costs to those that place greater  
17 demands on a water system. *Capistrano Taxpayers Association v. City of San Juan Capistrano*,  
18 235 Cal. App. 4th 1493 (2015). Article XIII D, section 6 prescribes no particular method for  
19 apportioning costs, and a rate structure adopted by a public agency is not invalid merely because a  
20 rate-payer would prefer it be done differently. *Griffith*, 220 Cal. App. 4th at 601.

21 In *Griffith*, the Pajaro Valley Water Management Agency managed the water resources of  
22 the Pajaro Valley Groundwater Basin. *Griffith*, 220 Cal. App. 4th at 590-591. The agency's  
23 service area covered territory along the coast and inland, and coastal areas had been subject to  
24 chronic overdraft and saltwater intrusion. *Id.* The agency was authorized to levy groundwater  
25 augmentation charges on the extraction of groundwater for the purposes of paying the costs of  
26 purchasing, capturing, storing, and distributing supplemental water for use within the agency's  
27 boundaries. *Id.* To protect the groundwater basin, the agency implemented a program to deliver  
28 supplemental water to certain coastal well users and develop other supplemental water projects.

1 *Id.* at 591. The goal was to provide coastal pumpers with an alternative supply, thereby reducing  
2 the amount of water pumped from the basin near the coast and preventing saltwater intrusion. *Id.*  
3 The cost of the program was to be shared by all properties served by a well within the boundaries  
4 of the agency subject to the charge, since all users would benefit from protection of the basin. *Id.*

5 The *Griffith* plaintiffs challenged the agency's charge on numerous grounds, and alleged  
6 that method by which the agency determined the amount of the charges violated the  
7 proportionality requirements of article XIII D, section 6(b) of the California Constitution. *Id.* at  
8 600. The agency used an industry standard method established by the *American Water Works*  
9 *Association's Principles of Water Rates, Fees and Charges: Manual of Water Supply Practices*  
10 (the "M1 Manual"). *Griffith*, 220 Cal. App. 4th at 600. The M1 Manual is the most widely used  
11 rate setting manual among public water purveyors, and the principles and methodologies  
12 established in the M1 Manual for structuring rates for water service fees comply with the  
13 proportionality requirements of article XIII D, section 6(b).

14 Specifically, the agency used the M1 Manual's "revenue-requirements" method for  
15 determining its rates whereby it: (1) calculated its total costs of the chargeable activities;  
16 (2) subtracted all other sources of revenue other than the augmentation charges; and  
17 (3) apportioned the remaining revenue requirement among the augmentation charge customer  
18 classes. *Id.* at 600-601. In upholding the agency's charge, the court found:

19 Given that Proposition 218 prescribes no particular method for  
20 apportioning a fee or charge other than that the amount shall not exceed the  
21 proportional cost of the service attributable to the parcel, defendant's  
22 method of grouping similar users together for the same augmentation rate  
23 and charging the users according to usage is a reasonable way to apportion  
the cost of service. That there may be other methods favored by plaintiffs  
does not render defendant's method unconstitutional. Proposition 218 does  
not require a more finely calibrated apportion. *Id.* at 601.

24 Similarly, the City of Lemon Grove's informal methodology for establishing its rates for  
25 sewer service fees and justifying its transfer to the city's general fund were deemed sufficient for  
26 purposes of article XIII D, section 6 of the California Constitution. *Moore v. City of Lemon*  
27 *Grove*, 237 Cal. App. 4th 363, 366. The city provided sewer services to its customers through its  
28 sanitation district, and charged its customers sewer service fees. *Id.* A portion of sewer service



1 fee revenues were transferred periodically to the city’s general fund. *Id.* The transfer was  
2 intended to reimburse the city for services provided and costs incurred on behalf of the district.  
3 *Id.* The plaintiff alleged that the transfer to the general fund violated article XIII D, section 6 of  
4 the California Constitution. *Id.* at 367. The city used informal methods to determine staff time  
5 and other resources spent to provide sewer services, and informal methods for calculating the  
6 district’s share of overhead and other expenses. *Id.* at 370-372. It was not relevant whether  
7 petitioner, or even the court, agreed with the methodology used by the city: “While the  
8 informality of Respondents’ method for determining the percentage of time employees spend on  
9 district matters is not ideal, we concur with the trial court’s implied conclusion that no  
10 unconstitutionality exists.” *Id.* at 373.

11 **b. Increasing Block Rates Appropriately Shift Costs of High**  
12 **Water Use to High Water Users.**

13 Managing water resources through rate design is a well-established and vital practice in  
14 California, both before and after the voters approved Proposition 218. The function of rate design  
15 in allocating costs to protect water resources is so fundamental that it was authorized by the  
16 California Legislature in California Water Code section 375(b), and further expanded in sections  
17 300 through 374. While section 375 pre-dates Proposition 218, sections 370 through 374,  
18 authorizing allocation-based rates (a form of inclining block rate structure), were adopted over  
19 10 years after the adoption of Proposition 218. With the adoption of Water Code sections  
20 370-374, the Legislature expressly found: “The use of allocation-based conservation water  
21 pricing by entities that sell and distribute water is one effective means by which waste or  
22 unreasonable use of water can be prevented and water can be saved in the interest of the people  
23 and for the public welfare, within the contemplation of [Article X] of the California  
24 Constitution.” Water Code §370(a). These California Water Code provisions specifically  
25 authorize public agencies to establish allocation-based water rates, designed for the purpose of  
26 allocating costs to tiers based on the demand placed on water resources and the system by  
27 particular water users, while simultaneously promoting conservation. *Id.*

28 *Capistrano* affirmed the viability of tiered rates under article XIII D, section 6. The City

1 of San Juan Capistrano adopted allocation-based water rates, with increasing tiers assigned to  
2 each budget. The first two tiers represented indoor and outdoor use, while the remaining two tiers  
3 were for unreasonable and excessive water use. *Id.* at 1499. Petitioner sued the city, alleging  
4 (among other things) that the city’s rates were not proportional to the proportional cost of  
5 providing service in violation of article XIII D, section 6(b)(3). *Id.* at 1501.

6 The city had various sources of supply of water – some more expensive than others – but  
7 failed to show that the costs of such sources of water were attributable to the inclining tiers for  
8 water service. *Id.* at 1516. The court, without any mention of Water Code sections 370-374,  
9 found that the City “practically admitted those tiers do not reflect cost of service, as shown by  
10 their tidy percentage increments and [their] refusal to defend the calculations.” *Id.* at 1516.

11 In so holding, however, the *Capistrano* court acknowledged multiple times in its opinion  
12 that tiered rates are “consonant” with and “not incompatible” with article XIII D, section 6(b),  
13 provided the rates reasonably reflect the cost of service attributable each parcel:

- 14 • “[T]iered, or inclined rates that go up progressively in relation to usage are perfectly  
15 consonant with article XIII D, section 6, subdivision (b)(3).” *Id.* at 1497-1498;
- 16 • “As we will say numerous times in this opinion, tiered water rate structures and  
17 Proposition 218 are thoroughly compatible ‘so long as’ ... those rates reasonably reflect  
18 the cost of service attributable to each parcel.” *Id.* at 1499 n. 6;
- 19 • “[N]othing . . . prevents water agencies from passing on the incrementally higher costs of  
20 expensive water to incrementally higher users. *Id.* at 1516.
- 21 • “[N]othing in *article XIII D, section 6, subdivision (b)(3)* is incompatible with water  
22 agencies passing on the true, marginal cost of water to those consumers whose extra use  
23 of water forces water agencies to incur higher costs to supply that extra water.” *Id.*

24 Article XIII D, section 6(b) therefore allows local agencies to pass on to customers the  
25 capital costs of improvements necessary to meet the demand of high water users. *Id.* at 1502. As  
26 the *Capistrano* court specifically recognized: “Proposition 218 protects lower-than-average users  
27 from having to pay rates that are *above the cost of service for them* because those rates cover  
28 capital investments their levels of consumption do not make necessary.” *Id.* at 1503.

1           *Capistrano* discussed marginal costs associated with differing sources of supply. *Id.* at  
2 1500, 1511. However, there are additional marginal costs associated with providing water to high  
3 water users that may be taken into consideration in designing tiered water rates, including system  
4 capacity or peaking. System capacity is the system's ability to supply water to all delivery points  
5 at the time when demanded. It is measured by customer water demand at the time of greatest  
6 system demand (i.e., peak demand, which typically occurs in the summer months when more  
7 water is used for outdoor irrigation). Both operating costs and capital asset costs incurred to  
8 accommodate peak flows are generally allocated to each customer class based upon peak demand.  
9 *See Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Auth.*, 121 Cal. App. 4th  
10 813, 817 (2004). For example, in explaining the base-extra capacity method of rate-setting and  
11 allocating costs, the M1 Manual explains:

12           Extra capacity costs are costs associated with meeting peak demand rate of  
13 use requirements in excess of average (base) use and include [operations and  
14 maintenance] expenses and capital costs for system capacity beyond that  
15 required for average rate of use. These costs may be subdivided into costs  
16 necessary to meet maximum-day extra demand, maximum-hour demand in  
17 excess of maximum-day demand, or other extra demand criteria ... facilities  
18 designed to meet maximum-hour requirements may appropriately be allocated  
19 to the base, maximum-day extra capacity, and maximum-hour extra capacity  
20 cost components. {7:141:W-2288}

21           **3. Unlike City of San Juan Capistrano, and Consistent with Established  
22 Cases, the Town Provided Sufficient Evidence Supporting its Tiers.**

23           Consistent with *Capistrano* and the M1 Manual, the Town's higher water users are  
24 allocated the marginal costs associated with providing the system capacity necessary to meet such  
25 high demand. The Town is required to size its water system to meet the capacity necessary to  
26 serve each of its customers, from the lower-than-average users that conserve water and place little  
27 demand on the system, to those placing the greatest demand on the system. The Town therefore  
28 has marginal costs associated with the system capacity for high water users, which are  
appropriately recovered from such high water users through the higher tiers. {See 4:53:W-1053}

The Town used data existing at the time the water rates were adopted in 2016 to demonstrate that the costs of infrastructure were clearly associated with the highest water users.

1 For example, distribution and pipeline projects were projected to cost approximately \$1 million in  
2 capital funding per year over the course of the five-year rate study period. {4:73:W-1214}  
3 Between 40% and 50% of the cost of such projects is attributable to the highest water users.  
4 {7:138:W-2199} Similarly, pump station improvements, 38% of which are attributable to high  
5 water users, were projected to require several millions of dollars of funding over the course of the  
6 five-year rate period. {*Id.*}<sup>3</sup>

7 This data is especially telling given the disparate water use among the Town's water  
8 customers. Average water use was 28.5 hcf<sup>4</sup>/month in calendar year 2015, and was projected to  
9 decrease to around 19 hcf/month in 2016. {3:41:W-862} Water use in tier 3 contributed upwards  
10 of 2.5 times projected average monthly consumption. {2:20:W-626} Tiers 4 and 5 use placed  
11 significantly larger demands on the system. Tier 4 use contributed from 5 to 10 times more  
12 water; tier 5 use contributed a minimum of 10 times more water. {*Id.*}

13 Petitioners cannot dispute that system capacity costs, including distribution pipelines,  
14 pump stations, and water storage tanks, are driven in significant part by such high use, and are  
15 therefore appropriately placed on those customers placing the greatest demand on the system.  
16 {7:138:W-2199} While Petitioner may disagree with how the costs were allocated and  
17 apportioned, and while placing the proportional cost of service on those users placing the highest  
18 demand on the system may not be preferred by such users, such a dispute is insufficient to  
19 invalidate the Town's rates where the record demonstrates sufficient evidence justifying the  
20 Town's tiers. *Griffith*, 220 Cal. App. 4th at 601 ("That there may be other methods favored by  
21 plaintiffs does not render [the Town's] method unconstitutional.")<sup>5</sup> The Town here sought to  
22 more equitably allocate the costs of service by apportioning these higher costs to the  
23 disproportionately higher water users.

24 <sup>3</sup> Petitioners assert the Town has presented no evidence regarding the rates in effect between June 28, 2015 and  
25 January 31, 2016. Not so. Even assuming Petitioners get beyond the mootness and laches defenses, the volumetric  
26 charges in Ordinance No. 731 adopted on January 11, 2016 are the same charges that were in place in 2015.  
{4:73:W-1185} As such, the same analysis applies.

27 <sup>4</sup> Water is measured in terms of "hcf" or "ccf," which equals one hundred cubic feet of water (1 hcf=748 gallons).

28 <sup>5</sup> To the extent, *Capistrano* requires more stringent proportionality requirements than the courts required in *Griffith*  
and *Morgan*, this Court may choose between the competing views and follow the more compelling proportionality  
analysis in *Griffith* and *Morgan*. See *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962); *People v.*  
*Hunter*, 133 Cal. App. 4th 371, 382 (2005).

1 Nor is perfection in cost allocation required. Again, “[a]pportionment is not a  
2 determination that lends itself to precise calculation.” *Griffith*, 220 Cal. App. 4th at 601; *see also*  
3 *Brydon v. East Bay Municipal Utility Dist.*, 24 Cal. App. 4th 178, 194 (1994), disapproved on  
4 other grounds in *Capistrano*, (“No rate structure is conceivable which would apply with complete  
5 fairness to each individual consumer.”). For example, in *Morgan v. Imperial Irrigation District*,  
6 223 Cal. App. 4th 892 (2014) the petitioners challenged new rates imposed by the district on its  
7 customers who used the district’s water for a variety of purposes, including agricultural,  
8 municipal, industrial, and residential purposes. *Id.* at 897. Similar to the rate-setting process  
9 here, the district hired an independent consultant to conduct a water rate cost of service study. *Id.*  
10 at 899. The resulting cost of service study used historical costs and projection of future costs to  
11 determine revenue requirements that needed to be recovered by the water rates and then followed  
12 “commonly accepted professional standards developed by the [AWWA] for cost of service  
13 studies” to come up with its recommended rates. *Id.* “The primary goal of the cost of service  
14 study was to ‘equitably allocate costs among customer classes in proportion to the services  
15 provided to each.’” *Id.* The rate consultant “did not have perfect data” on which to base the cost  
16 of service study, but was able to reasonably estimate water data “buttressed by data published by  
17 the AWWA, water use data for local municipalities” and other sources. *Id.* at 900.

18 The *Morgan* plaintiffs leveled numerous Proposition 218 challenges against these new  
19 water rates. Relevant here, the *Morgan* plaintiffs alleged the water rates were not proportional  
20 under article XIII D, section 6(b) because the underlying data was poor and the district did not  
21 prove proportionality. *Id.* at 911. The *Morgan* trial court rejected the plaintiffs’ contentions and  
22 the appellate court affirmed, concluding the district complied with Proposition 218’s  
23 requirements for property-related fees. In rejecting these particular challenges, the appellate court  
24 looked to Proposition 218’s substantive requirements and concluded:

25 [I]t is clear that section 6 contemplates customers paying different  
26 amounts. The cap requirement limits the total amount that an agency may  
27 collect. However, within that total amount, section 6 requires that each  
28 customer only pay his or her proportional share. Put differently, the  
proportionality requirement ensures that the aggregate fee collected on  
parcels is distributed among those parcels in proportion to the cost of

1 service for each parcel. There is nothing in section 6 that prohibits an  
2 agency from charging different rates to its customers as long as the fees  
3 paid by customers are proportional and the total amount the agency  
4 collects does not surpass the cost of providing the service. *Id.* at 908-909  
(internal citations omitted).

5 The Town has likewise provided ample evidence showing its rates were set according to  
6 industry standards in AWWA’s M-1 Manual with increased costs proportionally allocated to the  
7 highest users. To argue, as Petitioners do, that Tier 5 users who consume 10 times more water  
8 should not be charged a higher rate simply because the Town pays a uniform rate to SFPUC  
9 ignores the fact that these customers place a proportionately greater demand on the Town’s  
10 system and drive the need for larger distribution facilities to meet their higher peak demands.  
11 Failing to apportion such increased costs of service to higher users disproportionately burdens  
12 lower water users contrary to the principles of Proposition 218. As noted in the rate study, “The  
13 rate in each tier increases as consumption increases in proportion to the increasing cost of serving  
14 higher levels of demand, which places burdens on the capacity of the infrastructure as well as on  
15 the source of supply.” {4:73:W-1199}

16 In addition, simply because the Town sought to establish a more detailed basis for  
17 allocating and apportioning its costs to its tiers in the Rate Study that supported the new rates  
18 adopted in March 2017, does not mean that the rate structure at that time was unreasonable. As  
19 demonstrated in *Griffith, Moore, and Morgan*, that there is a different methodology for allocating  
20 costs and structuring rates – one that may be preferred by certain customers – does not render a  
21 prior rate structure in violation of article XIII D, section 6.

22 **4. The Revenue-Neutral Rate Stabilization Charges were Necessary to**  
23 **Meet the Town’s Cost of Providing Service during Mandatory Water**  
24 **Use Reduction.**

24 Water rates are established by using cost and demand projections to estimate revenue  
25 requirements. The M1 Manual describes the challenge posed by conservation in this analysis:

26 [Conservation] projections can be difficult to adjust. Past conservation  
27 measures may permanently reduce water sales, so comparing water sales  
28 before the conservation measures were installed could overstate future  
projections. The effects of future conservation measures can be difficult to  
quantify and support. However, a diligent attempt should be made to

1                    *estimate the effect of conservation efforts on revenues*; otherwise, actual  
2 revenues may differ significantly from projections. {7:141:W-2250-  
2251} (emphasis added).

3                    The Town completed the first phase of its rate study in the midst of a severe drought,  
4 unpredictable regulation mandating cutbacks on water use, and thus, projected shortfalls in  
5 revenue. Based on existing data, when the Town adopted its 2016 rates, the Town projected: (1)  
6 conservation could continue at 42%; and (2) the Town could experience a \$2,089,000 shortfall in  
7 revenue as a result that would deplete reserves, jeopardize the Town’s bond rating, and delay  
8 important capital projects. {4:73:W-1201} The revenue stabilization charge was thus set at a  
9 *maximum* amount of 22% of the volume charge in each tier. The charge was subject to review at  
10 least annually, if not more frequently, to “meet the water system’s revenue requirement” and to  
11 ensure that it did not exceed “the estimated reasonable proportional cost of providing water  
12 service to each parcel,” and could be terminated if no longer required. {4:73:W-1140, 1165}  
13 The charge was designed to recover costs of service that would otherwise go unpaid because the  
14 rates were based on a higher level of consumption and were therefore too low, thus adjusting the  
15 rates to a reduced level of demand without generating more revenue to avoid depletion of  
16 reserves. The charge was set based on the impact attributable to each tier.

17                    Oddly, Petitioners take issue with the Town’s methodology of establishing the revenue  
18 stabilization charge. However, the Town acted reasonably and in accordance with the M1  
19 Manual to ensure it could continue meeting its revenue requirement using available data in highly  
20 uncertain times, while complying with article XIII D, section 6 of the Constitution. As water  
21 demands and revenues increased with the easing of the drought, in November 2016, the Town  
22 opted to eliminate the revenue stabilization charge. Again, simply because the Petitioner would  
23 have preferred a different methodology, does not render the Town’s methodology to address  
24 revenue shortfalls caused by the drought does not mean the Town’s chosen rate methodology  
25 violated the Constitution. *Griffith*, 220 Cal. App. 4th at 601.

26                    **III. THE DROUGHT PENALTIES**

27                    Petitioners’ challenge to the drought penalties the Town imposed briefly during the State-  
28 wide emergency drought in 2015 reflects a misunderstanding of the true nature of the drought

1 penalties, which are not part of the Town’s water rates (codified in Chapter 13.20 of the  
2 Hillsborough Municipal Code (HMC)), but distinct penalties codified in Chapter 13.16 of the  
3 HMC that had their genesis many years ago under the Town’s Water Shortage Contingency Plan  
4 and the additional authority of California Constitution article XI, section 7, and the Water Code,  
5 including Water Code section 10632(a) and later section 377(i). In short, they are imposed for  
6 violations of the Town’s water use regulations.

7 A. **History of the Town’s Water Rationing Measures, Including the Adoption of**  
8 **Penalties, Consistent with the Urban Water Management Planning Act and**  
9 **the State’s Water Conservation Programs**

10 The Water Shortage Contingency Plan is part of the Urban Water Management Plan  
11 (UWMP). As discussed below, the drought penalties were implemented only as necessary to  
12 comply with the State’s emergency drought regulations and to help the Town achieve compliance  
13 with its mandatory conservation target. The Urban Water Management Planning Act, Water  
14 Code §§ 10610 et seq., requires the Town to prepare a UWMP every five years. *Id.* at §  
15 10621(a). The UWMP must include a “water shortage contingency analysis” that includes  
16 various elements, such as “[p]enalties or charges for excessive use, where applicable.” *Id.* at  
17 § 10632(a)(6); {see also 4:111:D-1100-1102; 4:118:D-1232}. The Town’s water rationing  
18 ordinance, currently codified in Section 13.16.040 of Chapter 13.16 of the HMC regarding  
19 “Water Conservation” (in contrast to Chapter 13.20 regarding “Water Charges”) is identified in  
20 the Town’s 2010 UWMP and 2015 Water Shortage Contingency Plan as one tool to implement  
21 during a drought emergency. {1:1:D-48, D-51; 4:118:D-1216-1228, D-1238-1239}

22 The Town first implemented a water rationing ordinance in 1988, with periodic updates to  
23 address the particular drought circumstances at issue. {4:118:D-1218-1219} The penalties at  
24 issue in this action arose from the 2012-2016 drought, which was one of the worst on record for  
25 the State of California. {4:118:D-1221-1222} The Governor issued a series of proclamations  
26 and executive orders accompanied by regulations from the SWRCB to implement conservation  
27 and eventually mandatory water use restrictions. Some of the more significant State actions were  
28 as follows:

- On January 17, 2014, the Governor declared a drought state of emergency,



1 set a 20% reduction goal, and directed local water suppliers (like the Town) to implement their  
2 water shortage contingency plans. {4:118:D-1279-1281}

3 • On April 25, 2014, the Governor issued a continued proclamation of a state  
4 of emergency through the State due to the ongoing drought. {4:118:D-1282-1286}

5 • On July 15, 2014, the SWRCB adopted Resolution No. 2014-0038, an  
6 emergency regulation for Statewide urban water conservation. The emergency regulation  
7 recognized that “[m]ost Californians use more water outdoors than indoors” and that “[o]utdoor  
8 water use is generally discretionary, and many irrigated landscapes would not suffer greatly from  
9 receiving a decreased amount of water.” The SWRCB further directed urban water suppliers to  
10 educate customers and improve their leak detection and response programs. {5:128:D-1659-  
11 1665; *see also* 4:118:D-1287-1288.}

12 • On March 17, 2015, the SWRCB adopted Resolution No. 2015-0013,  
13 which extended the existing drought emergency regulations and required urban water suppliers to  
14 limit the number of days per week that customers could irrigate outdoors. {4:118:D-1302-1308}

15 • On April 1, 2015, as a result of the on-going drought emergency, Governor  
16 Brown issued Executive Order B-29-15, which required a 25% reduction in statewide water use  
17 through February 28, 2016, as compared to the amount used in 2013. {5:137:D-1715} The  
18 Executive Order further directed the SWRCB to establish water cutback requirements for every  
19 California urban water supplier. {5:137:D-1714-1720} The specific restriction applicable to  
20 each water supplier was to be based upon the relative per capita water usage of each water  
21 suppliers’ service area and required that those areas with high per capita water use achieve  
22 proportionally greater reductions than those with low use. {*Id.*}

23 • On May 5, 2015, the SWRCB adopted such mandatory cutback  
24 requirements in compliance with Executive Order B-29-15 with the adoption of Resolution No.  
25 2015-0032. {5:141:D-1734-1744} The SWRCB created nine conservation tiers with cutback  
26 requirements ranging from 4% to 36% for water agencies based upon their average residential per  
27 capita water due during July-September of 2014. The Town was assigned to the highest water  
28 conservation tier because its July-September 2014 Residential Gallons Per Capita Per Day (“R-

1 GPCD”) was nearly 325, which required the Town to reduce its water use by 36% as compared to  
2 2013. {3:83:D-841; 3:85:D-879}<sup>6</sup> The Town was ranked 393 out of 411 water suppliers in per  
3 capita water use. {*Id.*} The Town’s 36% consideration standard was measured on a monthly and  
4 cumulative basis as compared to 2013 use. The SWRCB’s compliance period began on June 1,  
5 2015. Water agencies that violated the SWRCB’s orders faced fines of up to \$10,000 per day.

6 • On November 13, 2015, the Governor issued Executive Order B-36-15,  
7 which extended the water use restrictions until October 31, 2016 should drought conditions  
8 persist. {3:83:D-842; 5:142:D-1745-1747}

9 The Town’s drought response efforts tracked the direction of the Governor’s Executive  
10 Orders and the SWRCB’s emergency regulations. In August 2014, the Town adopted Ordinance  
11 No. 717 prohibiting water waste consistent with the SWRCB’s regulations with irrigation  
12 limitations and such tasks as using water to wash down driveways and sidewalks. {1:21:D-259-  
13 261} Public outreach was undertaken to notify residents of the new drought restrictions with  
14 individualized water use reports, and the Town further increased the budget for conservation  
15 projects by an additional \$40,000. {1:22:D-262; 1:24:D-266} The Town received a letter from  
16 the SWRCB in December 2014 requesting that Hillsborough implement its Water Shortage  
17 Contingency Plan. {5:132:D-1682-1683} The Town responded and provided the SWRCB with a  
18 copy of Ordinance No. 717. {5:132:D-1677-1681}

19 The Town extended the water waste prohibitions and incorporated additional prohibited  
20 activities in April 2015. {1:30:D-304-305; 1:34:D-374-376} The Town continued to monitor the  
21 drought and provided periodic updates to the City Council. {*See, e.g.*, 1:26:D-270-273, 1:27:D-  
22 274-288, 1:28:D-297-298, 1:31:D-318-347, 1:32:D-348-364, 1:33:D-368-370}

23 In response to the SWRCB’s unprecedented May 5, 2015 emergency regulations requiring  
24 mandatory water use cutbacks, the Town promptly looked at whether additional water rationing  
25 measures should be implemented to comply with the statewide emergency regulations, reduce R-  
26 GPCD, and avoid significant SWRCB fines and enforcement actions. {1:36:D-381, 2:38:D-383-  
27

28 <sup>6</sup> The Town’s conservation standard was 35% in the SWRCB’s draft regulations released in April 2015 (1:31:D-345),  
but that standard was increased to 36% with the final regulations adopted in May 2015.

1 419} At the April and May 2015 City Council meetings, the Town reviewed the Town's drought  
2 history, noting that the known water reduction over the prior year (June 2014-February 2015)  
3 with voluntary conservation reflected less than 25%, cumulatively, as compared to 2013 – still  
4 short of the mandatory 36% conservation standard and with the higher water use summer months  
5 still to come. {1:32:D-274-288; 2:38:D-383-419}

6 Because the Town's Council only meets once a month (*see* HMC § 2.04.010), the next  
7 regular meeting at which the Town could consider additional rationing was June 8th, after the  
8 June 1, 2015 effective date of the SWRCB's emergency regulations. Any amendment to the  
9 Town's existing municipal code water conservation regulations requires adoption of an  
10 ordinance. An ordinance in turn requires introduction at a meeting of the city council, and may  
11 only be passed at a regular or an adjourned regular meeting not less than five days after its  
12 introduction. Gov't Code § 36394. An ordinance generally may only take effect 30 days after its  
13 final passage. Gov't Code §§ 36934, 36937. Urgency ordinances provide an important exception  
14 to these procedures, allowing cities to adopt an ordinance effective immediately without a second  
15 reading or 30-day delay before implementation. *Id.* At best, if an urgency ordinance had not  
16 been adopted, the soonest the Town could have had additional regulations implementing more  
17 stringent water conservation measures in place would have been mid- to late-August 2015.<sup>7</sup>

18 With approximately two-thirds of the Town's annual water use occurring in June through  
19 September, due primarily to outdoor irrigation, it was imperative for the Town to put more  
20 aggressive water conservation regulations into effect earlier in the summer of 2015 to achieve  
21 higher cutbacks in these key summer months so it could achieve a cumulative water savings of  
22 36%. {2:38:D-395, D-400} Accordingly, the Town held a public hearing at its next meeting on  
23 June 8, 2015, reviewed the various rationing options, and adopted an urgency ordinance  
24 (Ordinance No. 725), effective the following day, by a unanimous vote of the City Council.  
25 {2:40:D-424-441, 2:42:D-459-495, 2:43:D-498-505} Ordinance No. 725 amended the Town's  
26 water rationing ordinance and imposed a \$30 per hcf volumetric drought penalty for violations of  
27

28 <sup>7</sup> The next regular city council meeting for the Town after June 8, 2015 was July 13, 2015.

1 the water use regulations. Under the Town's water conservation ordinance, customers were given  
2 an allotment of water appropriate for efficient indoor and outdoor water use. If a customer  
3 exceeded their assigned water allotment during any monthly billing period commencing July 1,  
4 2015, they were subject to a volumetric penalty based on the amount of water used in excess of  
5 their allotment. {2:44:D-507-511} The water rationing allotment in the water conservation  
6 ordinance (HMC, Chapter 13.16) was updated to take into account the number of individuals  
7 residing at the residence along with an outdoor allotment based on parcel size. {2:44:D-509}

8 Volumetric penalties, however, were not imposed immediately. Rather, customers were  
9 given warnings for use in excess of their assigned allotment in June 2015. {2:43:D-500,  
10 2:44:D-509-510} Thereafter, Ordinance No. 725 allowed for imposition of the \$30/hcf  
11 volumetric penalty if overuse persisted for three months after the warning. {*Id.*} In other words,  
12 Ordinance No. 725 allowed customer's to accumulate water usage for three consecutive monthly  
13 billing periods (July-September 2015), and only if the cumulative use over that three-month  
14 period exceeded the total allotment would the penalty be imposed. {2:44:D-510}

15 Cognizant of concerns regarding the Town's heritage trees and beautiful landscaping, the  
16 Town also adopted a detailed appeals process that allowed customers to have their drought  
17 penalties lowered or waived entirely depending on the facts of each appeal. In August-September  
18 2015 with the adoption of Ordinance No. 727, the Town expanded the grounds for appeal initially  
19 included in Ordinance No. 725 to permit modification or waiver of the appeal based upon  
20 extenuating circumstances. {2:52:D-555, 2:54:D-588-589, 2:57:D-597-602, 2:60:D-646; 2:61:D-  
21 650-651} Such extenuating circumstances included preventing the substantial loss of trees or  
22 other high value plants or loss of "landscaping of historic significance," accounting for longer-  
23 term temporary residents residing at the property during the penalty period, or protecting new but  
24 not yet established landscaping. {2:61:D-650}

25 The Town's imposition of the drought penalties was for a limited time. While finalizing  
26 the penalty appeal process, the Town also continued to provide its residents with regular drought  
27 updates. {2:48:D-529-542, 2:49:D-545-546, 2:53:D-560-582, 2:54:D-587-588, 2:59:D-609-640,  
28 2:60:D-645-646} Subsequent water use reports revealed that the Town's water rationing and

1 public outreach efforts were succeeding. The Town obtained SFPUC water purchase data the  
2 month after the use period. In late June 2015, the Town learned that it had reduced water use by  
3 43% in May 2015 as compared to May 2013. {2:48:D-534} And in mid-July 2015, it learned  
4 that it had reduced its water use by 47% in June 2015 as compared to June 2013. {2:51:D-554,  
5 2:53:D-563} Temperatures were cooler than average in May and June 2015, likely leading to  
6 some of the reduction. {2:53:D-567}

7 Water reductions were slightly less in July and August 2015 as compared to 2013, with  
8 42.5% and 40.9% reductions, respectively. {2:59:D-612} Nonetheless, the cumulative reduction  
9 was 43.6% for June-August 2015, leading the Town to amend the drought penalties in the water  
10 conservation ordinance. In September 2015, the Town introduced an amendment to HMC section  
11 13.16.050 to create a second compliance period for an additional five months from October 2015  
12 – February 2016. Water customers who used less than their full allotment during the first  
13 compliance period (July – September 2015), would have the remaining allotment balance  
14 available to them during the second compliance period. {2:65:D-673} This penalty amendment  
15 created additional opportunities for customers to avoid a penalty based upon accumulated water  
16 conservation efforts. Ordinance No. 729 was adopted on October 12, 2015 – superseding  
17 Ordinance No. 725. {2:67:D-691-692}

18 The SWRCB's 36% mandatory cut-back remained in place through the rest of 2015 and  
19 the first part of 2016. In April 2016, the Town reviewed the Town's water conservation efforts  
20 with cumulative water reductions at 42% in March 2016 as compared to 2013. {3:88:D-924} A  
21 review of the drought penalty appeals further revealed that nearly 90% of the Town's residential  
22 customers were in compliance with their water allotment and were not charged a penalty.  
23 {3:88:D-917} Of those who did receive a penalty and appealed, 93% of appeals were reduced or  
24 waived. {*Id.*} Leaks or construction were the most common reasons for an appeal. {*Id.*} In  
25 light of customers' conservation success, the Town adopted Ordinance No. 736 on May 9, 2016,  
26 which reduced the penalty to \$10 per hcf for water use in excess of conservation targets and  
27 eliminated any penalty if the penalty amount was less than \$250. {3:99:D-1018-1019}

28 Finally, with the easing of the drought, the SWRCB adopted Resolution No. 2016-0029

1 on May 18, 2016, which ended the mandatory cutbacks and instead implemented a long-term  
2 framework for water suppliers to self-certify water supply, demand, and conservation standards  
3 through 2019 based upon the agency’s specific circumstances. {3:101:1022-1025} The Town  
4 promptly lifted the drought penalties at a special meeting on June 2, 2016, and further amended  
5 its municipal code with the adoption of Ordinance No. 737 on June 13, 2016 to provide that no  
6 customer would incur a drought penalty for water use from the period of October 1, 2015 through  
7 May 31, 2016. {3:102:D-1026-1027, 3:114:D-1173-1174}

8 **1. Petitioners’ Challenge to the Drought Penalties is Moot**

9 Petitioners’ petition for writ of mandate, which seeks to “invalidat[e] the drought penalties  
10 enacted by the [Town] on June 8, 2015,” like the challenge to the water rates, is moot.  
11 Petitioners’ challenged the drought penalties enacted specifically by Ordinance No. 725 on June  
12 8, 2015. *See* Compl., ¶¶ 26, 30, 32. Petitioners have asked this Court to “[r]epeal Ordinance  
13 No. 725” and enjoin the Town from continuing to imposed the penalties. *See* Compl., Prayer for  
14 Relief, ¶¶ 2(c) and 3. Ordinance No. 725, however, was superseded long before Petitioners filed  
15 their claim and this action in November 2016. Noticeably absent from the Petitioners’ complaint  
16 is any reference to the three ordinances adopted after ordinance No. 725 that modified the drought  
17 penalty provisions in Section 13.16.050 of the Town’s Municipal Code well before Petitioners  
18 even filed this action in November 2016:

- 19 • On October 12, 2015, the Town adopted Ordinance No. 729 modifying the penalty  
20 provisions of HMC 13.16.050. {2:67:D-691-92}
- 21 • On May 9, 2016, the Town adopted Ordinance No. 736, reducing the drought  
22 penalties to \$10/hcf. {3:99:D-1018-1019}
- 23 • And on June 13, 2016, the Town adopted Ordinance No. 737, lifting the drought  
24 penalties. {3:114:D-1173-1174}

25 As such, there is no actual controversy that can be resolved by a writ or declaratory relief  
26 with respect to Ordinance No. 725. *See, e.g., Paul v. Milk Depots, Inc.*, 62 Cal. 2d 129, 132-33  
27 (1964) (repeal of Dep’t of Agriculture regulation while appeal was pending moots challenge to  
28 that regulation); *Bell v. Bd. of Supervisors*, 55 Cal. App. 3d 629, 636-37 (1976) (repeal of statute

1 concerning challenged judicial district moots case). Accordingly, Petitioners' challenge to the  
2 drought penalties is now moot and they are not entitled to the relief they seek.

3 **2. The Town did not abuse its discretion in adopting the Drought**  
4 **Penalties as an Urgency Ordinance**

5 Petitioners' challenge to Ordinance No. 725 as an urgency ordinance is equally without  
6 merit. Even assuming the challenge to this Ordinance was not mooted with the subsequent  
7 adoption of Ordinance Nos. 729, 736, and 737, all non-urgency ordinances, the Town acted well  
8 within its discretion to initially adopt the drought penalties pursuant to an urgency ordinance.

9 An "emergency ordinance" is an ordinance that may be passed immediately upon its  
10 introduction, rather than after a prescribed period of time for public hearings, and that may take  
11 effect immediately upon passage, rather than after a prescribed period of time for notice and  
12 publication. Gov't Code §§ 36934, 36937(b). Courts will generally not interfere where the facts  
13 constituting the alleged emergency or urgency are recited in the ordinance and are such that they  
14 may reasonably be held to constitute an emergency. *Crown Motors v. City of Redding*,  
15 232 Cal. App. 3d 173, 179 (1991); *Eckl v. Davis*, 51 Cal. App. 3d 831, 851 (1975). Under the  
16 doctrine of separation of powers, courts will not invalidate local legislation in the absence of  
17 some overriding constitutional, statutory, or charter proscription. *See Crown Motors*, 232 Cal.  
18 App.3d at 179; *see also Northgate P'ship v. City of Sacramento*, 155 Cal. App. 3d 65, 69 (1984).  
19 In the absence of contrary evidence, courts will assume that a municipality based its decision to  
20 adopt an urgency ordinance on "sufficient inquiry as to whether an emergency existed." *Id.* The  
21 declaration of urgency or emergency is prima facie evidence of that fact and courts will not  
22 typically investigate the truth of the recited facts. *Id.*

23 This standard of review is highly deferential. For instance, in *Crown Motors v. City of*  
24 *Redding*, 232 Cal. App. 3d 173 (1991), an automobile dealership applied for a use permit to erect  
25 an electronic advertising reader board. The city council then adopted an urgency measure,  
26 effective immediately, prohibiting the erection of such boards on aesthetic grounds. *Id.* at  
27 176-77. If the ordinance had not been adopted on an urgency basis, the dealership's application  
28 would have been reviewed and granted before the ordinance took effect. *Id.* at 180. The

1 appellate court held that aesthetics could be considered a public health matter under Government  
2 Code section 36937 and deferred to the city council’s legislative determination that an urgency  
3 ordinance was required given that the approval of an electronic reader board was imminent and  
4 would have occurred absent the urgency ordinance. *Id.* at 178.

5 Here, the facts are even more compelling where the State was in the midst of an  
6 undisputed, multi-year, emergency drought. The Governor issued an emergency Executive Order  
7 on April 1, 2015 regarding the continued drought emergency, finding that “severe drought  
8 conditions continue to persist,” “posing extreme peril to the safety of persons and property,” and  
9 directing the SWRCB to impose mandatory water use restrictions. {5:137:D-1714} The  
10 SWRCB in turn adopted an emergency resolution imposing mandatory cutback restrictions for  
11 water suppliers with potential penalties of up to \$10,000 per day. {5:141:D-1734-1744} In  
12 response, the Town amended its water shortage contingency ordinance to implement water  
13 rationing and imposed penalties to enforce the mandatory rationing to meet the State’s standards,  
14 and protect the public health and safety. *See Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706,  
15 711 (1971) (city has broad discretion in determining what is reasonable in endeavoring to protect  
16 public health, safety, morals, and general welfare of a community).

17 Given the short time to act and begin rationing during the crucial summer months when  
18 the greatest conservation could be attained via outdoor water conservation, the Town adopted  
19 Ordinance No. 725 on June 8, 2015, reiterating the undisputed statewide drought emergency.  
20 {2:44:D-507-511} The findings in support of the Town’s urgency ordinance, like the Governor’s  
21 emergency drought executive orders, found that the Town was “continuing to experience severe  
22 drought conditions that require immediate and decisive action for the preservation of public  
23 peace, health and safety.” {2:44:D-507} The Town further found that “delay in adopting an  
24 ordinance to further reduce waste will further exacerbate the drought conditions” and that “urgent  
25 action [was] needed to comply with the requirement that the new regulations adopted by the  
26 [SWRCB] be implemented by local jurisdictions by June 1, 2015, and the Town’s future water  
27 allocation is likely to be reduced significantly if water consumption is not reduced now.” {*Id.*}  
28 Without the urgency ordinance, the Town risked further exacerbating severe drought conditions



1 and failing to comply with SWRCB regulations to the detriment of public health and safety.<sup>8</sup> See  
2 *Northgate P'ship*, 155 Cal.App.3d at 69 (upholding city's urgency ordinance in part because  
3 "both the courts and the Legislature have recognized the emergency situation" at issue).

4 The only evidence Petitioners cite to the contrary to refute the Town's urgency findings is  
5 the later obtained data the Town obtained as to its compliance with the SWRCB's 36% water  
6 conservation standard. As Petitioners note, the Town actually exceeded the conservation target in  
7 May 2015 as compared to 2013. But the Town did not know this at the time it had to act to  
8 implement the SWRCB's emergency regulations. Rather, the City Council reasonably believed  
9 that imposing volumetric penalties would be the best method for gaining immediate compliance  
10 with SWRCB-mandated water use restrictions, avoiding fines of up to \$10,000 per day, and  
11 encouraging customers to change their water consumption behavior during this critical period to  
12 avoid future water allocation reductions.<sup>9</sup> At the time Ordinance No. 725 was adopted, the water  
13 use data showed that in January and March of 2015, the Town used more water than 2013 due to  
14 the warm winter. In February and April 2015, the Town likewise did not meet the 36% target  
15 reduction. {3:85:D-872} The 48.5% reduction for May 2015 did not get reported to the Town  
16 until mid-late June when manual meter reads were done. It was not until the State, Governor,  
17 then the City Council imposed the 36% conservation standard that the Town started hitting its  
18 conservation target on a monthly basis. The Town did not have real time water use data available  
19 and instead had to wait for approximately two-three weeks for the prior month's water use to  
20 become available following manual meter reads.<sup>10</sup> So, based on the information available in June  
21 of 2015 when Ordinance No. 725 was adopted, neither the City Council nor the Petitioners would  
22 have known that the Town was hitting its conservation target. What the Town did know at the  
23 time was that for the whole year (2014) when voluntary reductions were in place, the Town only

24 \_\_\_\_\_  
25 <sup>8</sup> A city also has authority to impose criminal or civil penalties to ensure obedience to its regulations. Cal. Const. art.  
26 XI, § 7 (police power); *Hale v. Morgan*, 22 Cal. 3d 388, 398 (1978).

27 <sup>9</sup> Following adoption of SWRCB Resolution No. 2015-0032, the SWRCB issued 98 warning letters to agencies, 118  
28 notices of violation, 12 conservation orders, and four administrative civil liability complaints, and seven alternative  
compliance orders to agencies not meeting their conservation standards. {3:89:D-943}

<sup>10</sup> In April 2017, the Town completed installation of an advance water meter systems known as "Advanced Metering  
Infrastructure" or "AMI," which allows for remote meter readings and provides the Town and its customers with  
hourly meter reads on a daily basis.

1 cumulatively reduced its water use by less than 25% for the year and was not hitting the State-  
2 mandated target conservation standard. {See 21:33:D-369; 2:38:D-395; 3:42:D-463}

3 Regardless, the Town corrected any potential procedural issue by adopting Ordinance  
4 No. 729 on October 12 2015, which was adopted on a non-urgency basis and superseded  
5 Ordinance No. 725 with respect to the drought penalties to allow for a five-month compliance  
6 period in place of the three-month cumulative compliance period initially adopted with Ordinance  
7 No. 725.

8 **3. The More Deferential Arbitrary or Capricious Standard of Review**  
9 **Applies to the Drought Penalties**

10 Because, as discussed in the following section, the Town's drought penalties are not  
11 subject to Proposition 218, Petitioners' motion for writ of mandate is not subject to independent  
12 judgment review. As Petitioners noted, adoption of the water rates and drought penalties at issue  
13 were quasi-legislative acts subject to review by a proceeding in ordinary mandate pursuant to  
14 Code of Civil Procedure section 1085. As such, the judicial inquiry is generally confined to the  
15 question whether the action is arbitrary, capricious, or without reasonable or rational basis or  
16 evidentiary support. *Western States Petroleum Assn. v. State Dep't of Health Svcs.*, 99 Cal. App.  
17 4th 999, 1018 (2002). The courts exercise this deferential standard "out of deference to the  
18 separation of powers between the Legislature and the judiciary, to the legislative delegation of  
19 administrative authority to the agency, and to the presumed expertise of the agency within its  
20 scope of authority." *California Hotel & Motel Assn. v. Industrial Welfare Comm'n*, 25 Cal. 3d  
21 200, 212 (1979). The agency action has a strong presumption of validity, and the burden is on the  
22 party challenging it. *Western States*, 99 Cal. App. 4th at 1007. The court does not weigh  
23 evidence or substitute its judgment for that of the agency, for to do so would frustrate legislative  
24 mandate. *Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 230 (1991).

25 **4. The Town's Drought Penalties Are Not Subject to Proposition 218 and**  
26 **Are Authorized by the California Constitution and the Water Code**

27 Petitioners reliance on *Capistrano* for the proposition that drought penalties are subject to  
28 Proposition 218 is misplaced. In contrast to drought penalties, property-related fees like the water

1 rates at issue in *Capistrano*, and on which Petitioners rely, are imposed for the ongoing delivery  
2 of a service to a property and are designed to recover an agency's costs of providing that service  
3 to property. *See Bighorn*, 39 Cal. 4th at 215; *Richmond*, 32 Cal. 4th at 427.<sup>11</sup> In *Capistrano*, the  
4 city argued that the water service fees imposed in the upper tiers of its rate structure were  
5 penalties. The city did not present any evidence to demonstrate that the fees for water service  
6 were imposed for the violation of any ordinance, rule, or regulation established by the city. The  
7 *Capistrano* court held that the tiered water rates at issue could not be justified solely as  
8 "penalties" because that would "open up a loophole" under Proposition 218, which places  
9 specific limitations on water rates (including the proportionality requirement at issue in  
10 *Capistrano*). *Capistrano* 235 Cal. App. 4th at 1514-15. *Capistrano* stands for the proposition  
11 that water rate tiers cannot be justified as penalties when the tiered rates are part of the cost of  
12 service analysis and the revenues from those tiers are used for water supply and operations  
13 purposes. However, *Capistrano* did not concern actual penalties for violations of water use  
14 limitations imposed pursuant to other statutory authorizations like the various provisions  
15 authorizing such penalties in times of drought or other water shortage emergencies. The  
16 *Capistrano* court did not address or even mention penalties that might be imposed pursuant to a  
17 Water Shortage Contingency Plan as authorized by Water Code section 10632(a)(6) or other  
18 Water Code provisions authorizing imposition of penalties to address violations of mandatory  
19 water rationing regulations. *See, e.g.*, Water Code §§ 10632(a)(6), Water Code §§ 350-378.

20 The intent of a penalty is not to raise revenue, though a penalty of course "directly raises  
21 revenue by imposing a penalty." *Calif. Taxpayers Assoc. v. Franchise Tax Bd.*, 190 Cal. App. 4th  
22 1139, 1148 (2010). A penalty "regulates conduct (and indirectly raises revenue)" by deterring  
23 individuals from violating the regulations at issue. *Id.* Stated another way, "a penalty raises  
24 revenue only if some legal obligation is disobeyed." *Id.* "[C]ivil penalties may have a punitive or  
25 deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations  
26

27 <sup>11</sup> The Town, in fact, separately charged water customers water service fees for the water served to their respective  
28 properties. {*See, e.g.*, 69:1791:D-26777-78} The only individuals who were subject to a volumetric penalty were  
those water users who violated the Town's water conservation regulations.

1 imposed to assure important public policy objectives.” *Kizer v. County of San Mateo*, 53 Cal. 3d  
2 139, 147-48 (1991).<sup>12</sup>

3 The Town’s drought penalties are very different from the tiered water rates struck down in  
4 *Capistrano*. The volumetric penalties are true penalties for violations of the Town’s water  
5 conservation regulations and are designed to promote and attain water conservation so that the  
6 Town can meet mandatory conservation requirements in times of drought. Here, the drought  
7 penalties were imposed to protect the public health and safety within the Town as a result of the  
8 drought emergency, secure compliance with the State mandate to conserve 36% by changing the  
9 conduct of water users, and avoid SWRCB fines for failure to comply with the mandatory  
10 emergency regulations. The Town implemented water rationing steps and progressed to penalties  
11 in direct response to directives from the Governor and the SWRCB to conserve water. The Urban  
12 Water Management Planning Act expressly recognizes that a “water shortage contingency  
13 analysis” should include “[p]enalties or charges for excessive use” as a valid element of the  
14 UWMP water shortage contingency analysis. Water Code § 10632(a)(6). Consistent with water  
15 shortage contingency planning, the drought penalties were completely untethered to the Town’s  
16 water rate study and cost of service analysis because the purpose of the penalties was to obtain  
17 compliance with SWRCB regulations via significant water conservation, not to raise revenue to  
18 pay for operations and maintenance, capital projects, or other costs of providing service. Such  
19 intent is reflected in the timing of the Town’s actions – moving from voluntary to mandatory  
20 reductions in step with the SWRCB’s regulations and then promptly lifting the drought penalties  
21 once the statewide drought emergency was over.

22 Indeed, in June 2015, the Legislature adopted legislation expressly recognizing  
23 volumetric penalties like the Town’s drought penalties as a valid water shortage emergency tool:  
24 “[A] public entity may enforce water use limitations established by an ordinance or resolution  
25

26 <sup>12</sup> Emphasizing this distinction between a penalty and taxes or other charges, article XIII C, section 1, of the  
27 California Constitution expressly excludes penalties from the definition of a “tax.” See Cal. Const., art. XIII C, §  
28 1(e)(5) (“[T]ax’ means any levy, charge, or exaction of any kind imposed by a local government, except the  
following: (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local  
government, as a result of a violation of law.”).

1 adopted pursuant to this chapter, or as otherwise authorized by law, by a volumetric penalty in an  
2 amount established by the public entity.” Water Code § 377(i).<sup>13</sup> This statute eliminated the  
3 argument Petitioners try to assert here that such penalties are subject to Proposition 218. The  
4 enactment of Water Code section 377, subdivision (i) in June 2015 after the *Capistrano* decision  
5 in April 2015 reflects the Legislature’s concurrence that volumetric penalties of the sort adopted  
6 by the Town are an effective method of enforcing water conservation measures and regulations,  
7 particularly during a water shortage emergency such as that declared within the State. The  
8 provisions of the Water Code recognize that such volumetric penalties are distinguishable from  
9 the water service fees that the city attempted to justify as penalties in *Capistrano*. See *Greene v.*  
10 *Marin County Flood Control and Water Conservation Dist.*, 49 Cal. 4th 277, 291 (2010) (“[T]he  
11 presumption of constitutionality accorded to legislative acts is particularly appropriate when the  
12 Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind.”).

13 The Town’s efforts to enforce the 36% mandatory water use restrictions as opposed to  
14 raising revenue through its volumetric penalties are further reflected in the Town’s appeal  
15 process. The Town implemented an appeal process that allowed for the reduction and even the  
16 full waiver of penalties where property owners could show their high use was a result of a leak,  
17 need to preserve trees, or other exceptional circumstances. The penalties had the desired effect of  
18 getting customers to determine the reason for their high water use identified by the imposition of  
19 a penalty and fix or correct the cause of the problem, if at all possible, while allowing for some  
20 additional water use for medical conditions or to protect trees. Of the drought penalties imposed,  
21 nearly 40% were appealed and 93% of those appeals were waived or reduced. {3:88:D-917; see,  
22 e.g., 69:1791:D-26772-78}<sup>14</sup> Such reductions reflect a clear intent not to raise revenue or fund  
23 the delivery of water to properties, but to achieve compliance with the SWRCB’s mandatory  
24 cutbacks. The Town was identified as one of the highest water users per capita resulting in a  
25 significant 36% cumulative cutback target set by the State as compared to the same water use in

16 <sup>13</sup> Water Code section 377(i) was part of urgency legislation, Senate Bill 88, which became effective June 24, 2015.

17 <sup>14</sup> Indeed, several of the named Petitioners had their penalties waived completely or significantly reduced. Petitioner  
18 Marquardt has failed to pay his penalties in violation of the “pay first, litigate later” doctrine, precluding him from  
19 pursuing this action. See *Water Replenishment Dist. of Southern California v. City of Cerritos*, 220 Cal. App. 4th  
20 1450, 1465-66 (2013).

1 2013. Such rationing required the Town to implement significant water rationing measures and  
2 implementing the drought penalties helped the Town to achieve its mandatory conservation  
3 standard while striking a balance with the appeals process to ensure the penalties had the desired  
4 effect of getting the Town's customers to comply with the SWRCB's emergency regulations.

5 In line with being a penalty, the Town's drought penalty ordinances raised revenue only if  
6 the water customer violated the water rationing regulations established in HMC, Chapter 13.16.  
7 As customers conserved (90% of customers did meet their conservation targets), fewer penalties  
8 were imposed and penalties were waived if customers fixed leaks and took other appropriate  
9 water-saving steps to gain compliance with the Town's regulations. {3:89:D-917;  
10 3:112:D-1161}; cf. *California Taxpayers Assoc.*, 190 Cal. App. 4th at 1148-49 ("In line with  
11 being a penalty, [the statute] directly raises revenue only if a corporate taxpayer has disobeyed a  
12 legal obligation .... Furthermore, the continuous decline, over time, in projected revenue from  
13 [the statute] concretely illustrates this aspect of a penalty: As more corporations fully pay their  
14 taxes to avoid the penalty, the penalty revenue declines."). Again, the penalties were ultimately  
15 only imposed from July through September 2015 as the Town revised the penalties in response to  
16 conservation data and the SWRCB's regulations. Once the Statewide drought emergency was  
17 over, the penalties were lifted and no penalties were imposed following the initial penalty period.  
18 {See 3:114:D-1168, D-1173 [Section 3 of Ordinance No. 737]}

19 In short, the Town's drought penalties in Section 13.16.050 of the Town's Water  
20 Conservation Ordinance (as amended by Ordinance Nos. 725, 729, 736 and 737) imposed valid  
21 penalties authorized under the California Constitution and the Water Code in response to the  
22 unprecedented drought emergency and mandatory State rationing standards—penalties that are  
23 simply not subject to Proposition 218 and the Town acted well within its discretion to impose the  
24 drought penalties during the drought emergency to comply with the SWRCB's mandatory  
25 rationing requirements.

26 **IV. CONCLUSION**

27 The Town has engaged in a long and interactive process over many years to implement  
28 water rates that fairly and proportionately capture the Town's costs of providing service. The

1 Administrative Record reflects that the Town understand its obligations under article XIII D,  
2 section 6 and adopted rates based upon independent expert recommendations, industry-standards,  
3 consumption data, and the incremental costs high water users place on system capacity thereby  
4 protecting low consumption water users from costs they do not cause. Simply stated, the Town's  
5 tiered water rates reasonably reflect the proportionate cost of providing water service attributable  
6 to those parcels that use the most water and place the greatest demands on the Town's resources.

7 The drought penalties, in contrast, are true penalties not subject to Proposition 218 but  
8 borne out of the drought emergency and mandatory State rationing regulations. The Town ranked  
9 as one of the highest communities in per capita water use and had to take action to comply with  
10 State regulations. It evaluated its options and reduced the penalties in step with attainment of  
11 increased conservation. The Town acted responsibly and reasonably in implementing the drought  
12 penalties for a brief period in 2015 at the peak of the drought emergency. Nothing in the  
13 extensive Administrative Record supports a determination that the Town's adoption of drought  
14 penalties during the unprecedented drought emergency was arbitrary or capricious.

15 Petitioners' motion for issuance of a writ of mandate should be denied.

16 Dated: May 29, 2018

BEST BEST & KRIEGER LLP

17  
18 By:   
19 HARRIET A. STEINER  
KIMBERLY E. HOOD

20 Attorneys for Defendant/Respondent  
21 Town of Hillsborough  
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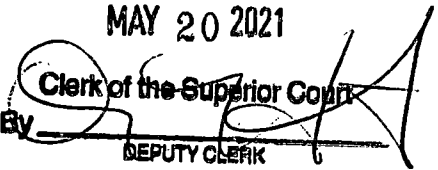
# **EXHIBIT 4**



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**FILED**  
**SAN MATEO COUNTY**

MAY 20 2021

Clerk of the Superior Court  
By   
DEPUTY CLERK

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN MATEO**

Case No. 16CIV02284

BRAD BARUH, KATHY BARUH,  
CHARLES BOLTON, ELDRIDGE GRAY,  
JOHN LOCKTON, DAVID MARQUARDT,  
PAUL ROCHESTER, ARTHUR  
STROMBERG, CHARLES SYERS,  
individually and on behalf of all others  
similarly situated,

Plaintiffs and Petitioners,

v.

TOWN OF HILLSBOROUGH and DOES 1-  
100, inclusive,

Defendants and Respondents.

  
~~PROPOSED~~ ORDER ON PLAINTIFFS'  
MOTION FOR CLASS CERTIFICATION

On May 17, 2021, the Court heard oral arguments on Plaintiff's Motion for Class Certification. Beau R. Burbidge appeared for Plaintiffs. Kimberly Hood appeared for Defendant. Now, having considered all of the papers submitted and the arguments of counsel, **IT IS HEREBY ORDERED:** The Court adopts in full its tentative ruling on class certification, a copy of which is attached as **EXHIBIT A**.

DATED: **MAY 20 2021**

  
The Honorable V. Raymond Swope

# **EXHIBIT A**

3:00

LINE: 1

16-CIV-02284 BRAD BARUH, ET AL. VS. TOWN OF HILLSBOROUGH, ET AL.

BRAD BARUH  
TOWN OF HILLSBOROUGH

BEAU R. BURBIDGE  
HARRIET A. STEINER

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MOTION FOR CLASS CERTIFICATION BY PLAINTIFF BRAD BARUH

**TENTATIVE RULING:**

Plaintiffs Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers' Motion for Class Certification is GRANTED, IN PART, and DENIED, IN PART, and the two classes are certified and defined as:

Ratepayer Class: All residential water service customers of the Town of Hillsborough who have paid in excess of Tier 2 in a billing cycle during the time period from June 28, 2015 through April 30, 2017.

Drought Penalty Class: All residential water service customers of the Town of Hillsborough, who were assessed and paid penalties pursuant to Town of Hillsborough Ordinance No. 725, and exhausted their administrative remedies.

Plaintiffs Charles Bolton, John Lockton, David Marquardt, Paul Rochester, and Charles Syers are appointed Class Representatives of the Ratepayer Class.

Plaintiffs Charles Bolton, John Lockton, and Charles Syers are appointed Class Representatives of the Drought Penalty Class, but not Plaintiffs David Marquardt, Paul Rochester.

Attorneys Beau Burbridge, Walter H. Walker, III, and Peter J. Koenig of Walker, Hamilton & Koenig, LLP are appointed as Class Counsel.

Section 382 of the Code of Civil Procedure authorizes a class action when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." "[W]e have articulated clear requirements for the certification of a class" under this statute. (Brinker, supra, 53 Cal.4th at p. 1021.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (Ibid.) "The community of interest requirement involves three factors: '(1) predominant common

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questions of law or fact; (2) class representatives with claims or defenses typical on the class; and (3) class representatives who can adequately represent the class.'" (Linder, supra, 23 Cal.4th at p. 435.) Regarding the first of these factors, we have recognized "'[a]s a general rule'" that "'if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'" (Brinker, at p. 1022; see also Daar, supra, 67 Cal.2d at p. 706.) Relatedly, "In certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, 28-29.) Finally, other considerations relevant to certification "include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (Linder, at p. 435.)

(Noel v. Thrifty Payless, Inc. (2019) 7 Cal.5th 955, 968-969. See also Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2020 Update) ¶¶ 14:11.)

Defendant Town of Hillsborough raises the following arguments in opposition: (1) Plaintiffs' ratepayer claims are barred by Revenue and Taxation Code section 5097 and 5140; (2) the ratepayer class is not ascertainable; (3) individual issues predominate; (4) the proposed class representatives' claims are not common to the class; and (4) superiority.

Thus, Defendant does not oppose the issues of numerosity or the adequacy of class counsel.

#### 1. Ratepayer Class

First, Defendant has not demonstrated that the at-issue water rates were enacted pursuant to Health & Safety Code section 5471 ("Section 5471"), and therefore the bar against class actions in Revenue & Taxation Code sections 5097 and 5140 does not apply. The Court requested further briefing on this matter to which the parties have complied. Section 5471 provides supplemental authority to act and set water rates.

In addition to the powers granted in the principal act, any entity shall have power, by an ordinance or resolution approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.

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(Health & Saf. Code, § 5471, subd. (a) (emphasis added). Section 5471's "main purpose is to supplement rather than to limit a public agency's authority to impose charges for water or sewer services in connection with a water or sewerage system." (Richmond v. Shasta Community Services Dist. (2004) 32 Cal.4th 409, 430. See also 27B Cal. Jur. 3d (Nov. 2020 Update) Drains and Sewers § 10 ("A two-thirds votes of the legislative body members is an alternative avenue to collect fees"); (Miller & Starr, 1 Cal. Real Est. Digest (3d, Aug. 2020 Update) Drains and Sewers § 3 (Section 5471 "was intended to provide a method for setting and revising sewer service rates in a situation where a local entity is not proceeding under a specific revenue bond or improvement statute").)

Defendant has not identified the principal act upon which it chose not to proceed. (See Am. Reply, filed Sep. 25, 2020, p. 3:25 - 4:14; Pl. Supp. Br., filed Nov. 12, 2020, p. 3:21-25.) Defendant's contention that "For general law cities, however, there is no one 'principal act' governing it" is not supported by any citation to legal authority. (Def. Sup. Br., supra, at p. 6:20-21. . See Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal.App.4th 27, 35, superseded by statute on other grounds in Union Bank v. Sup.Ct. (1995) 31 Cal.App.4th 573, 583 ("A point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion".) Furthermore, Defendant's contention is contradicted by the legal authority it cites. (Def. Sup. Br., supra, at p. 5:25-27.)

A general law city has only those powers expressly conferred upon it by the Legislature, together with such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.' The powers of such a city are strictly construed, so that 'any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation.' [Citation.]

(Irwin v. City of Manhattan Beach (1966) 65 Cal.2d 13, 20-21.) Furthermore, Defendant cites to various statutes generally authorizing "general law cities to establish and operate municipal water and sewer systems and authorizing imposition of rates and charges to recover the cost of operating these system [sic] where assessments for improvements or revenue bonds are implicated," but fails to identify or posit any evidence or legislative history as to which of these statutes, if any, formed the principal act upon which it chose not to proceed. (Def. Sup. Br., supra, at p. 6:21 - 7:3. See Pl. Resp. Br., filed Mar. 25, 2021, p. 4:7-14.)

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Furthermore, Defendant did not invoke Section 5471 in enacting its water service rates codified at Hillsborough Municipal Code ("HMC") section 13.20.040. This is in contrast to Defendant explicitly citing to its authority pursuant to Section 5471 for the issuance of other water charges for: (1) payment of an initial deposit when opening a new water account (Section 13.20.050A); (2) a \$25 charge for a special water invoice requested by the customer (Section 13.20.050B); (3) service reconnection charges for termination after for nonpayment of a delinquent account (Section 13.20.050F); and (4) service charges for after-hour work, application for lateral testing for leaks, and observation, inspection and re-observation of laterals (Section 13.20.050G.) (Hood Dec. ISO Def. Supp. Br., Ex. A, W-1302 - W-1304 ("Hood Supp. Br. Dec")). Also in HMC section 13.02.050D and E, Defendant specifically cited to its authority under Health & Safety Code section 5473.10 for charging penalties for delinquent payment of water bills and collection services. (Id. at W-1303 - W-1304.) Defendant also specifically cited to its authority under Health & Safety Code section 5473.11 for its lien process for unpaid water charges in HMC section 13.20.070D. (Id. at W-13050.)

Defendant does not cite to any legislative history contemplating Section 5471 in setting its water rates. Given the foregoing, the Court finds this omission from the water rates is purposeful, and "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." (Hamdan v. Rumsfeld (2006) 548 U.S. 557, 572, 578. Contra Def. Suppl. Br., filed Mar. 5, 2021, p. 8:3-22.) Accordingly, the Court finds Section 5471 inapplicable to the water service rates.

Second, the Court finds that Plaintiffs have demonstrated the Ratepayer Class is ascertainable as to those ratepayers who were charged at Tiers 3, 4, and/or 5 levels. (See Bolton Dec., filed Aug. 28, 2020, ¶ 3; Lockton Dec., filed Aug. 28, 2020, ¶ 3; Marquardt Dec., filed Aug. 28, 2020, ¶ 3; Rochester Dec., filed Aug. 28, 2020, ¶ 3; Syers Dec, filed Aug. 28, 2020, ¶ 3.)

[A] class is ascertainable if a plaintiff supplies a reasonable means of identifying potential class members and the class is defined in terms of objective characteristics and common transactional facts sufficient to allow a class member to identify himself or herself as having a right to recover based on that description. So long as these requirements are met, a class is ascertainable even if the definition pleads ultimate facts or conclusions of law.

(ABM Industries Overtime Cases (2017) 19 Cal.App.5th 277, 303 (internal quotations, citations omitted).)

In turn, Defendant has not demonstrated in opposition that the Ratepayer Class is not ascertainable. (See Opp., filed Sept. 11,

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2020, p. 13:4-16.) The evidence cited does not support its assertion that "figuring out at what point of water use each customer overpaid and who overpaid during a particular period or billing cycle cannot be done with reasonable expense and in reasonable time." (Opp., p. 13:10-14. See Cooke Dec., filed Sep. 11, 2020, ¶ 10, Ex. B.) Furthermore, other evidence proffered by Defendant contradicts this assertion. (Cooke Dec., ¶ 9 ("As reflected in the Town's most recent rate study, the 2017 HF&H Water Rate Cost of Service Study, the majority of the Town's water bills are in Tiers 1 and 2. According to that Rate Study, 70% of customer bills under the Ordinance No. 744 tiered rates were in Tier 2 and 90% of bills reached into Tier 3. (See Rate Study pp. 52-53).").)

Third, the Court finds that Plaintiffs have demonstrated common issues of law and fact predominate.

The "ultimate question" the element of predominance presents is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. The answer hinges on whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. A court must examine the allegations of the complaint and supporting declarations and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.

(Brinker Restaurant Corp. v. Sup. Ct. (2012) 53 Cal.4th 1004, 1021-1022 (internal citations, quotations, footnotes omitted).) Here, as Plaintiffs argue in reply, Defendant's contentions pertain to the issue of damages. (Am. Reply, p. 7:23 - 8:1. See Opp., p. 15:19 -26.) However "individualized issues regarding proof of the amount of damages class members may recover does not defeat a class action so long as there are common questions of liability amenable to class resolution." (ABM Industries Overtime Cases, supra, 19 Cal.App.5th at p. 308.) Furthermore, whether "[t]he Town provides water to customers on revenue neutral basis" is a merits-based argument that further demonstrates common issues of law and fact to be adjudicated. (Def. Supp Br., supra, at p. 10:28 - 11:1.)

Fourth, the Court finds that that Plaintiffs have demonstrated the proposed class representatives' claims are common to those in the Ratepayer Class. Defendant has not demonstrated that Plaintiffs' claims are unique or antagonistic to the class. (See Opp., p. 17:20 - 18:4.)

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The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those [s]he purports to represent that denial of class certification is appropriate.

(Medraza v. Honda of North Hollywood (2008) 166 Cal.App.4th 89, 99 (finding "[t]hat [the defendant] may raise a defense against certain class members that would not apply to [the plaintiff] does not defeat her standing, nor does it make her claims not typical of the class").)

At most, Defendant attempts to draw a delineation between Tiers 1 and 2 and Tiers 3 - 5, which the class definition contemplates. (Opp., p. 17:9-19.) However, Defendant again contradicts this assertion in arguing "the Town's 4,000+ users fluctuate between tiers." (Opp., p. 13:13. See also Cooke, ¶ 9.)

Fifth, the Court finds that Plaintiffs have demonstrated that a class action is superior. Defendant's argument that the burdens of class treatment weigh against certification are unavailing as they pertain to the merits and damages. (See Opp., 19:9-25.)

## 2. Drought Penalty Class

First, Defendant acknowledges that the drought penalties are not subject to Section 5471. (Def. Supp. Br., p. 2:18 - 3:3.)

Second, the Court finds that Plaintiffs have demonstrated a community of interest among the Drought Penalty Class. Defendant has not demonstrated that individual issues predominate (Opp., p. 8:17 - 9:12, 17:5-7), where Plaintiffs contend the enactment of drought penalties violated Proposition 218 (MPA ISO Class Cert, filed Aug. 21, 2020, p. 6:7-10).

Third, Defendant has demonstrated that Plaintiff Marquardt and Rochester should be excluded as class representatives for the drought penalty class.

Plaintiff Marquardt did not pay first, litigate later. (Water Replenishment Dist. of So. California v. City of Cerritos (2013) 220 Cal.App.4th 1450, 1465-1466. See Opp., p. 18:26 - 19:19:7.) In reply, Plaintiffs assert without citation to evidence that "Plaintiffs have incurred and paid both the excessive water rates and the drought penalties. Their claims are therefore typical and Plaintiffs are more than adequate representatives to challenge the

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constitutionality of the Town's practices." (Am. Reply, p. 8:11-13.)

Plaintiffs Marquardt and Rochester did not avail themselves of the administrative remedies. (Opp., p. 18:5-23.)

Generally, a party must exhaust administrative remedies before resorting to the courts. Under this rule, an administrative remedy is exhausted only upon termination of all available, nonduplicative administrative review procedures. . . . The exhaustion doctrine is primarily grounded on policy concerns related to administrative autonomy and judicial efficiency. . . . As to judicial efficiency, the doctrine allows an administrative agency to provide relief without requiring resort to costly litigation. Even when an administrative remedy does not resolve all issues or provide complete relief, it still may reduce the scope of litigation.

(Plantier v. Ramona Municipal Water Dist. (2019) 7 Cal.5th 372, 382-383 (internal citations, quotations omitted).) Plaintiffs did not address the issue of exhaustion of administrative remedies or whether an exception applies in their reply.

Fourth, the Court finds that Plaintiffs have demonstrated that a class action is superior. Defendant's argument is not well taken (Opp., p. 19:25 - 20:11) where Plaintiffs challenge the drought penalty as illegal as enacted and not its application to any individual (Am. Reply, p. 9:19-24).

### 3. Requests for Judicial Notice

Plaintiffs' Request for Judicial Notice, Exhibit A and Defendant's Request for Judicial Notice, Exhibits E - G contemplate orders issued by other trial courts and are therefore GRANTED, BUT NOT FOR THE TRUTH OF THE MATTERS ASSERTED THEREIN.

Defendant's Request for Judicial Notice, Exhibits A - D are ordinances enacted by Defendant are and GRANTED.

Defendant's Supplemental Request for Judicial Notice that the Defendant is a general law city is GRANTED.

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# **EXHIBIT 5**

Electronically

**FILED**

By Superior Court of California, County of San Mateo  
ON 08/24/2022

By /s/ Tovar, Priscilla  
Deputy Clerk

1 Beau R. Burbidge (SBN 267267)  
2 WALKER, HAMILTON & KOENIG, LLP  
3 50 Francisco Street, Suite 460  
4 San Francisco, CA 94133  
5 Telephone: (415) 986-3339  
6 Facsimile: (415) 986-1618  
7 Email: [beau@whk-law.com](mailto:beau@whk-law.com)

Electronically  
**RECEIVED**  
8/15/2022

8 Attorneys for Plaintiffs and Petitioners

CLERK OF THE SUPERIOR COURT  
SAN MATEO COUNTY

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN MATEO**

11 BRAD BARUH, KATHY BARUH,  
12 CHARLES BOLTON, ELDRIDGE GRAY,  
13 JOHN LOCKTON, DAVID MARQUARDT,  
14 PAUL ROCHESTER, ARTHUR  
15 STROMBERG, CHARLES SYERS,  
individually and on behalf of all others  
similarly situated,

16 Plaintiffs and Petitioners,

17 v.

18 TOWN OF HILLSBOROUGH and DOES 1-  
19 100, inclusive,

20 Defendants and Respondents.

Case No. 16CIV02284

RS

**[PROPOSED] ORDER PRELIMINARILY  
APPROVING CLASS ACTION  
SETTLEMENT AND DIRECTING  
NOTICE TO CLASS**

**Date: August 8, 2022**

**Time: 3:00 p.m.**

**Dept.: Hon. V. Raymond Swope  
Dept. 23**

21 On August 8, 2022, this Court heard Plaintiffs' motion for preliminary approval of class  
22 action settlement, made pursuant to California Rules of Court 3.766 and 3.769. This Court,  
23 having reviewed the motion, supporting declarations, and the Second Amended Class Action  
24 Settlement Agreement ("Settlement Agreement") and exhibits thereto, hereby finds good cause to  
25 **GRANT** the motion and hereby finds and orders as follows:

26 **FINDINGS:**

- 27 1. Unless otherwise specified, defined terms in the Order Preliminarily Approving  
28

1 Class Action Settlement and Directing Notice to the Class (“Order”) have the same definitions as  
2 the terms in the Settlement Agreement.

3 2. The Settlement Agreement falls within the range of possible approval as fair,  
4 adequate, and reasonable, and in the best interests of the absent class members.

5 3. The Court finds that (a) the Summary Notice and Long Form Notice, attached to  
6 the Agreement as Exhibits A and B respectively, constitute the best notice practicable under the  
7 circumstances, (b) constitute valid, due, and sufficient notice to all members of the Class, and (c)  
8 comply fully with the requirements of the California Code of Civil Procedure section 382,  
9 California Rules of Court 3.766 and 3.769, and the California and United States Constitutions, and  
10 other applicable law. The Summary Notice and Long Form Notice are attached hereto as Exhibits  
11 A and B respectively, and incorporated herein by reference.

12 4. The Court, in its Order of May 17, 2021, granted class certification and appointed  
13 class representatives and class counsel. The certified classes, class representatives, and class  
14 counsel are accurately reflected in the Settlement Agreement.

15 **IT IS ORDERED THAT:**

16 5. **Settlement Approval.** The Settlement is preliminarily approved.

17 6. **Class Notice.** The form and manner of notice as set forth in paragraph 8 of the  
18 Settlement Agreement and as reflected in the Summary Notice and Long Form Notice (**Exhibits A**  
19 **and B** hereto) are approved. The parties and the Settlement Administrator are directed to provide  
20 notice in accordance with paragraph 8 of the Settlement Agreement.

21 7. **Settlement Administrator.** Phoenix Settlement Administrators is approved as the  
22 Settlement Administrator to administer the notice to class members, create a settlement website,  
23 collect and track claims, opt-outs, and objections, and to process and pay claims, as provided for  
24 under paragraphs 6, 8, 9 and 10 of the Settlement Agreement. Pursuant to paragraph 6.4 of the  
25 Agreement, the Settlement Administrator shall be paid its fees and costs by the Defendant Town  
26 of Hillsborough (“Hillsborough”).

27 8. **Provision of Class Notice.** Hillsborough, through the Settlement Administrator,  
28 shall notify the Class of the Settlement in the manner specified under Paragraph 8 of the

1 Settlement Agreement. The notice sent to Class members shall include the Summary Notice  
2 (**Exhibit A**) as well as Opt-Out Form (**Exhibit D**) and Objection Form (**Exhibit E**). The  
3 Settlement Administrator shall file a declaration describing its compliance with this Order and  
4 Paragraph 8 of the Settlement Agreement not less than sixteen (16) days prior to the Fairness  
5 Hearing.

6       9.     **Objection to Settlement.** Class Members who have not submitted a timely and  
7 valid opt-out form and who desire to object to the Settlement Agreement shall mail such objection  
8 to the Court, Class Counsel, Hillsborough’s Counsel, and the Settlement Administrator no later  
9 than seventy (70) calendar days after the Summary Notice is mailed. The mailing date is deemed  
10 to be the date the objection is deposited in the U.S. Mail as evidenced by the postmark. Written  
11 objections shall be on the form attached to the Settlement Agreement at **Exhibit E** and must  
12 include (a) full name of Objector; (b) mailing address of Objector; (c) the property address where  
13 the Objector has received water service; and (d) the specific reason(s), if any, for the objection,  
14 including any legal support the Class Member wishes to bring to the Court’s attention.

15       10.    **Appearance at Fairness Hearing.** Class Members have the option to appear at  
16 the Fairness Hearing, either in person (or via Zoom or other telephonic means if the hearing is held  
17 in that manner) or through personal counsel hired at the Class Member’s expense, to object to the  
18 fairness, reasonableness, or adequacy of the Agreement, the award of attorneys’ fees and costs, or  
19 to the incentive awards to the Class Representative. However, Class Members (with or without  
20 their attorneys) intending to make an appearance at the Fairness Hearing must inform the Parties  
21 and the Court no later than seventy (70) calendar days after the Summary Notice is mailed by  
22 indicating on the Objection Form, whether they intend to appear.

23       11.    **Failure to Object to Settlement Agreement.** Class Members who fail to object to  
24 the Settlement Agreement in the manner specified above will: (1) be deemed to have waived their  
25 right to object to the Settlement Agreement; (2) be foreclosed from objecting (whether by a  
26 subsequent objection, intervention, appeal, or any other process) to the Settlement Agreement; and  
27 (3) not be entitled to speak at the Fairness Hearing.

28       12.    **Refund Claims.** Pursuant to the terms of the Settlement Agreement, refunds will

1 be paid automatically to all current water customers of Hillsborough, and to all former customers  
2 whose addresses can be located utilizing a skip trace search by the Settlement Administrator, as  
3 described in Paragraphs 6 and 8 of the Settlement Agreement. These payments will be made  
4 automatically with no claim or claim form submission required. However, those Class Members  
5 whose addresses cannot be located through the above-described procedure, and who want to  
6 receive a refund, must submit a completed and valid Refund Claim Form to the Settlement  
7 Administrator no later than seventy (70) calendar days after the Summary Notice is mailed. Those  
8 eligible Class Members who submit valid, timely Refund Claim Forms, and whose eligibility is  
9 verified by the Settlement Administrator, will receive a refund as stated in the Settlement  
10 Agreement at Paragraph 6. The Refund Claim Form is attached hereto as **Exhibit C** and  
11 incorporated herein by reference.

12       13.   **Opt-Out Form.** Class members who do not wish to be part of the class or the  
13 settlement, or to receive a refund from the settlement, must submit a complete and valid Opt-Out  
14 Form to the Settlement Administrator no later than seventy (70) calendar days after the Summary  
15 Notice is mailed. Those Class Members who submit a valid, timely Opt-Out Form, will not be  
16 entitled to a refund, will not release any released claims pursuant to this Settlement or be subject to  
17 the release, and will reserve all released claims he or she may have, and may not file an objection  
18 to the Settlement. The Opt-Out Form is attached hereto as **Exhibit D** and incorporated herein by  
19 reference.

20       14.   **Publication of Notice.** Within fourteen (14) days of this Order, the Settlement  
21 Administrator shall cause to be published in the San Mateo Daily Journal newspaper, a notice  
22 substantially in the form of **Exhibit F**, attached hereto and incorporated herein by reference, which  
23 shall be published in two editions of that newspaper at least seven (7) days apart.

24       15.   **Termination.** If the Agreement terminates for any reason, the following will  
25 occur: (a) this Order and all of its provisions will be vacated; (b) the Action will revert to the  
26 status that existed before the Plaintiffs filed their motion for approval of the Preliminary Approval  
27 Order; and (c) no term or draft of the Settlement Agreement, or any part of the Parties' settlement  
28 discussions, negotiations, or documentation will have any effect or be admissible into evidence for

1 any purpose in the Action or any other proceeding. This Order will not waive or otherwise impact  
2 the Parties rights or arguments

3 16. **No Admissions.** Nothing in this Order is, or may be construed as, admission or  
4 concession on any point of fact or law by or against any Party.

5 17. **Stay of Dates and Deadlines.** Except for such actions as are necessary to  
6 implement the Agreement and this Order, any pending deadlines and/or proceedings in this Action  
7 are stayed and suspended until further notice from the Court.

8 18. **Fairness Hearing.** On March 20, 2023, at 3:00 p.m., this Court will hold a  
9 Fairness Hearing to determine whether the Agreement should be finally approved as fair,  
10 reasonable, and adequate. All papers supporting Plaintiffs' request for attorneys' fees and  
11 reimbursement of expenses, and Class Representative's service awards must be filed no later than  
12 sixteen (16) calendar days before the Fairness Hearing. All papers supporting final approval of the  
13 Agreement must be filed no later than sixteen (16) calendar days before the Fairness Hearing.  
14 Any responses to objections must be filed no less than ten (10) court days before the Fairness  
15 Hearing. Based on the date of this Order and the date of the Fairness Hearing, the following are  
16 the certain associated dates in this Agreement:

<b>Event</b>	<b>Timing</b>
Last day for Settlement Administrator to send the Summary Notice and to establish a Settlement Website	14 days after entry of the Preliminary Approval Order
Last day for Class Members to submit a claim and/or object to the Settlement Agreement	70 days after Summary Notice is mailed
Last day for Class Counsel to move for Attorneys' Fees and Expenses and for a Class Representative Service Award	16 days prior to Fairness Hearing
Last day for Parties to file briefs in support of the Final Order and Judgment	16 days prior to Fairness Hearing
Last day to file an affidavit of compliance with all notice requirements	16 days prior to Fairness Hearing
Last day to file response to objections	10 court days before Fairness Hearing







**SUPERIOR COURT OF SAN MATEO COUNTY**

Civil Department  
400 County Center, Redwood City, CA 94063  
(650) 261-5100  
www.sanmateocourt.org

**AFFIDAVIT OF MAILING**

Date: 8/24/2022

In the Matter of: BRAD BARUH, et al vs. TOWN OF HILLSBOROUGH, et al  
Case No.: 16-CIV-02284

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City, a true copy of the attached document(s) **ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND DIRECTING NOTICE TO CLASS**, enclosed in an envelope, with proper and necessary postage thereon, and addressed to the following:

Executed on: 8/24/2022

Neal I Taniguchi, Court Executive Officer/Clerk

By: /s/ Priscilla Tovar

Priscilla Tovar, Deputy Clerk

Copies Mailed To:

BEAU R BURBIDGE  
WALKER, HAMILTON & KOEING, LLP  
50 FRANCISCO STREET, SUITE 460  
SAN FRANCISCO, CA 94133

JAMES B GILPIN  
BEST BEST & KRIEGER LLP  
500 CAPITOL MALL, SUITE 1700  
SACRAMENTO, CA 95814

# **EXHIBIT 6**

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
2/17/2016	BRB	1.6	Legal research regarding Proposition 218 case law, mandamus actions, and administrative records	\$ 450.00	\$ 720.00
2/18/2016	BRB	2.9	Legal research regarding Proposition 218 case law, mandamus actions, and administrative records	\$ 450.00	\$ 1,305.00
2/19/2016	BRB	2.5	Draft and revise public records request letter for records related to water rates	\$ 450.00	\$ 1,125.00
3/1/2016	BRB	0.4	Review email from Town counsel re request to inspect water rate records	\$ 450.00	\$ 180.00
3/4/2016	BRB	0.3	Letter to Town counsel re request to review water rate records	\$ 450.00	\$ 135.00
3/16/2016	BRB	0.3	Review email from Town counsel re request to inspect water rate records	\$ 450.00	\$ 135.00
3/18/2016	BRB	0.5	Review and analysis of correspondence from Town re public record request	\$ 450.00	\$ 225.00
3/29/2016	BRB	0.7	Draft and revise list of documents requested for review and documents to review for potential lawsuit	\$ 450.00	\$ 315.00
3/29/2016	BRB	8.4	Travel to Hillsborough Town hall and conduct review of requested records related to water rates for purpose of potential water rate class action	\$ 450.00	\$ 3,780.00
4/5/2016	BRB	1.7	Draft and revise class action retainer agreement for potential clients; review and analysis of template agreements sent by counsel	\$ 450.00	\$ 765.00
4/7/2016	BRB	1.2	Coordinate copying and initial review of documents requested from on-site inspection of Town records	\$ 450.00	\$ 540.00
4/8/2016	BRB	0.4	Letter to client Lockton re formal engagement	\$ 450.00	\$ 180.00
4/12/2016	BRB	3.9	Review, organize, and summarize records received from Town pursuant to public record request	\$ 450.00	\$ 1,755.00
4/15/2016	BRB	4.6	Further review and summary of records received from Town	\$ 450.00	\$ 2,070.00
4/16/2016	BRB	5.0	Further review and summary of records received from Town	\$ 450.00	\$ 2,250.00
4/30/2016	BRB	1.2	Call with plaintiff Lockton re retainer agreement and correspond to finalize same	\$ 450.00	\$ 540.00
5/5/2016	BRB	0.4	Letter to client Lockton re formal engagement	\$ 450.00	\$ 180.00
5/5/2016	BRB	0.5	Correspond with plaintiff Stromberg and finalize retainer	\$ 450.00	\$ 225.00
5/31/2016	BRB	0.3	Letter to client Stromberg re formal engagement	\$ 450.00	\$ 135.00
5/31/2016	BRB	0.6	Correspond with plaintiff Syers and finalize retainer	\$ 450.00	\$ 270.00
6/2/2016	BRB	2.0	Draft and revise timeline of water rates in Town based on review of requested records	\$ 450.00	\$ 900.00
6/8/2016	BRB	0.9	Draft and revise excel table of proposed water rates for study for Prop 218 case	\$ 450.00	\$ 405.00
6/20/2016	BRB	0.9	Correspond with Baruh plaintiffs and finalize retainer	\$ 450.00	\$ 405.00
6/21/2016	BRB	0.5	Correspond with plaintiff Bolton and finalize retainer	\$ 450.00	\$ 225.00
6/22/2016	BRB	2.7	Correspond with plaintiff Marquardt and finalize retainer; further legal research regarding mandamus actions, government claims, and Proposition 218	\$ 450.00	\$ 1,215.00
6/28/2016	BRB	0.6	Draft and revise letter to Town re request for meeting and compilation of administrative record	\$ 450.00	\$ 270.00
7/1/2016	BRB	0.7	Correspond with plaintiff Grey and finalize retainer	\$ 450.00	\$ 315.00
7/8/2016	BRB	0.4	Review and analysis of correspondence from Town counsel re request to review documents on water rates	\$ 450.00	\$ 180.00
7/18/2016	BRB	0.5	Correspond with plaintiff Rochester and finalize retainer	\$ 450.00	\$ 225.00
7/22/2016	BRB	0.9	Draft and revise case overview for potential co-counsel	\$ 450.00	\$ 405.00
7/22/2016	BRB	0.7	Draft and revise roster of plaintiffs and potential plaintiffs for water rate action	\$ 450.00	\$ 315.00
8/30/2016	BRB	0.7	Review correspondene from Lockton re potential Prop 218 litigation and strategy	\$ 450.00	\$ 315.00
8/31/2016	BRB	4.3	Travel to and meet with client re case strategy	\$ 450.00	\$ 1,935.00
9/1/2016	BRB	2.6	Legal research and correspond with client re case strategy	\$ 450.00	\$ 1,170.00
9/7/2016	BRB	1.5	Review materials provided by client re case and water rates	\$ 450.00	\$ 675.00
9/14/2016	BRB	2.0	Legal research in support of drafting of complaint	\$ 450.00	\$ 900.00
9/16/2016	BRB	1.5	Draft and revise memo on notes and agenda for meeting with Town on water rates	\$ 450.00	\$ 675.00
11/1/2016	BRB	4.7	Draft and revise complaint and petition for writ of mandate	\$ 450.00	\$ 2,115.00

**Baruh v. Town of Hillsborough**  
**San Mateo Superior Court Case No. 16CIV02284**

**Attorney Time Report**

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
11/2/2016	BRB	3.6	Revise and edit complaint and petition for writ of mandate	\$ 450.00	\$ 1,620.00
11/3/2016	BRB	1.3	Revise and edit complaint and petition for writ of mandate	\$ 450.00	\$ 585.00
11/4/2016	BRB	2.9	Revise and edit complaint; correspond with clients re approval and form	\$ 450.00	\$ 1,305.00
11/7/2016	BRB	1.6	Revise and edit complaint; correspond with clients re approval and form	\$ 450.00	\$ 720.00
11/8/2016	BRB	2	Revise and finalize complaint and petition for writ of mandate	\$ 450.00	\$ 900.00
12/14/2016	BRB	1.3	Review and analysis of answer to complaint	\$ 450.00	\$ 585.00
12/15/2016	BRB	3.8	Analysis and strategy re compilation of administrative record and adjudication of writ	\$ 450.00	\$ 1,710.00
1/23/2017	BRB	0.7	Draft and revise letter to Town request ing preparation of administrative record	\$ 450.00	\$ 315.00
1/24/2017	BRB	0.5	Draft letter to clients re case schedule and briefs on writ of mandate	\$ 450.00	\$ 225.00
2/7/2017	BRB	0.4	Review correspondence from defense counsel re compilation of administrative record	\$ 450.00	\$ 180.00
2/8/2017	BRB	4.0	Review dockets and filings in other Proposition 218 cases handled by defense counsel for purpose of drafting pleadings and request for administrative record	\$ 450.00	\$ 1,800.00
3/2/2017	BRB	0.6	Review and analysis of correspondence from town counsel re compilation of administrative record and proposal re rates	\$ 450.00	\$ 270.00
3/28/2017	BRB	0.4	Correspond with defense counsel re proposed meeting with Town coucil	\$ 450.00	\$ 180.00
4/6/2017	BRB	0.3	Review correspondence from defense counsel re status of administrative record	\$ 450.00	\$ 135.00
4/10/2017	BRB	1.7	Review and analysis of draft drought penalty record index	\$ 450.00	\$ 765.00
5/11/2017	BRB	0.7	Draft and revise letter to defense counsel re proposed drought administrative record	\$ 450.00	\$ 315.00
5/15/2017	BRB	0.4	Review correspondence from defense counsel re proposed administrative record	\$ 450.00	\$ 180.00
5/16/2017	BRB	0.6	Review and analysis of letter from Lockton re rate increase protest	\$ 450.00	\$ 270.00
5/19/2017	BRB	0.4	Review correspondence from defense counsel re proposed administrative record	\$ 450.00	\$ 180.00
6/7/2017	BRB	0.7	Draft and revise letter to defense counsel re proposed compilation of adminisitrative record	\$ 450.00	\$ 315.00
10/23/2017	BRB	0.7	Confer with opposing counsel re stip and order re case assignment	\$ 450.00	\$ 315.00
10/26/2017	BRB	2	Draft and revise stip and order re case assignment	\$ 450.00	\$ 900.00
10/27/2017	BRB	0.9	Further confer with counsel re draft stip and order re case assignment	\$ 450.00	\$ 405.00
10/30/2017	BRB	1.3	Revise and edit stip and order re case assignment	\$ 450.00	\$ 585.00
10/31/2017	BRB	0.4	Revise and finalize stip and order re case assignment for filing	\$ 450.00	\$ 180.00
11/8/2017	BRB	0.7	Review of court order singly-assigning case, analysis and strategy re same	\$ 450.00	\$ 315.00
11/20/2017	BRB	0.6	Review of court order on complex designation and case management conference	\$ 450.00	\$ 270.00
1/3/2018	BRB	2.3	Confer with opposing counsel re case management statement; draft and revise case management statement	\$ 450.00	\$ 1,035.00
1/5/2018	BRB	1.6	Revise and edit case management statement	\$ 450.00	\$ 720.00
1/8/2018	BRB	0.9	Correspond with counsel re draft case management statement and revisions thereof	\$ 450.00	\$ 405.00
1/9/2018	BRB	1.7	Revise and edit case management statement	\$ 450.00	\$ 765.00
1/10/2018	BRB	0.7	Revise and finalize joint case management statement	\$ 450.00	\$ 315.00
1/19/2018	BRB	5.3	Prepare for, travel to and from, and attend case management conference	\$ 450.00	\$ 2,385.00
1/23/2018	BRB	1.6	Draft and revise proposed order following case management conference; correspond with counsel re same	\$ 450.00	\$ 720.00
1/24/2018	BRB	1.7	Revise and edit proposed case management order	\$ 450.00	\$ 765.00
1/30/2018	BRB	0.6	Correspond with defense counsel re format of administrative record and issues with thumb drives	\$ 450.00	\$ 270.00
3/14/2018	BRB	4.7	Draft and revise mandatory settlement conference statement	\$ 450.00	\$ 2,115.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
3/15/2018	BRB	2.6	Revise and edit mandatory settlement conference statement	\$ 450.00	\$ 1,170.00
3/19/2018	BRB	3.8	Revise and edit mandatory settlement conference statement	\$ 450.00	\$ 1,710.00
3/19/2018	BRB	2.5	Draft and revise memorandum on review of water rate administrative record	\$ 450.00	\$ 1,125.00
3/20/2018	BRB	1.9	Revise and edit mandatory settlement conference statement	\$ 450.00	\$ 855.00
3/20/2018	BRB	4.7	Review Town spreadsheets on water rates and billings and draft and revise potential damages scenarios for class action case	\$ 450.00	\$ 2,115.00
3/20/2018	BRB	1.0	Review of Hillsborough financial records and draft and revise spreadsheet on Town water cost calculations	\$ 450.00	\$ 450.00
3/23/2018	BRB	4.9	Review drought penalty record and prepare table of contents for hot docs	\$ 450.00	\$ 2,205.00
3/26/2018	BRB	3.6	Review water rate record and prepare table of contents for hot docs	\$ 450.00	\$ 1,620.00
3/27/2018	BRB	2.7	Meet with clients to discuss mandatory settlement conference	\$ 450.00	\$ 1,215.00
3/28/2018	BRB	8.4	Travel to and attend mandatory settlement conference; confer with clients re outcome of conference and strategy going forward	\$ 450.00	\$ 3,780.00
3/29/2018	BRB	1.6	Call with clients to discuss settlement conference and post-settlement conference strategy	\$ 450.00	\$ 720.00
3/29/2018	BRB	5.0	Legal research regarding motion for writ of mandate	\$ 450.00	\$ 2,250.00
4/3/2018	BRB	6.3	Review and summarize water administrative record for use in motion for writ of mandate	\$ 450.00	\$ 2,835.00
4/4/2018	BRB	5.6	Further review and summarize water administrative record for use in motion for writ of mandate	\$ 450.00	\$ 2,520.00
4/5/2018	BRB	5.9	Further review and summarize water administrative record for use in motion for writ of mandate	\$ 450.00	\$ 2,655.00
4/9/2018	BRB	4.4	Review and summarize water and drought administrative record for use in motion for writ of mandate	\$ 450.00	\$ 1,980.00
4/11/2018	BRB	4.9	Review and summarize drought administrative record for use in motion for writ of mandate	\$ 450.00	\$ 2,205.00
4/12/2018	BRB	3.8	Review and summarize drought administrative record for use in motion for writ of mandate; draft and revise motion for writ of mandate	\$ 450.00	\$ 1,710.00
4/16/2018	BRB	5.7	Draft and revise memo in support of motion for writ of mandate	\$ 450.00	\$ 2,565.00
4/17/2018	BRB	5.9	Revise and edit memo in support of motion for writ of mandate	\$ 450.00	\$ 2,655.00
4/18/2018	BRB	5.0	Revise and edit memo in support of motion for writ of mandate	\$ 450.00	\$ 2,250.00
4/23/2018	BRB	7.4	Revise and edit memo in support of motion for writ of mandate	\$ 450.00	\$ 3,330.00
4/24/2018	BRB	8.5	Revise and edit all supporting paperwork for motion for writ of mandate	\$ 450.00	\$ 3,825.00
4/25/2018	BRB	9.0	Revise and edit all supporting paperwork for motion for writ of mandate	\$ 450.00	\$ 4,050.00
4/26/2018	BRB	0.7	Finalize motion for writ of mandate and supporting paperwork	\$ 450.00	\$ 315.00
5/30/2018	BRB	3.7	Review and analysis of opposition to motion for writ of mandate and supporting evidence and authority	\$ 450.00	\$ 1,665.00
5/31/2018	BRB	4.9	Review and analysis of opposition to motion for writ of mandate and supporting evidence and authority	\$ 450.00	\$ 2,205.00
6/1/2018	BRB	4.7	Review and analysis of opposition to motion for writ of mandate and supporting evidence and authority	\$ 450.00	\$ 2,115.00
6/7/2018	BRB	0.7	Review and analysis of notice or errata filed by defendant	\$ 450.00	\$ 315.00
6/11/2018	BRB	5.7	Legal research for reply ISO motion for writ of mandate	\$ 450.00	\$ 2,565.00
6/12/2018	BRB	4.8	Review and summary of record for reply to motion for writ of mandate; draft and revise reply brief in support of motion	\$ 450.00	\$ 2,160.00
6/18/2018	BRB	4.8	Review and summary of record for reply to motion for writ of mandate; draft and revise reply brief in support of motion	\$ 450.00	\$ 2,160.00
6/20/2018	BRB	5.7	Further legal research and draft and revise reply brief in support of motion	\$ 450.00	\$ 2,565.00
6/21/2018	BRB	3.3	Revise and edit reply brief and declaration	\$ 450.00	\$ 1,485.00
6/22/2018	BRB	7.7	Revise and edit reply brief and declaration	\$ 450.00	\$ 3,465.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
6/26/2018	BRB	1.3	Draft and revise notice of errata to points and authorities for writ of mandate; revise and edit reply and supporting documents	\$ 450.00	\$ 585.00
6/27/2018	BRB	0.7	Draft and revise notice of errata to points and authorities for writ of mandate; revise and finalize reply and supporting documents	\$ 450.00	\$ 315.00
7/12/2018	BRB	1.9	Review lodging of appendix of administrative record and contents thereof	\$ 450.00	\$ 855.00
7/18/2018	BRB	1.2	Review court order continueing writ of mandate; call with clients	\$ 450.00	\$ 540.00
7/19/2018	BRB	0.7	Correspond with clients re case status and strategy	\$ 450.00	\$ 315.00
8/14/2018	BRB	0.8	Correspond with clients to answer inquiries regarding case	\$ 450.00	\$ 360.00
9/11/2018	BRB	2.0	Call with client re strategies and additional areas to consider for hearing	\$ 450.00	\$ 900.00
10/10/2018	BRB	1.6	Legal research on Proposition 218 an updated cases in support of hearing for writ of mandate	\$ 450.00	\$ 720.00
10/16/2018	BRB	2.7	Legal research on Proposition 218 an updated cases in support of hearing for writ of mandate	\$ 450.00	\$ 1,215.00
10/22/2018	BRB	3.9	Draft and revise argument outline for writ of mandate hearing	\$ 450.00	\$ 1,755.00
10/24/2018	BRB	4.6	Draft and revise outline for hearing; draft and revise exhibit handups	\$ 450.00	\$ 2,070.00
10/25/2018	BRB	3.0	Draft and revise outline for hearing; draft and revise exhibit handups	\$ 450.00	\$ 1,350.00
10/26/2018	BRB	2	Review court order continueing writ of mandate; conference with clients re same	\$ 450.00	\$ 900.00
11/2/2018	BRB	0.7	Review correspondence from potential class member and have call re joining case	\$ 450.00	\$ 315.00
11/16/2018	BRB	1.6	Review court tentative on motion for writ of mandate; conference with clients re same	\$ 450.00	\$ 720.00
11/20/2018	BRB	2.9	Legal research re writ of mandate appropriateness, procedural options for case	\$ 450.00	\$ 1,305.00
11/21/2018	BRB	1.0	Legal research re writ of mandate appropriateness, procedural options for case	\$ 450.00	\$ 450.00
11/28/2018	BRB	0.8	Draft and revise letter to Town counsel re one-way intervention issues and determining merits prior to class certification	\$ 450.00	\$ 360.00
11/30/2018	BRB	6.4	Confer with counsel and draft and revise supplemental brief re writ of mandate appropriateness	\$ 450.00	\$ 2,880.00
12/3/2018	BRB	2.6	Confer with counsel and draft and revise supplemental brief re writ of mandate appropriateness	\$ 450.00	\$ 1,170.00
12/4/2018	BRB	2.0	Confer with counsel and draft and revise supplemental brief re writ of mandate appropriateness	\$ 450.00	\$ 900.00
12/5/2018	BRB	3.0	Legal research and research from other court dockets in California re writes of mandate in Prop 218 cases	\$ 500.00	\$ 1,500.00
1/9/2019	BRB	0.3	Letter to court requesting telephonic appearance at CMC	\$ 500.00	\$ 150.00
1/25/2019	BRB	1.4	Attend case management conference; Draft and revise correspondence re continuance of hearing on writ of mandate	\$ 500.00	\$ 700.00
2/1/2019	BRB	0.5	Review final proposed stipulation and case management order	\$ 500.00	\$ 250.00
3/21/2019	BRB	0.4	Letter to court re firm name change	\$ 500.00	\$ 200.00
5/21/2019	BRB	0.3	Letter to defense counsel re request to dismiss Grey from case	\$ 500.00	\$ 150.00
5/28/2019	BRB	0.3	Letter to defense counsel re request to dismiss Grey from case	\$ 500.00	\$ 150.00
5/30/2019	BRB	0.4	Call with defense counsel re proposal to dismiss Grey from case	\$ 500.00	\$ 200.00
6/18/2019	BRB	0.4	Draft and revise notice of errata	\$ 500.00	\$ 200.00
7/8/2019	BRB	0.4	Review correspondence from defense counsel re agreement to dismiss Grey from case	\$ 500.00	\$ 200.00
7/10/2019	BRB	0.5	Draft and revise request for dismissal as to plaintiff Grey only	\$ 500.00	\$ 250.00
8/2/2019	BRB	4.0	Draft and revise water cost and rate calculations spreadsheet based on Town administrative record; draft and revise damages analysis	\$ 500.00	\$ 2,000.00
8/22/2019	BRB	4.9	Review tentative ruling and prepare arguments for hearing	\$ 500.00	\$ 2,450.00
8/23/2019	BRB	4.7	Attend hearing on writ of mandate; correspond with clietns re outcome and analysis and strategy re next steps	\$ 500.00	\$ 2,350.00

**Baruh v. Town of Hillsborough**  
**San Mateo Superior Court Case No. 16CIV02284**

**Attorney Time Report**

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
8/30/2019	BRB	0.5	Review correspondence and proposed order from defense counsel re writ of mandate	\$ 500.00	\$ 250.00
9/4/2019	BRB	3.6	Review and analysis at court filings for other California Proposition 218 cases for strategies on law on handling of remedies	\$ 500.00	\$ 1,800.00
9/5/2019	BRB	2.5	Further review of outhter Proposition 218 cases re remedies; legal research re same	\$ 500.00	\$ 1,250.00
9/9/2019	BRB	3.7	Further review of outhter Proposition 218 cases re remedies; legal research re same	\$ 500.00	\$ 1,850.00
9/12/2019	BRB	2.7	Legal research and draft and revise trial brief on liability	\$ 500.00	\$ 1,350.00
9/13/2019	BRB	5	Legal research and draft and revise trial brief on liability	\$ 500.00	\$ 2,500.00
9/17/2019	BRB	2.8	Revise and edit trial brief on liability	\$ 500.00	\$ 1,400.00
9/19/2019	BRB	0.5	Correspond with office re filing procedures for briefs	\$ 500.00	\$ 250.00
9/19/2019	BRB	1.9	Revise and finalize brief on liability and remedies for filing; and documents in support	\$ 500.00	\$ 950.00
10/7/2019	BRB	2.5	Review and analysis of court's case management order 3; analysis and strategy re response	\$ 500.00	\$ 1,250.00
10/8/2019	BRB	2.0	Call with clients to confer on case strategy following court order	\$ 500.00	\$ 1,000.00
10/22/2019	BRB	8.5	Travel to San Jose for meeting with client Lockton, review of documents regarding water rate issues and cases provided by client	\$ 500.00	\$ 4,250.00
10/30/2019	BRB	0.7	Review initial claim and complaint documents, and other documents provided by client Lockton regarding claims	\$ 500.00	\$ 350.00
11/7/2019	BRB	0.4	Letter to court requesting telephonic appearance at CMC	\$ 500.00	\$ 200.00
11/7/2019	BRB	0.7	Call with client Lockton re status of case	\$ 500.00	\$ 350.00
11/8/2019	BRB	0.7	Correspond with counsel re draft case management statement	\$ 500.00	\$ 350.00
11/12/2019	BRB	1.2	Revise and edit case management statement, correspond with defense counsel re same	\$ 500.00	\$ 600.00
11/22/2019	BRB	1.7	Attend CMC; correspond with clients re same and strategy	\$ 500.00	\$ 850.00
11/25/2019	BRB	0.4	Review and analysis of case management order 4	\$ 500.00	\$ 200.00
1/17/2020	BRB	0.3	Review letter from defense counsel re request to appear by telephone	\$ 500.00	\$ 150.00
4/10/2020	BRB	0.3	Review letter from court re continuance of CMC	\$ 500.00	\$ 150.00
6/19/2020	BRB	1	Attend case management conference; correspond with clients re same	\$ 500.00	\$ 500.00
6/22/2020	BRB	0.4	Review and analysis of proposed case management order served by defense	\$ 500.00	\$ 200.00
6/22/2020	BRB	0.4	Review proposed case management order from defense counsel	\$ 500.00	\$ 200.00
8/6/2020	BRB	0.9	Correspondence with office re filings in prior cases re attorney qualifications for use in class cert motion	\$ 500.00	\$ 450.00
8/7/2020	BRB	5.3	Draft and revise motion for class certification and supporting papers	\$ 500.00	\$ 2,650.00
8/10/2020	BRB	6.2	Legal research and review of other Proposition 218 cases regarding applicable law and argument for class certification	\$ 500.00	\$ 3,100.00
8/11/2020	BRB	4	Legal research and review of other Proposition 218 cases regarding applicable law and argument for class certification	\$ 500.00	\$ 2,000.00
8/13/2020	BRB	4.0	Draft and revise motion for class certification and supporting papers	\$ 500.00	\$ 2,000.00
8/14/2020	BRB	3.6	Draft and revise motion for class certification and supporting papers	\$ 500.00	\$ 1,800.00
8/17/2020	BRB	3.6	Revise and finalize motion and supporting papers for motion for class certification; correspond with clients re declarations	\$ 500.00	\$ 1,800.00
8/20/2020	BRB	0.7	Correspondence with office re signatures for client declarations of class cert motion	\$ 500.00	\$ 350.00
8/20/2020	BRB	2.0	Revise and finalize motion and supportiogn papers for class certification	\$ 500.00	\$ 1,000.00
8/21/2020	BRB	0.6	Correspond with office re filing procedures for class cert motion	\$ 500.00	\$ 300.00
8/31/2020	BRB	1.1	Correspond with clients re class certification motion and case strategy going forward	\$ 500.00	\$ 550.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
9/10/2020	BRB	0.8	Call with defense counsel re dismissal of clients	\$ 500.00	\$ 400.00
9/14/2020	BRB	3.7	Review and analysis of Town's opposition to motion to class certification	\$ 500.00	\$ 1,850.00
9/15/2020	BRB	2.6	Review and analysis of Town's opposition to class certification, legal research re same; prepare requests for dismissal	\$ 500.00	\$ 1,300.00
9/17/2020	BRB	5.3	Legal research to respond to Town's opposition; Draft and revise reply for class certification and supporting papers	\$ 500.00	\$ 2,650.00
9/18/2020	BRB	3.9	Further draft and revise motion for class certification and supporting papers	\$ 500.00	\$ 1,950.00
9/21/2020	BRB	5.5	Further draft and revise reply in support of class certification and supporting papers	\$ 500.00	\$ 2,750.00
9/22/2020	BRB	3.3	Further draft and revise reply in support of class certification and supporting papers	\$ 500.00	\$ 1,650.00
9/24/2020	BRB	0.5	Correspond with office re filing procedures for reply brief on class certification	\$ 500.00	\$ 250.00
9/24/2020	BRB	1.4	Revise and finalize reply brief and supporting papers for class certification	\$ 500.00	\$ 700.00
10/14/2020	BRB	1.1	Deaft and revise opposition brief	\$ 500.00	\$ 550.00
10/15/2020	BRB	2.1	Legal research and review of tentative ruling	\$ 500.00	\$ 1,050.00
10/29/2020	BRB	1.6	Review and analysis of supplemental excerpt from administrative record	\$ 500.00	\$ 800.00
11/2/2020	BRB	4.6	Review and analysis of defnese supplemental brief; draft and reply plaintiff's response to supplemental brief	\$ 500.00	\$ 2,300.00
11/4/2020	BRB	5.1	Revise and edit plaintiffs' response to supplemental brief	\$ 500.00	\$ 2,550.00
11/4/2020	BRB	2.4	Review supplemental brief from defense re class certification and supplemental Hood declaration re same	\$ 500.00	\$ 1,200.00
11/5/2020	BRB	3.1	Revise and edit plaintiffs' response to supplemental brief	\$ 500.00	\$ 1,550.00
11/6/2020	BRB	3.1	Revise and edit plaintiffs' response to supplemental brief	\$ 500.00	\$ 1,550.00
11/10/2020	BRB	2.6	Legal and administrative record research in support of supplemental briefing	\$ 500.00	\$ 1,300.00
11/11/2020	BRB	1.9	Revise and finalize supplemental brief for class certification	\$ 500.00	\$ 950.00
11/11/2020	BRB	0.4	Correspond with office re filing of response to Town's supplemental brief	\$ 500.00	\$ 200.00
1/19/2021	BRB	0.4	Review and analysis of court order continueing class certificaion hearing	\$ 500.00	\$ 200.00
1/20/2021	BRB	2.2	Download and review relevant case and damages documents; review experts for damages workup	\$ 500.00	\$ 1,100.00
1/21/2021	BRB	2.0	Further review of damages documents for damages workup	\$ 500.00	\$ 1,000.00
1/28/2021	BRB	1.3	Call with potential experts	\$ 500.00	\$ 650.00
2/1/2021	BRB	1.0	Call with clients	\$ 500.00	\$ 500.00
2/2/2021	BRB	1.3	Research on potential mediators	\$ 500.00	\$ 650.00
2/4/2021	BRB	1.3	Call with potential experts; further research re damages experts	\$ 500.00	\$ 650.00
2/5/2021	BRB	2.2	Legal research and review of pleadings in preparation for class cetification hearing	\$ 500.00	\$ 1,100.00
2/8/2021	BRB	3.3	Prepare for and attend hearing on class certification	\$ 500.00	\$ 1,650.00
2/9/2021	BRB	3.1	Analysis and strategy re moving case and discovery forward following hearing; draft and revise discovery to defendant	\$ 500.00	\$ 1,550.00
2/10/2021	BRB	2.5	Draft and revise request for production of documents; correspond with potential expert on damages	\$ 500.00	\$ 1,250.00
2/12/2021	BRB	0.5	Call with potential damages expert	\$ 500.00	\$ 250.00
2/25/2021	BRB	0.7	Call with defense counsel re case status	\$ 500.00	\$ 350.00
2/26/2021	BRB	1.2	Call with potential expert on damages; correspond with defense counsel re schedule	\$ 500.00	\$ 600.00
3/2/2021	BRB	1.4	Call with clients re case status	\$ 500.00	\$ 700.00
3/3/2021	BRB	1.6	Legal research re damages issues for case	\$ 500.00	\$ 800.00
3/4/2021	BRB	1.7	Further legal research re damages issues for trial	\$ 500.00	\$ 850.00



Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
3/5/2021	BRB	0.7	Correspond with damages consultant	\$ 500.00	\$ 350.00
3/8/2021	BRB	3.9	Review and analysis of Town's objections to court's tentative on class certification and request for judicial notice; review of administrative record on damages	\$ 500.00	\$ 1,950.00
3/9/2021	BRB	3.6	Further review of town's objections and legal research in response to same	\$ 500.00	\$ 1,800.00
3/10/2021	BRB	2.9	Correspond with office re deadlines to calendar; legal research in support of brief	\$ 500.00	\$ 1,450.00
3/15/2021	BRB	1.3	Revise and edit briefRevise and edit briefn in response to defendants' supplemental briefing	\$ 500.00	\$ 650.00
3/16/2021	BRB	3.2	Revise and edit briefRevise and edit briefn in response to defendants' supplemental briefing	\$ 500.00	\$ 1,600.00
3/17/2021	BRB	7.3	Correspond with consultant; revise and edit brief	\$ 500.00	\$ 3,650.00
3/18/2021	BRB	7.0	Revise and edit briefRevise and edit briefn in response to defendants' supplemental briefing	\$ 500.00	\$ 3,500.00
3/19/2021	BRB	1.3	Revise and edit briefRevise and edit briefn in response to defendants' supplemental briefing	\$ 500.00	\$ 650.00
3/24/2021	BRB	1.5	Revise and finalize suppelemtnal briefing	\$ 500.00	\$ 750.00
3/25/2021	BRB	4.5	Review and complete mediation agreement; call with clients re case status and mediation; draft and revise mediation brief	\$ 500.00	\$ 2,250.00
3/26/2021	BRB	2.3	Draft and revise meidation brief	\$ 500.00	\$ 1,150.00
4/6/2021	BRB	2.5	Correspond with office re confirmation of mediation with Snowden; plan and prepare for mediation	\$ 500.00	\$ 1,250.00
4/15/2021	BRB	2.2	Draft and revise mediation brief	\$ 500.00	\$ 1,100.00
4/16/2021	BRB	5.9	Review and analysis of Town cost and water rate spreadhseets and perform calculations on water rate structure and refund amounts	\$ 500.00	\$ 2,950.00
4/18/2021	BRB	4.2	Further review and summary of records received from Town	\$ 500.00	\$ 2,100.00
4/19/2021	BRB	3.5	Further review and summary of records received from Town; information on town water rates available online	\$ 500.00	\$ 1,750.00
4/19/2021	BRB	6.9	Review of Town's document production and summary thereof; Revise and edit mediation brief and review record and prior briefing for exhibits	\$ 500.00	\$ 3,450.00
4/20/2021	BRB	7.5	Review of Town's document production and summary thereof; Revise and edit mediation brief and review record and prior briefing for exhibits	\$ 500.00	\$ 3,750.00
4/21/2021	BRB	9.3	Revise and edit mediation brief and review record and prior briefing for exhibits; correspond with clients re completion of confidentiality agreement; Draft and revise spreadsheet of cost of service calculations for comparison to Town's calculations in preparation for mediation	\$ 500.00	\$ 4,650.00
4/22/2021	BRB	3.2	Revise and finalize mediation brief and exhibits	\$ 500.00	\$ 1,600.00
4/28/2021	BRB	3.1	Review briefs, correspond with clients and prepare for mediation	\$ 500.00	\$ 1,550.00
4/28/2021	BRB	2.6	Draft and revise spreadsheet of Town over charge calcaultions for purposes of preparing for mediation and calculating damages	\$ 500.00	\$ 1,300.00
4/29/2021	BRB	10.4	Attend mediation with Judge Snowden	\$ 500.00	\$ 5,200.00
4/30/2021	BRB	1.7	Correspond with clients following mediation; call with expert re damages	\$ 500.00	\$ 850.00
5/3/2021	BRB	5.4	Further review and analysis of Town's native drought penalty and water rate excel files; summarize for remedies analaysis	\$ 500.00	\$ 2,700.00
5/4/2021	BRB	5.5	Further review and analysis of Town's native drought penalty and water rate excel files; summarize for remedies analaysis	\$ 500.00	\$ 2,750.00
5/6/2021	BRB	0.5	Correspond with damages consultant	\$ 500.00	\$ 250.00
5/17/2021	BRB	3.1	Prepare for and attend class cert hearing; analysis and strategy re next steps following hearing	\$ 500.00	\$ 1,550.00
5/18/2021	BRB	1.2	Draft and revise order on class certification	\$ 500.00	\$ 600.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
5/20/2021	BRB	1.4	Call with mediator and defense counsel in CA water case; correspond with court re proposed order	\$ 500.00	\$ 700.00
5/21/2021	BRB	4.8	Draft and revise remedies analysis based on Town's native files produce in discovery	\$ 500.00	\$ 2,400.00
5/24/2021	BRB	1.3	Draft proposed statement CA water case; review defense brief in water case	\$ 500.00	\$ 650.00
5/25/2021	BRB	0.6	Revise and edit CMC statement	\$ 500.00	\$ 300.00
5/26/2021	BRB	0.7	Analysis and strategy re next phase of case and trial	\$ 500.00	\$ 350.00
5/27/2021	BRB	3.3	Call with damages consultant; call with defense counsel	\$ 500.00	\$ 1,650.00
5/28/2021	BRB	0.4	Finalize draft CMC statement; draft and revise spreadhseet on average rate calculation	\$ 500.00	\$ 200.00
6/1/2021	BRB	2.6	Legal research in preparation for drafting and revising trial brief	\$ 500.00	\$ 1,300.00
6/3/2021	BRB	3.0	Further legal research in preparation for drafting and revising trial brief	\$ 500.00	\$ 1,500.00
6/4/2021	BRB	1.2	Attend case management conference; analysis and strategy re course of case following conference	\$ 500.00	\$ 600.00
6/5/2021	BRB	5.9	Legal research re remedies available under causes of action and appropriateness of writ of mandate; draft and revise trial brief on liability and remedies	\$ 500.00	\$ 2,950.00
6/6/2021	BRB	6.0	Further legal research re remedies; revise and edit trial brief of liability and remedies	\$ 500.00	\$ 3,000.00
6/7/2021	BRB	2.4	Correspond with office re case schedule and items to calendar; correspond with damages consultant	\$ 500.00	\$ 1,200.00
6/8/2021	BRB	3.5	Confer with defense counsel and draft and revise proposed order bifurcating trial on liability and remedies; draft and revise trial brief	\$ 500.00	\$ 1,750.00
6/11/2021	BRB	6.5	Further draft, revise, and edit trial brief on liability; review of administrative record and hot docs for support and citation	\$ 500.00	\$ 3,250.00
6/12/2021	BRB	4.2	Further draft, revise, and edit trial brief on liability; review of administrative record and hot docs for support and citation	\$ 500.00	\$ 2,100.00
6/13/2021	BRB	5.9	Further draft, revise, and edit trial brief on liability; review of administrative record and hot docs for support and citation	\$ 500.00	\$ 2,950.00
6/16/2021	BRB	5.5	Draf and revise trial brief on liability; legal research re same	\$ 500.00	\$ 2,750.00
6/17/2021	BRB	7.5	Re-review of drought and water administrative record and hot docs in preparation for drafting trial brief on liability	\$ 500.00	\$ 3,750.00
6/18/2021	BRB	8.0	Further review of drought and water administrative record and hot docs and draft and revise trial brief on liability; draft and revise spreadhseet on potential settlement rates for calculation	\$ 500.00	\$ 4,000.00
6/21/2021	BRB	1.6	Call with clients re status of case and strategy	\$ 500.00	\$ 800.00
6/22/2021	BRB	6.5	Draft revise and edit trial brief on liability	\$ 500.00	\$ 3,250.00
6/23/2021	BRB	6.9	Draft, revise, and edit trial brief on liability	\$ 500.00	\$ 3,450.00
6/25/2021	BRB	3.6	Draft, revise, and edit trial brief on liability; review documents to attach as exhibits to supporting declaration; calls with clients and defense counsel	\$ 500.00	\$ 1,800.00
6/28/2021	BRB	2.5	Further draft, revise, and edit trial brief on liability and remedies; draft and revise declaration in support of brief	\$ 500.00	\$ 1,250.00
6/29/2021	BRB	2.0	Further draft, revise, and edit trial brief on liability and remedies; draft and revise declaration in support of brief	\$ 500.00	\$ 1,000.00
6/30/2021	BRB	1.7	Further draft, revise and edit trial brief on liability and remedies	\$ 500.00	\$ 850.00
7/1/2021	BRB	0.9	Finalize trial brief on liability and supporting documents and declaration; Correspond with office re filing procedure for trial briefs	\$ 500.00	\$ 450.00
7/16/2021	BRB	0.8	Call with clients re status of case and strategy	\$ 500.00	\$ 400.00
7/22/2021	BRB	0.7	Run report and conduct review of case costs to date	\$ 500.00	\$ 350.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
7/26/2021	BRB	0.5	Call with mediator	\$ 500.00	\$ 250.00
7/27/2021	BRB	1.3	Review of case documents and record; call with counsel re case status	\$ 500.00	\$ 650.00
7/28/2021	BRB	1.0	Exchange correspondence with defense counsel re case status	\$ 500.00	\$ 500.00
7/30/2021	BRB	2.0	Revise and edit draft settlement agreement	\$ 500.00	\$ 1,000.00
8/9/2021	BRB	1.3	Work on settlement agreement	\$ 500.00	\$ 650.00
8/10/2021	BRB	3.3	Legal research on class action settlements; revise and edit draft settlement agreement	\$ 500.00	\$ 1,650.00
8/11/2021	BRB	2.3	Revise and edit draft settlement agreement; legal research re same	\$ 500.00	\$ 1,150.00
8/12/2021	BRB	6.6	Draft and revise settlement approval paperwork	\$ 500.00	\$ 3,300.00
8/13/2021	BRB	1.3	Further draft and revise settlement approval paperwork	\$ 500.00	\$ 650.00
8/16/2021	BRB	2.6	Meet with class administrator; revise and edit settlement approval paperwork	\$ 500.00	\$ 1,300.00
8/17/2021	BRB	2.4	Revise and edit settlement approval paperwork	\$ 500.00	\$ 1,200.00
8/18/2021	BRB	5.9	Correspond with office re procedure for filing settlement approval paperwork; call with defense counsel and administrator re settlement procedures; revise and edit settlement approval paperwork	\$ 500.00	\$ 2,950.00
8/19/2021	BRB	2.7	Revise and edit settlement approval paperwork	\$ 500.00	\$ 1,350.00
8/23/2021	BRB	1.7	Finalize settlement approval paperwork	\$ 500.00	\$ 850.00
8/26/2021	BRB	1.3	Call with clients re settlement process	\$ 500.00	\$ 650.00
8/30/2021	BRB	1.7	Further research and strategy re settlement and approval process	\$ 500.00	\$ 850.00
9/13/2021	BRB	0.7	Correspond with counsel re settlement	\$ 500.00	\$ 350.00
9/17/2021	BRB	0.5	Review and analysis of tentative ruling on settlement approval	\$ 500.00	\$ 250.00
9/20/2021	BRB	0.5	Attend hearing on settlement approval; correspond with counsel re same	\$ 500.00	\$ 250.00
9/21/2021	BRB	1.9	Draft and revise order on settlement approval	\$ 500.00	\$ 950.00
9/22/2021	BRB	0.4	Correspond with defense counsel re settlement	\$ 500.00	\$ 200.00
10/1/2021	BRB	2.7	Revise and edit settlement agreement	\$ 500.00	\$ 1,350.00
10/5/2021	BRB	3.9	Revise and edit settlement approval paperwork	\$ 500.00	\$ 1,950.00
10/6/2021	BRB	5.0	Revise and edit settlement approval paperwork	\$ 500.00	\$ 2,500.00
10/11/2021	BRB	2.9	Review revised settlement agreement; correspondence re same; calls and correspondence with clients re same	\$ 500.00	\$ 1,450.00
10/12/2021	BRB	1.3	Correspond with clients re execution of revised settlement agreement	\$ 500.00	\$ 650.00
10/14/2021	BRB	0.4	Correspond with clients re settlement	\$ 500.00	\$ 200.00
10/15/2021	BRB	3.5	Revise and edit settlement approval paperwork	\$ 500.00	\$ 1,750.00
10/18/2021	BRB	0.9	Revise and edit settlement approval paperwork	\$ 500.00	\$ 450.00
10/19/2021	BRB	1.3	Revise and edit settlement approval paperwork	\$ 500.00	\$ 650.00
10/22/2021	BRB	1.3	Calls and correspondence with clients re settlement	\$ 500.00	\$ 650.00
10/26/2021	BRB	1.2	Correspondence with clients, administrator, and counsel re settlement	\$ 500.00	\$ 600.00
12/14/2021	BRB	0.5	Call with defense counsel	\$ 500.00	\$ 250.00
1/3/2022	BRB	4.7	Revise and edit settlement paperwork	\$ 500.00	\$ 2,350.00
1/4/2022	BRB	5.4	Revise and edit settlement paperwork	\$ 500.00	\$ 2,700.00
1/31/2022	BRB	4.0	Draft and revise motion for final settlement approval and supporting documents	\$ 500.00	\$ 2,000.00
2/16/2022	BRB	2.9	Revise and edit settlement paperwork	\$ 500.00	\$ 1,450.00
2/28/2022	BRB	2.7	Revise and edit settlement agreement; correspond with clients re finalized settlement agreement; review and analysis of revisions to attachments to settlement agreement	\$ 500.00	\$ 1,350.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
3/1/2022	BRB	0.9	Correspond with clients and settlement administrator re settlement	\$ 500.00	\$ 450.00
3/3/2022	BRB	0.4	Correspond with court re settlement	\$ 500.00	\$ 200.00
3/4/2022	BRB	0.5	Correspond with clients re case status	\$ 500.00	\$ 250.00
3/7/2022	BRB	1.4	Call with settlement administrator	\$ 500.00	\$ 700.00
3/8/2022	BRB	1.2	Correspond with clients re settlement; Review and analysis of court order re setting of case management conference	\$ 500.00	\$ 600.00
3/10/2022	BRB	2.7	Revise and edit settlement paperwork; correspond with clients re case status	\$ 500.00	\$ 1,350.00
3/11/2022	BRB	3.4	Revise and edit settlement paperwork	\$ 500.00	\$ 1,700.00
3/14/2022	BRB	2.7	Revise and edit settlement paperwork	\$ 500.00	\$ 1,350.00
3/15/2022	BRB	1.4	Revise and edit settlement paperwork	\$ 500.00	\$ 700.00
3/16/2022	BRB	0.5	Correspond with court and draft ex parte application	\$ 500.00	\$ 250.00
3/31/2022	BRB	0.9	Correspond with defense counsel and draft and revise stipulation re extension of 5-year deadline	\$ 500.00	\$ 450.00
4/1/2022	BRB	0.7	Revise and finalize stipulation re extension of 5-year deadline; correspond with counsel re signing	\$ 500.00	\$ 350.00
4/5/2022	BRB	1.6	Draft and revise proposed CMC statement for upcoming CMC; correspond with defense counsel re review	\$ 500.00	\$ 800.00
4/8/2022	BRB	0.7	Revise and edit proposed CMC statement; correspond with defense counsel re signature; finalize proposed CMC statement for filing	\$ 500.00	\$ 350.00
4/15/2022	BRB	0.7	Further revise and edit retainer agreement based on discussions with potential clients and review of templates	\$ 500.00	\$ 350.00
4/23/2022	BRB	4.9	Review and analysis of Town mediation brief and exhibits in support; draft and revise memorandum in response to Town arguments for use at mediation; correspond with mediator and clients re mediation	\$ 500.00	\$ 2,450.00
8/8/2022	BRB	0.9	Attend hearing on settlement approval; correspond with counsel re same	\$ 500.00	\$ 450.00
8/10/2022	BRB	1.2	Correspondence with court and administrator re settlement order	\$ 500.00	\$ 600.00
8/11/2022	BRB	0.7	Draft and revise proposed order re preliminary approval	\$ 500.00	\$ 350.00
8/14/2022	BRB	0.9	Draft and revise proposed order re preliminary approval	\$ 500.00	\$ 450.00
8/30/2022	BRB	0.4	Correspond with clients re settlement	\$ 500.00	\$ 200.00
8/31/2022	BRB	1.2	Review settlement records; correspond with administrator re same	\$ 500.00	\$ 600.00
9/2/2022	BRB	0.7	Correspond with client re case status	\$ 500.00	\$ 350.00
9/13/2022	BRB	0.4	Correspond with clients and administrator re settlement	\$ 500.00	\$ 200.00
9/19/2022	BRB	0.9	Correspond with clients and administrator re settlement	\$ 500.00	\$ 450.00
9/20/2022	BRB	1.3	Correspond with clients; correspond with class members re questions on settlement	\$ 500.00	\$ 650.00
9/21/2022	BRB	0.7	Respond to inquiries re class action settlement	\$ 500.00	\$ 350.00
9/22/2022	BRB	0.3	Correspond with clients re class action settlement	\$ 500.00	\$ 150.00
2/6/2023	BRB	4.6	Draft and revise motion for final settlement approval and supporting documents; correspond with settlement administrator	\$ 500.00	\$ 2,300.00
2/8/2023	BRB	2.7	Draft and revise motion for final settlement approval and supporting documents; correspond with clients re same	\$ 500.00	\$ 1,350.00
2/10/2023	BRB	3.8	Draft and revise motion for final settlement approval and supporting documents; correspond with clients re same	\$ 500.00	\$ 1,900.00
2/13/2023	BRB	4.3	Correspond with clients and prepare and edit their declarations in support of settlement; revise and edit final approval brief and supporting papers	\$ 500.00	\$ 2,150.00

Date	Timekeeper	Time Spent	Description	Hourly Rate	Amount Billed
<b>TOTAL:</b>		864.1			<b>\$ 415,685.00</b>

# **EXHIBIT 7**

# Client Costs - Baruh v. Hillsborough

Type	Date	Num	Source Name	Memo	Amount
<b>Baruh v Hillsborough</b>					
General Journal	02/29/2016	westlaw	WestLaw	on-line research	4.95
General Journal	03/31/2016	westlaw	WestLaw	on-line research	1.05
Credit Card Charge	04/08/2016		Ronsin Litigation Support	inv 428304-01-01, Town of Hillsborough 04/07, 1648 pages	445.52
Check	05/03/2016	1054	Beau Burbidge	03/29 mileage RT re inspection	37.80
Check	05/03/2016	1054	Beau Burbidge	03/29 bridge toll	6.00
General Journal	06/30/2016	westlaw	WestLaw	on-line research	42.82
General Journal	09/30/2016	westlaw	WestLaw	on-line research	19.27
Check	12/05/2016	1455	Nationwide Legal	11/08 San Mateo Sup Ct, incl complaint	677.14
Check	12/05/2016	1455	Nationwide Legal	11/10 Town of Hillsborough	256.64
Credit Card Charge	02/08/2017		LOS ANGELES Superior Ct	filing(s)	9.60
General Journal	09/30/2017	westlaw	WestLaw	on-line research	7.75
Check	11/22/2017	2102	Nationwide Legal	10/31 San Mateo Sup Ct	163.36
Credit Card Charge	01/19/2018		Port IPS Parking Meter	BRB, in SF	13.50
Check	02/08/2018	2235	Nationwide Legal	01/10 San Mateo Sup Ct	170.13
Check	02/20/2018	2264	Nationwide Legal	01/10 San Mateo Sup Ct	170.13
Credit Card Charge	03/28/2018		Redwood City Parking	BRB	2.00
Credit Card Charge	04/10/2018		LEXIS-NEXIS	on-line research	4.75
Check	04/19/2018	2379	Beau Burbidge	03/28 RT mileage	41.42
Check	04/20/2018	2405	Nationwide Legal	03/22 San Mateo Sup Ct	160.92
Credit Card Charge	04/24/2018		Uber	BRB	28.38
Credit Card Charge	04/25/2018		Uber	BRB	30.54
Credit Card Charge	05/15/2018		LEXIS-NEXIS	on-line research	10.35
Check	05/23/2018	2453	First Legal Network LLC	04/25 Sam Mateo Sup Ct RWC	207.07
Credit Card Charge	07/15/2018		LEXIS-NEXIS	on-line research	28.46
Check	07/16/2018	2528	First Legal Network LLC	06/27 to San Mateo Sup Ct RWC	152.52
Credit Card Charge	10/31/2018		LEXIS-NEXIS	on-line research	13.59
Credit Card Charge	12/07/2018		LEXIS-NEXIS	on-line research	4.91
Check	12/31/2018	2841	Nationwide Legal	12/06 San Mateo Sup Ct	148.00
General Journal	01/16/2019	c.call	Baruh v Hillsborough	Court Call, San Mateo Cnty 01/25 BRB	94.00
Check	03/25/2019	2964	Nationwide Legal	02/11 San Mateo Sup Ct	177.83
Check	07/15/2019	3123	Nationwide Legal	06/18 San Mateo Sup Ct	166.60
Check	08/14/2019	3160	Nationwide Legal	07/11 San Mateo Sup Ct	164.50
Check	09/27/2019	3224	FedEx	08/29 to BRB	24.55
Check	11/01/2019	3279	Nationwide Legal	09/19 San Mateo Sup Ct	347.95
General Journal	11/14/2019	c.call	Baruh v Hillsborough	Court Call, San Mateo Cnty 11/22 BRB	94.00
General Journal	06/11/2020	c.call	Baruh v Hillsborough	Court Call, San Mateo Cnty 06/19 BRB	94.00
Check	07/13/2020	3638	Nationwide Legal	06/11 San Mateo Sup Ct	38.62
Check	09/23/2020	3739	Nationwide Legal	08/21 San Mateo Sup Ct	36.77

# Client Costs - Baruh v. Hillsborough

Type	Date	Num	Source Name	Memo	Amount
Check	09/23/2020	3739	Nationwide Legal	08/28 San Mateo Sup Ct	38.62
Bill	09/30/2020	21967	Nationwide Legal	9/16/20 - San Mateo County Superior Court - Request for dismissal	38.62
Bill	09/30/2020	21967	Nationwide Legal	9/16/20 - San Mateo County Superior Court - Request for dismissal	145.70
Bill	09/30/2020	21967	Nationwide Legal	9/25/20 - San Mateo County Superior Court - Reply in support of plaintiff's motion for class cer...	38.62
Bill	09/30/2020	21967	Nationwide Legal	9/25/20 - San Mateo County Superior Court - Amended reply in support of plaintiff's motion for c...	38.62
Bill	11/15/2020	23258	Nationwide Legal	11/11/20 - San Mateo County Superior Court - Motion for class certification	38.62
Bill	11/15/2020	23258	Nationwide Legal	11/11/20 - San Mateo County Superior Court - Motion for class certification	145.12
Bill	03/30/2021	5640578	JAMS	Deposit for mediation with Wayne S. Snowden	4,500.00
Bill	03/31/2021	28136	Nationwide Legal	03/25/21 - San Mateo County Superior - Response to defendant's 2nd supplemental brief re: motio	38.62
Bill	04/16/2021	7-341-57741	FedEx	4/07/21 - Delivery to Hon. Wayne Snowden @ JAMS	34.18
Bill	05/31/2021	1130009358 - Rep #1	JAMS	Additional session time Hon. with Wayne S. Snowden	750.00
Bill	05/31/2021	30384	Nationwide Legal	05/28/21 - San Mateo County Superior Court - Joint CMS	33.62
Bill	07/15/2021	32072	Nationwide Legal	07/01/21 - San Mateo County Superior - Declaration and trial brief	33.62
Bill	08/31/2021	33669	Nationwide Legal	08/23/21 - San Mateo County Superior - Declaration	135.77
Bill	09/30/2021	34731	Nationwide Legal	09/21/21 - San Mateo County Superior - Prop order	33.62
Bill	10/31/2021	35785	Nationwide Legal	10/18/21 - San Mateo County Superior Court - Dec of Moore, memo of points & authorities, propos	134.47
Bill	04/15/2022	42070	Nationwide Legal	04/06/22 - San Mateo County Superior Court - Memo of points and authorities	137.62
Bill	04/15/2022	42070	Nationwide Legal	04/08/22 - San Mateo County Superior Court - Joint CMC	38.50
Bill	04/15/2022	42070	Nationwide Legal	04/08/22 - San Mateo County Superior Court - Joint CMC	155.22
Bill	08/15/2022	46965	Nationwide Legal	08/15/22 - San Mateo Superior - Proposed order	43.57
Bill	08/31/2022	47355	Nationwide Legal	08/15/22 - San Mateo County Superior - Proposed order	43.57
Bill	08/31/2022	47355	Nationwide Legal	08/18/22 - San Mateo County Superior - Proposed order	39.95
Bill	08/31/2022	47355	Nationwide Legal	07/19/22 - Contra Costa Superior - Ex-parte application	39.95
General Journal	02/01/2023		WHK	Case Postage and Copy Expenses	208.50
Total Baruh v Hillsborough					<u>10,982.09</u>
<b>TOTAL</b>					<b><u>10,982.09</u></b>



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**PROOF OF SERVICE**

***Baruh, et al. v Town of Hillsborough***  
San Mateo County Superior Court Case No. 16CIV02284

My business address is 50 Francisco Street, Suite 460, San Francisco, California 94133. I am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18 years and not a party to the within cause. On the date set forth below, I served the foregoing document(s) described as:

**DECLARATION OF BEAU R. BURBIDGE IN SUPPORT OF PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS’ FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARD**

on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as listed below.

**[X] [X] BY ELECTRONIC SERVICE – E-MAIL** On **February 21, 2023**, based on an agreement or stipulation of the parties to accept electronic service and/or CCP §1010.6(e), I caused said document(s) to be sent via electronic mail to the email addresses listed below from my email address: [serena@whk-law.com](mailto:serena@whk-law.com).

Harriet A. Steiner, Esq. James Gilpin, Esq. Christopher Diaz, Esq. BEST BEST & KRIEGER LLP 500 Capitol Mall, Suite 1700 Sacramento, CA 95814 Tel: (916) 325-4000 Fax: (916) 325-4010 <i>Attorneys for Defendant Town of Hillsborough</i>	<a href="mailto:harriet.steiner@bbklaw.com">harriet.steiner@bbklaw.com</a> <a href="mailto:James.Gilpin@bbklaw.com">James.Gilpin@bbklaw.com</a> <a href="mailto:Christopher.Diaz@bbklaw.com">Christopher.Diaz@bbklaw.com</a> <a href="mailto:Jannine.South@bbklaw.com">Jannine.South@bbklaw.com</a>
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **February 21, 2023** at San Francisco, California.

By: *Serena L. Broussard*  
Serena L. Broussard