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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

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.

Case No. 16CIV02284

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: March 20, 2023
Time: 3:00 p.m.
Dept.: Hon. V. Raymond Swope
Dept. 23

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I. INTRODUCTION

On August 24, 2022, this Court entered an order preliminarily approving a proposed Class Action Settlement and approving the parties' proposed notice procedure ("Preliminary Order"). Notice was thereafter provided to the Class in compliance with the Preliminary Order. Plaintiffs now respectfully move the Court for final approval of the Class Action Settlement Agreement entered into by and between them, on behalf of themselves and the Class, and Defendant Town of Hillsborough (the "Town"). For the reasons set forth in this memorandum, and supporting documents, the proposed Settlement achieves an excellent recovery for Class members, was the result of arms'-length, non-collusive negotiations between the parties, and is fair, adequate, reasonable, and in the best interest of the Class. Accordingly, Plaintiffs respectfully request that the Court (1) grant final approval of the Settlement, (2) dismiss the Drought Penalty Class, and (3) enter a Final Judgment and Final Order in the forms lodged herewith. Plaintiffs separately files herewith a motion for an award of attorneys' fees and reimbursement of expenses, and for a service award.

II. PROCEDURAL SUMMARY OF THE CASE

This case was filed on November 8, 2016, as a writ of mandate and class action. However, the beginning of the case predates the complaint by over half a year. Prior to filing suit, Plaintiffs necessarily brought a government claim against the Town in June 2016. In addition, at this same time, Plaintiffs contacted the Town by letter, detailing their concerns regarding the legality of the Town's water rates and seeking an amicable resolution of those concerns. They also served a public records request on the Town, thereby obtaining and reviewing a substantial number of documents—many thousands of pages—regarding the Town's rate structure prior to bringing suit. (*See* Burbidge Decl., ¶ 4.)

The disputes at issue were not resolvable at this early stage and Plaintiffs proceeded with their suit. Following the Town's answer to the complaint, and as is standard in writ of mandate actions, the Town compiled an administrative record to serve as the evidentiary basis for the case. (Burbidge Decl., ¶ 5.) This administrative record took a substantial amount of time to compile and was not completed until early in 2018. (*Id.*) The reason for this was that the record was

voluminous. It was assembled in two parts—one covering the Town's tiered water rates, and another covering its drought penalties. The tiered rate water record spanned 16 volumes and nearly 6,000 pages of documents. The drought penalty record spanned 77 volumes and nearly 30,000 pages. (*Id.*)

Naturally, a thorough review and digestion of this amount of information took a great deal of time and work by Plaintiffs' counsel. Once this review was completed, by agreement of the parties and consent of the Court, the parties then briefed the merits of the case (*i.e.,* whether the Town had violated Proposition 218) for the Court to hear on August 3, 2018. (Burbidge Decl., ¶ 6.)

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

In response, the parties submitted a stipulation to the Court seeking a determination of the merits of the case prior to class certification. That request was initially agreed upon by the parties and Court; however, the procedure was subsequently modified by the Court and the parties were ordered to proceed with moving for class certification. (Burbidge Decl., ¶ 8.)

The Court thus established a class certification briefing schedule and set a hearing for October 2020. Briefing on class certification was then submitted and the parties prepared for the hearing. However, prior to the hearing the Court issued an order requiring the parties to submit supplemental briefing on one of the defenses raised by the Town, and thus continued the hearing until January 2021. (Burbidge Decl., ¶ 9.)

That supplemental briefing was completed and the Court heard the issue of class certification in January 2021, issuing a lengthy tentative ruling certifying both Plaintiffs' classes (one for the tiered rates and another for the drought penalties). However, at the hearing the Court asked for another round of supplemental briefing. Following that briefing, at the continued

hearing on certification, on May 17, 2021, and both Plaintiffs' classes were certified—with modifications by the Court—in an order dated May 20, 2021. (Burbidge Decl., ¶ 10; **Exh. 4**.)

Following class certification, the parties and Court established a schedule for trial, whereby liability and remedies would be bifurcated with liability to be tried first based on briefing submitted by the parties and relying on the administrative record as the body of evidence. A trial on liability was scheduled for September 1, 2021, and Plaintiffs filed their opening brief on liability on July 1, 2021. (Burbidge Decl., ¶ 11.) The parties were fortunately able to reach a settlement during the pendency of this briefing on liability and they now seek approval of that settlement.

III. SETTLEMENT NEGOTIATIONS AND PRELIMINARY APPROVAL

As the Court will recall, the parties attended a settlement conference with the Court early in the litigation. Unfortunately, due the infancy of the case, neither of the parties was prepared to alter their positions substantially and the case proceeded along. (Burbidge Decl., ¶ 12.)

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

As the day wore on into the evening, the parties agreed to end the session but keep the mediation open and to continue negotiations using the insight and assistance of Judge Snowden. Those negotiations continued through the briefing of class certification and then after the hearing on class certification in which Plaintiffs' classes were certified. During these negotiations, several rounds of proposals were exchanged over the course of many conversations between Judge

Snowden and the parties. (Burbidge Decl., ¶ 14.)

Finally, in July, the parties were able to reach a settlement in principle that had approval of both the Plaintiffs and the Town Council. The parties thereafter negotiated and exchanged drafts of the Settlement Agreement and exhibits thereto and the Settlement Agreement was finalized on August 16, 2021. (Burbidge Decl., ¶ 15.)

Plaintiffs then filed a motion for preliminary approval on the settlement on August 23, 2021, which motion was to be heard by the Court on September 20, 2021. (Burbidge Decl., ¶ 16.) On September 17, 2021, the Court issued a tentative ruling denying the motion for preliminary approval on the ground that the settlement was construed to be an "opt-in class," meaning that class members had to opt into the settlement to be included in the class. This was not the parties' intention—they sought to make the settlement a claims-made settlement. However, they recognized that the settlement agreement and forms were not artfully phrased and needed to be amended. (Burbidge Decl., ¶ 17.)

Therefore, at the September 20, 2021, hearing on the motion, the parties thanked the Court for its analysis and represented to the Court that they would be re-working their settlement agreement and other paperwork to ensure that the settlement could not be construed as an "opt-in" settlement and that it fully complied with California's class action requirements. (Burbidge Decl., ¶ 18.)

The parties thereafter re-worked the settlement agreement, forms, and settlement framework to work towards its compliance with California law. (Burbidge Decl., ¶ 19.) On or around October 18, 2021, the parties filed a renewed motion for preliminary settlement approval based on their re-worked settlement agreement. That motion was to be heard by the Court on November 22, 2021. However, on November 19, 2021, the Court issued a tentative ruling again denying the motion. In its tentative ruling, the Court laid out several identified deficiencies with the settlement that were significantly more complex and broader in scope than the issues identified in the Court's first denial. (Burbidge Decl., ¶ 20.)

Rather than challenging the tentative ruling, the parties reviewed it carefully and then began negotiating and drafting a revised settlement agreement that would address the Court's

issues with the prior settlement and align with the law. This was a slow process because of the significance of the changes required and because of various other commitments of all of the interested parties, including both counsel and clients. Nonetheless, by late February 2022, a Second Amended Settlement Agreement was finalized and all parties had signed it by March 9, 2022. (Burbidge Decl., ¶ 21; **Exh. 1**.) Plaintiffs then filed a renewed approval motion on April 6, 2022, to be heard on August 8, 2022. At that hearing, the Court granted its approval of the settlement following minor changes to the notice paperwork and the preliminary approval order was issued on August 24, 2022. (Burbidge Decl., ¶ 22; **Exh. 5**.)

IV. SUMMARY OF THE FACTUAL AND LEGAL ALLEGATIONS AND DEFENSES IN THE CASE

While a full summary of Plaintiffs' claims and the Town's defenses can be found in their merits briefing, attached hereto as **Exhibits 2** and **3** to the Burbidge Declaration, Plaintiffs provide this brief summary for the Court's convenience.

Plaintiffs in this case are a group of civically-active Town residents, homeowners, and water customers who have sought relief from what they contend are the Town's illegal water rates and penalties. These Plaintiffs, who are now Class Representatives, are John Lockton, David Marquart, Charles Syers, Charles Bolton, and Paul Rochester.[1]

Plaintiffs brought this action challenging the Town's tiered water rate structure as violating Proposition 218, California Constitution, Article XIIID, Section 6(b)(3), which prohibits a supplier of water service (such as the Town) from imposing fees for water that exceed the cost of service for providing that water. Plaintiffs contended that the Town's tiered rate structure, which charged customers higher rates for water as their water use increased, violated this provision of the Constitution. Relying on the Court of Appeal decision in *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, they contended that the Town's rate studies, by which the Town had set its tiered rates, did not attempt to correlate tiered rates with the cost of providing service.

[1] While this case was originally filed by several additional other Plaintiffs, they were all dismissed prior to class certification. Arthur Stromberg passed away during the pendency of this case and Brad and Kathy Baruh had to be dismissed due to illness. Eldridge Gray was dismissed as well.

The Town disputed these allegations at the outset of the case, continued to dispute them during the near-five-year pendency of this action, and still continues to dispute them through this Settlement. The Town claimed that its rate studies did attempt to apportion its higher costs to those customers who used an outsized amount of water. Thus, the Town contended that its higher tiered rates reflected the Town's need to have greater water storage capacity and infrastructure. This capacity and infrastructure was more costly and those increased costs were reflected in the higher rates assigned to the higher tiers.

Plaintiffs also challenged the Town's drought penalties, imposed in 2015 in response to a State mandate for reduced water usage. By these penalties, the Town established a level of water usage for each water customer. Those customers who used water in excess of that level were charged a penalty for that excess use. Plaintiffs claimed that these penalties, like the tiered rates, were subject to and in violation of Proposition 218. However, the Town, while acknowledging that the tiered rates *were* subject to Proposition 218, contended that its drought penalties *were not* subject to Proposition 218. The Town contended that these penalties were not only imposed in response to a State mandate for reduced water usage, but that they were expressly permitted pursuant to both that mandate and the California Water Code, which permits such penalties in the drought situation which the State and Town faced at the time.

V. SUMMARY OF SETTLEMENT TERMS

For the Court's review, the parties' executed Second Amended Settlement Agreement, including all exhibits thereto, is attached as **Exhibit 1** to the declaration of Beau R. Burbidge.

A. Overview of Proposed Settlement

By this Settlement, the Town is providing refunds to all customers who paid for water in Tiers 3, 4, and 5 during the period from June 28, 2015 through April 30, 2017 (the "Refund Period").[2] Both the Tiers affected and the Refund Period correspond with the Ratepayer Class certified by this Court on May 17, 2021 ("All residential water service customers of the Town of

[2] As previously stated, this Refund Period begins one year prior to Plaintiffs' bringing their government tort claim and ends at the time the Town enacted a new water rate structure, one that is not at issue in this lawsuit. (*See* Burbidge Decl., **Exh. 2** (8:4-9, 18:1-19).)

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"). (*See* Burbidge Decl., **Exh. 4**.)

These refunds are calculated based on negotiated Settlement Rates of **$11.09/hcf** during the Rate Stabilization Period (when rates were greater) of February 10, 2016, through November 16, 2016, and **$9.06/hcf** during the rest of the refund period. As noted above, the Settlement Rates represent the difference between the applicable Tier 2 and Tier 3 rates taking into account that the Tier 2 rate is below the average cost of water. Customers who paid rates in excess of the Settlement Rates during this period (*i.e.,* customers paying in Tiers 3, 4, and 5) are entitled to refunds amounting to the difference between their tiered rates and the negotiated Settlement Rates. (*See* Burbidge Decl., ¶¶ 23-25; **Exh. 1,** Settlement Agreement (hereinafter, "SA"), ¶ 6.3.) (A helpful explanation and illustrative example of these refunds may be found in Appendix 1 to the Settlement Agreement.) Based on the claims mailed and opt-outs received, these refunds will benefit 3,066 customers (out of 3,083 total class members) in amounts ranging from a few to over ten-thousand dollars based on each customer's levels of water usage. (Burbidge Decl., ¶ 27.) In exchange for these refunds, the tiered rate claims will be released and drought penalty claims will be dismissed. (An explanation of the drought penalty claims is provided, *infra*, at Subsection D.)

These refunds will be funded by a Settlement Fund in the amount of $1,229,329, funded by the Town. This fund consists of $779,329 designated to customer refunds (based on opt-outs received, the amount of refunds will be $771,386.38, with the remaining $7,942.62 of unpaid refunds going towards the fund for the fund for the *cy pres* recipient) and an additional $450,000 for Plaintiffs' attorneys' fees, costs, and Class Representative Service awards as may be awarded by the Court. (*See* SA, ¶¶ 6.2, 13-14.) This represents and additional benefit of the Settlement. Rather than attorneys' fees being deducted from the total settlement fund, and thus reducing customers' refunds, those fees and costs are being paid in addition to and on top of full refunds for customers. This total settlement fund of $1,229,329 represents nearly 10% of the Town's entire yearly water budget during the years encompassing the Refund Period. (Burbidge Decl., ¶ 27.)

B. Settlement Benefits

As discussed above, the benefits of this Settlement come in the form of refunds to all water

customers who paid rates at Tiers 3, 4, and 5 during the Refund Period. These refunds are being issued in full to the Town's customers, with no deduction for amounts those customers underpaid for water (at Tiers 1 and 2 rates), and with no deductions for attorneys' fees, costs, service awards, or Settlement administration.

These refunds will be calculated based on negotiated "Settlement Rates" for water: **$11.09/hcf** during the Rate Stabilization Period (when rates were greater) of February 10, 2016 through November 16, 2016, and **$9.06/hcf** during the rest of the refund period. Customers who paid rates in excess of these negotiated Settlement Rates during this period (*i.e.,* customers paying in Tiers 3, 4, and 5) will be refunded the difference between their tiered rates and the negotiated Settlement Rates. (*See* SA, ¶¶ 6.2-6.3.) (A helpful explanation and illustrative example of these refunds may be found in Appendix 1 to the Settlement Agreement.) These refunds will benefit 3,066 customers (out of approximately 3,083 total in the class) in amounts ranging from a few to over ten-thousand dollars based on each customer's levels of water usage. (Burbidge Decl., ¶ 27.)

The Settlement Rates used for the refund calculations were a result of lengthy negotiations between the parties, mediated by Judge Snowden, and they represent something very close to what was the "average rate" for water during the time periods at issue. In other words, if one were to take all of the Town's expenses for water service and divide that by the amount of water (in hcf) provided to customers, one would come to an "average rates" for water—what the Town would have to charge on a per unit basis to recoup its expenses. These "average rates" were calculated as $10.70/hcf during the Rate Stabilization Period and $8.77/hcf during all other times. (Burbidge Decl., ¶ 24.) In essence, these would have been the Town's water rates had the Town not imposed a tiered rate system. Thus, these "average rates" would be the best-case scenario for calculation of refunds if Plaintiffs were to succeed at trial and invalidate the Town's tiered rate system.

The Settlement Rates represent only an incremental increase over these "average rates" of $0.39 and $0.29, respectively. The reason for this disparity was the fact that the Settlement by necessity had to take into consideration (1) the risks that Plaintiffs would not succeed on the merits of the case; (2) the delay in providing benefits to class members if the case proceeded through trial and potential appeals; (3) the uncertainty of how and if refunds would be adjudicated

at trial; and (4) the recognition of the Town's right to impose tiered rates on its customers (and thus its asserted right to not be subject to a simple "average rate"). (Burbidge Decl., ¶ 25.) In light of all these considerations, the fact that there is only a small difference between the "average rates" negotiated refund "Settlement Rates" is a great achievement for the class.

A very important benefit of these refunds is that they are being issued without any credit to the Town for amounts these customers underpaid for water at the lower Tiers 1 and 2. In other words, while customers are being refunded for payments made in excess of the negotiated Settlement Rates, they are not being debited for amounts paid under the Settlement Rates at Tiers 1 and 2. This is important because if this case were to proceed through a trial on remedies, the Town would argue that such a debit is fair and reasonable as part of any remedy.[3] And such a debit would substantially reduce the amount of refunds going to Town customers. Thus, in this way, the Settlement represents a substantial benefit to the Class, perhaps over and above any benefit they would have received had this case proceeded all the way through trial. (*See* Burbidge Decl., ¶ 26.)

C. Release

In exchange for the Settlement benefits, the Class Members will release all rights, claims, and actions they and any of the Class Members 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 No. 725 and 731. (*See* SA, ¶¶ 7.2.) The Settlement also contemplates a Civil Code section 1542 waiver. (*Id.*, ¶ 7.3.) However, if the Court should deem this waiver to be against the interest of class members, it will be considered null and void and will be stricken from the Agreement.

D. Dismissal of Drought Penalty Claims

The Settlement reached between the parties calls for the dismissal of Plaintiffs' drought penalty claims, consideration for which comes in the form of refunds for tiered water rates. (*See*

[3] In essence, the Town would argue that if a "flat rate" is being applied, it should be applied to the customer's entire bill. Thus, the customer should be credited for amounts paid above the "flat rate" and debited for amounts paid below the "flat rate" to come to a net refund.

SA, ¶ 7.1.) And pursuant to the Settlement Agreement, Plaintiffs hereby request that the Court dismiss the Drought Penalty Class with prejudice.

Good cause exists for this dismissal, as was explained in Plaintiffs' Preliminary Approval Motion and supporting papers:

- Following the narrowing of the Drought Penalty Class in the Court's Order on Class Certification, the size of this class went from 695 customers to 60 customers, and potential (best-case scenario) damages went from $1,118,934 to only $88,359.
- Hillsborough's defenses regarding the legality of drought penalties carried significant risks for Plaintiffs at trial.
- These Drought Penalty Class members are subsumed within the water rate class because they necessarily had to pay water rates in Tiers 3, 4, and 5 to be issued drought penalties. They will thus be benefitting from the Settlement.
- It is not economically feasible to pursue the Drought Penalty Class 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).

(Burbidge Decl., ¶ 28.) Thus, Plaintiffs sought in settlement negotiations to leverage the drought penalty claims to negotiate a better settlement for all class members (including those who incurred drought penalties) in the form of higher refunds.

The drought penalty class is perhaps more accurately depicted as a sub-class of the tiered rate class. There are a large group of citizens who paid water rates in Tiers 3, 4, and 5 during the Refund Period and they make up the ratepayer class (approximately 3,083 customers). Subsumed within this group is the smaller group of citizens (approximately 695 customers) who were also made to pay drought penalties during this period, the drought penalty class. These citizens necessarily are part of the ratepayer class as, to incur drought penalties, they had to use water in amounts that brought them into Tier 3, 4, or 5 rates. (Burbidge Decl., ¶ 29.) Thus, in this way, the drought penalty class is akin to a subclass of tiered rate payers.

Following briefing and then the hearing and order on class certification, the drought penalty class—those who had actionable claims for the drought penalties—became much smaller than Plaintiffs had originally contemplated. This is because the Town's arguments against class certification and the Court's Order on class certification severely diminished the size of this class.

This diminished size is best understood by grouping drought penalty recipients into three types: (1) those who were issued penalties but did not pay them; (2) those who were issued penalties and paid them without appealing them; and (3) those who were issued penalties, appealed them, and paid them. (Burbidge Decl., ¶ 30.)

As to the first group, the Town argued and the Court held that this group could not be part of this class under the "pay first, litigate later," doctrine. *See Water Replenishment Dist. of So. California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465-1466. Thus, for example, Plaintiff David Marquardt was not made a representative of this class as he had not yet paid his drought penalties at the time of class certification. (Burbidge Decl., ¶ 31, **Exh. 4**.) This reduced the class by approximately 78 customers (or $169,633 out of $1,118,934 in penalties assessed). (*Id.*) As to the second group, the Town argued and the Court held that those customers who had not appealed their penalties had not exhausted their administrative remedies and were excluded from the class as well. (Burbidge Decl., ¶ 32.) This reduced the class even more substantially, by approximately 452 customers (or $570,074 out of $1,118,934 in penalties assessed). (*Id.*) This left the third group, a substantially smaller number of customers both in number (approximately 166 customers) and in the dollar amount of penalties assessed. This is because the vast majority of those customers who appealed drought penalties had those penalties either waived completely (105 customers) or significantly reduced (52 customers) (in total 93% of appealed penalties were reduced or waived). (Burbidge Decl., ¶ 33.) These waivers and reductions represented another $290,868 of the penalties assessed; meaning that out of $1,118,934 in assessed penalties, ***only approximately $88,359 paid by approximately 60 customers could be included in the class.*** (*Id.*)

On top of the significant shrinking of the class was the fact that the drought penalty claims carried significantly greater legal risk than the tiered rate claims. The Town argued that drought penalties were not subject to Proposition 218 and therefore not actionable by Plaintiffs. The Town's argument was, essentially this (*see* Burbidge Decl., **Exh. 3** (Opposition to Motion for Issuance of Writ of Mandate, 32:3-33:3):

> The Town's drought penalties are very different from the tiered water rates struck down in *Capistrano*. The penalties were not part of the Town's water rates, which are codified in Chapter 13.20 of

> the Hillsborough Municipal Code (HMC), but distinct penalties codified in Chapter 13.16 of the HMC. The drought penalties had their genesis many years ago under the Town's Water Shortage Contingency Plan and the additional authority of California Constitution article XI, section 7, and the Water Code, including Water Code section 10632(a) and later section 377(i).
>
> The volumetric penalties are true penalties designed to promote and attain water conservation so that the Town may meet its mandatory conservation requirements, while the water rates are so-called "property-related" fees subject to Proposition 218. "[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148.) In this instance, the drought penalties were imposed to secure obedience to the Town's water use reduction regulations contained in its Water Shortage Contingency Plan during time of extreme drought.
>
> In June 2015, the Legislature adopted legislation expressly recognizing volumetric penalties like the Town's drought penalties as a valid water shortage emergency tool: "[A] public entity may enforce water use limitations established by an ordinance or resolution adopted pursuant to this chapter, or as otherwise authorized by law, by a volumetric penalty in an amount established by the public entity." (Water Code § 377(i).) This statute eliminated the argument Plaintiffs try to assert here that such penalties are subject to Proposition 218.

While Plaintiffs disputed this position, they were not able to say with complete confidence that the Court would reject it, and they therefore recognized that it carried significant risk. If the Court were to adopt the Town's position, Plaintiffs' drought penalty claim would be dismissed entirely and they would be entitled to nothing.

Recognizing this very real risk, Plaintiffs sought to utilize the drought penalty claims, while they remained pending, in settlement discussions to negotiate a more favorable settlement for all class members. The pendency of the drought penalty claim allowed Plaintiffs to negotiate for greater refunds that they would otherwise be likely to achieve had the drought penalty claims been dismissed. Because customers receiving drought penalties were also ratepayer class members, these greater refunds inure to the benefit of all class members, including those who paid drought penalties. (Burbidge Decl., ¶ 34.)

A final reason counseling in favor of dismissing the drought penalty class is that the potential, best-case-scenario damages are now only $88,359. ***Pursuing the drought refund claims through trial, or administering a settlement for those claims, would simply not be***

feasible in terms of time, effort, or money spent. The costs incurred in going to trial over these claims and proving their amount, which would require the work and testimony of expert witnesses, would easily eclipse the amount that could be recovered under a best-case scenario—experts alone could easily exceed $100,000 in costs. Put simply, even setting aside the real risks of trial and the issues of proving both liability damages for the drought penalty claims, it would not be feasible from an economic perspective to pursue these claims. (Burbidge Decl., ¶ 35.) Instead, because those paying drought penalties will be receiving a refund for water rates and thus be benefitting from the settlement, it is entirely reasonable to dismiss those claims.

Thus, the dismissal of the drought penalty claims does not prejudice any class members, has been fully endorsed by the Class Representatives for both of the classes, and has resulted in benefits for all class members.

VI. COMPLIANCE WITH NOTICE PROCEDURES AND RESPONSE FROM THE CLASS

The notice procedures for this class action worked extraordinarily well in the capable hands of Phoenix Settlement Administrators. Thus, as demonstrated in the Declaration of Taylor Mitzner, filed herewith, the Settlement Administrator received from the Town a final list of 3,083 Class Members. (Mitzner Decl., ¶ 3.) The Administrator then conducted a change-of-address database search on all of these members and mailed the notice packed to all 3,083 members at their most up-to-date addresses. (*Id.* at ¶¶ 4-5.) On that same date, the settlement website, www.hillsboroughclassaction.com, went live. (*Id.*) In addition to this mailing of the notice packet, the Administrator published a class notice in the San Mateo Daily Journal on both September 13, and September 20, 2022. (*Id.* at ¶ 6.)

Of the mailed notices, only a tiny number, 32, were ultimately deemed undeliverable due to failure to find an updated address or the return of the mailing a second time after being remailed. (*Id.* at ¶¶ 7-9.) Thus, nearly 99% of all notice packets were received by Class Members due to the Administrator's diligence and compliance with the notice provisions of the Settlement Agreement and the Court's Preliminary Approval Order.

The notice period ran from September 6, 2022, to November 15, 2022. During this period,

the Administrator received 18 Opt-Out forms from Class Members who did not want to be included in the Settlement. However, one class member later rescinded their Opt-Out, making the for a total of 17 Opt-Outs from the Settlement. (*Id.* at ¶ 10.) Thus, 3,066 Class Members will be bound by and receive the benefit of the Settlement—representing 99.45% of the Settlement Class and $771,386.38 dollars in refunds (out of $779,329.00 set aside for such refunds). (*Id.* at ¶¶ 14-15.) (The names of those Class Members who timely opted out of the Settlement are listed in **Exhibit C** to the Mitzner Declaration, which exhibit can be used in the Court's Final Approval Order to designate those Class Members not bound by the Settlement.)

Additionally, of the 3,066 Class Members bound by the settlement, only 9 of them filed timely objections to the Settlement. (*Id.* at ¶ 11.) Those objections may be found at **Exhibit D** to the Mitzner Declaration, and they are addressed by Plaintiffs below, *infra.*

VII. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Standards for Final Approval.

California Rules of Court ("CRC"), Rule 3.769(a) provides: "A settlement or compromise of an entire class action, or of a cause of action in a class action, or as a party, requires the approval of the court after hearing." In determining whether to approve or reject a proposed settlement, the Court has broad discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35, disapproved on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260; *Mallick v. Superior Ct.* (1989) 89 Cal.App.3d 434, 438.

California has a well-established and strong public policy favoring compromises of litigation. *Hamilton v. Oakland School Dist.* (1933) 219 Cal. 322, 329 ("it is the policy of the law to discourage litigation and favor compromises"); *see also Central & West Basin Water Replenishment Dist. v. Southern California Water Co.* (2003) 109 Cal.App.4th 891, 912. This policy is particularly compelling in class actions. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152.

Before final approval, the Court must conduct an inquiry into the fairness of the proposed settlement C.R.C. 3.769(g). A court's analysis of a settlement should be conducted in light of the above-discussed favorable view of settlement disputes. *Stambaugh v. Superior Court* (1976) 62

Cal.App.3d 231, 236. "The inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the produce of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389 (citation omitted).

A class settlement should be approved if the settlement is found to be fair, adequate, and reasonable. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. "In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include, but are not limited to the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th at 1389 (citation omitted, cleaned up). However, a "presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Id.* citing *Dunk, supra*, 48 Cal.App.4th at 1802.

B. This Settlement Is Fair, Reasonable, and Adequate.

As already discussed above, the settlement provides for refunds to Town water customers for amounts they were allegedly overcharged for water service provided to them. And the amount of refunds provided is entirely within the range of reasonableness. Refunds will be given to all members of the Ratepayer Class, customers who paid for water at Tiers 3, 4, and 5 during the Refund Period. Further, as discussed above, the "flat rate" negotiated for refunds is very near the "average rate" of water; in other words, the rate that the Town would have to charge all customers if it did not impose tiered rates. If Plaintiffs were to take this case through trial and win at every stage, the most they could secure in refunds would be based on this "average rate." Thus, this Settlement comes very close to Plaintiffs' best-case scenario. In addition, this Settlement might

exceed even that scenario because it does not contemplate debiting customers for rates they paid under the negotiated "flat rate." If the case were to go to trial on remedies, the Town would argue that while customers may be due refunds for rate paid in excess of the "average rate," the Town should be credited for the amounts these customers paid under that "average rate." This would inevitably reduce the amount of refunds significantly. This Settlement, on the other hand, provides only for refunds for overcharges without any reductions for undercharges. In this way, it may reflect a better outcome than had this case gone through a trial on remedies.

Furthermore, it must be noted that no attorneys' fees, costs, or service awards are being deducted from these refunds. Instead, class members will receive 100% of their calculated refunds. As discussed above, the Town has agreed to contribute to the settlement fund in an amount meant to pay fees, costs, and service awards in excess and on top of these refunds.

Thus, in sum, these refunds come close to the best-case scenario that Plaintiffs could hope for at the trial on remedies. And, because of the lack of precedent on how such remedies should be adjudicated, these Settlement refunds may very well be more than class members would receive at trial.

In light of the novel issues raised herein, the uncertainty of the outcome, the possibility that the Court would find the Town's actions were legal, in whole or in part, the uncertainty of the method by which damages would be adjudicated, and the probable risks of delay following a litigated judgment, Plaintiffs and Class Counsel believe that the Settlement is fair, adequate and reasonable, within the range of reasonableness, and should be preliminarily approved by the Court.

C. The Settlement Is the Result of Arms'-Length Bargaining

The proposed Settlement is presumptively fair because it was reached following protracted and arm's-length negotiations at a mediation session and lengthy follow-up negotiations conducted by the Honorable Scott Snowden (Ret.) of JAMS. *See Wershba, supra*, 91 Cal.App.4th at 245. The fact that mediation was overseen by a neutral third party is proof of the non-collusive nature of the negotiations. *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 800 ("'The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement

agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.'") Then, following the Court's initial denial of preliminary approval, the parties conducted extensive further negotiations that addressed the Court's issues and largely favored Plaintiffs' position. This was because the revised settlement provided for additional benefits to the class such as automatic payment of settlement funds without a claims procedure and the establishment of a *cy pres* fund for unpaid claims.

D. Class Counsel Have Conducted Sufficient Investigation and Discovery.

Given the: (i) significant legal and factual investigation conducted by Class Counsel, both prior to and after the filing of the complaint; (ii) the voluminous documents obtained by Class Counsel, including the many-thousand page Administrative Record produced by the Town; (iii) the extensive briefing prepared by both parties on the writ petition and trial briefs; and (iv) the extensive briefing prepared by both parties on the issue of class certification, Class Counsel is well able to judge the strengths and weaknesses of Plaintiffs' claims and the Town's defenses as well as the propriety of the Settlement. The extensive course of this litigation is, of course, known to the Court, but is also recounted above, *supra*.

E. The Recommendations of Experienced Counsel Favor Preliminary Approval of the Proposed Settlement.

Also weighing in favor of preliminary approval are Class Counsel's experience and success in similar actions. *Wershba, supra*, 91 Cal.App.4th at p. 245. Class Counsel have developed an expertise in Proposition 218 cases and have prosecuted two such class action cases. (Burbidge Decl., ¶ 56.) Class Counsel have a proven and extensive track record of success. Drawing from these experiences, Class Counsel executed the Settlement Agreement confident that it constitutes a fair and adequate outcome, and that it is in the best interests of the Class. (*Id.*)

F. The Involvement of a Governmental Entity in Negotiating and Approving the Settlement Lends Support for Approval.

The fact that this settlement has been reached by and for the Town, and that it has been approved by both the Town's manager and its counsel, supports its approval. As the Town serves and must interact with its customers, the members of the Class, in a constant and ongoing basis, it must and has taken into consideration the necessity of a fair resolution to these claims.

G. The Reaction by Class Members to the Settlement Has Been Positive and the Objections Should be Overruled.

As discussed above, *supra*, the reaction to this Settlement has been overwhelmingly positive. Of the 3,066 settlement notices that reached Class Members, only 17 of those Class Members chose to opt-out of the settlement. (Mitzner Decl., ¶¶ 10, 14-15.) Thus, 99.45% of Class Members will be receiving a refund in this case, and nearly all of the Settlement Funds designated for refunds will be paid to them (the remaining $7,942.62 will go towards the *cy pres* fund to be combined with any unpaid or unclaimed settlement funds to be paid to a *cy pres* recipient).

Impressively, in what has been a politically charged litigation that has made news headlines in the past, only 9 Class Members have filed objections to the Settlement. (*See* Mitzner Decl., ¶ 11, **Exh. D**.) Fairly characterized, these objections are by and large very succinct and represent general discontent as to the class action litigation structure (and request for attorneys' fees), as to the nature of the underlying litigation, and as to the fact that the litigation does not go far enough in ensuring rates are set fairly going forward. They will be addressed in turn.

Mr. Stein objections on several grounds, one being the request for attorneys' fees and costs. His basis is that this was a "basically a frivolous lawsuit." Ms. Stoner appears to join in this sentiment., arguing that the amount of fees sought is too high given the benefits each Class Member will receive, and further advocating that the suit should never have been brought and should be dismissed. Neither of these arguments is valid. As the Court is aware, this litigation has gone on for many years, the merits of it have been fully briefed, the Class has been certified and Class Counsel appointed, and the parties have expended extraordinary efforts to reach a fair and valid settlement to resolve the suit. This suit has operated precisely as a class action should and with fantastic results for the Class.

Mr. Stein, Ms. Dickinson and Mr. Mahoney (objecting jointly), Ms. Swartz, and Ms. Bernas-Yung complain that the Settlement does not resolve the issue of future rate-setting for water. They therefore do not believe that this litigation solves anything, or have concerns that additional litigation will be brought against future rates. These beliefs are both untrue and provide

no reason to reject this Settlement. This litigation, by its nature, had to be narrowly focused. It was filed in 2016 and challenged the then-existing rates (a new rate structure wouldn't go into effect until 2017). That was the scope of the litigation, and it would not be permissible, or feasible, for it to change and expand as new rates came into effect over the years—those new rates being completely different and requiring a different administrative record. Nor could the litigation seek to steer or impose requirements on future rate-setting. Litigation, by its nature, is backwards looking. Short of an injunction, good cause for which would never exist here, this case could not impose rate-setting requirements on the Town. The goal of this suit has always been to challenge the legality of the rate in place when it was filed. And it has succeeded in that goal. (And to the extent that these objectors are concerned about additional litigation, counsel notes that the Town's "new" rates have been in place since 2017. No other suits have been filed challenging those rates despite the fact that they have been in around for nearly six years.)

The remaining four objections provide no grounds by which to reject the Settlement. Three, by Mr. Chan, Mr. Pessah, and Ms. Solinsky, specify no grounds for the objections. The other, by Ms. Bones, does not seem to address any issues from this litigation or even the Town of Hillsborough as it references a water system in San Joaquin County.

Thus, none of these objections provides good cause for rejection of the Settlement nor should they outweigh the 3,056 other Class Members (99.7% of the Settlement Class) who favor the Settlement and will benefit by it. These objections should be overruled.

VIII. CONCLUSION

Plaintiffs respectfully request that this Court grant final approval of the Settlement, dismiss the Drought Class, and enter the Final Judgment and Final Order in the form lodged herewith.

DATED: February 21, 2023 WALKER, HAMILTON & KEARNS, LLP

By: Beau R. Burbidge
Beau R. Burbidge
Attorneys for Plaintiffs

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:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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*.

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 ***Attorneys for Defendant Town of Hillsborough***	harriet.steiner@bbklaw.com James.Gilpin@bbklaw.com Christopher.Diaz@bbklaw.com Jannine.South@bbklaw.com

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