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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST COURTHOUSE**

11
12 PATRICK ECK, TYLER CHAPMAN,
13 BRENDAN EISAN, JUSTIN KRISTOPHER
LE-ROY, Individually and On Behalf of All
14 Others Similarly Situated,

15 Plaintiffs,

16 v.

17 CITY OF LOS ANGELES, THE LOS
ANGELES DEPARTMENT OF WATER
18 AND POWER, LOS ANGELES
DEPARTMENT OF WATER AND POWER
19 BOARD OF COMMISSIONERS, and DOES
1 through 10, inclusive,

20 Defendants.

Case No. BC577028 (Lead)
Consolidated with Case No.: BS153395 &
Case No.: BC583788

*Assigned for all purposes to the
Honorable Ann I. Jones*

**OBJECTION TO PROPOSED
CLASS ACTION SETTLEMENT
BY CARMEN BALBER**

Date: February 14, 2018
Time: 9:00 a.m.
Dept: 308

Complaint Filed: April 1, 2015

1 In compliance with the proposed Settlement Agreement (“Settlement Agreement,”
2 “Settlement,” or “SA”), the Preliminary Approval Order, and the Long Form Notice in the
3 above-captioned matter, Carmine Lucille Balber (“Carmen Balber”), residing at 1127 1/2 S
4 Wooster Street, Los Angeles, CA 90035 (“Objector”), files this Objection to the proposed
5 Settlement Agreement by and through her undersigned counsel.

6 The Objector is a member of the Class because she purchased retail electricity from the
7 LADWP during the period from January 29, 2012 through September 14, 2017. Objector
8 intends to appear and argue at the Fairness Hearing, by and through her undersigned counsel.
9 At the Fairness Hearing counsel for Objector will present this Objection and the documents
10 attached as exhibits to the concurrently filed Declaration of Jerry Flanagan (“Flanagan Decl.”).
11 Objector has not submitted any objection in state or federal court in the United States in the
12 past five years. Objector’s counsel has submitted one objection in state or federal court in the
13 United States in the past five years.¹ Objector should be contact only through counsel.

14 **I. Introduction**

15
16 Objector opposes the Settlement in its present form and proposes the Settlement be
17 denied for the following reasons:

18 First, the Settlement “Release and Waiver” provisions² are overbroad because they
19 exceed the scope of allegations of the operative complaint, sweeping in a recent \$241,848,000³
20 financial transfer from the LADWP to the City of Los Angeles approved by the City Council
21 on December 13, 2017 (“December 13 Transfer”)—two months *after* the date notice was
22 distributed to the Class and *after* the Court preliminarily approved the settlement. The
23

24
25 ¹ *In Re: Hyundai and Kia Fuel Economy Litigation*, U.S. Dist. Ct. Cent. Dist. of California,
Case No. 2:13-ml-02424-GW-FFM

26 ² Proposed Settlement Agreement, ¶¶ 85-95.

27 ³ See Ordinance No. 185349, Office of the City Clerk, City of Los Angeles,
http://clkrep.lacity.org/onlinedocs/2017/17-1356_ORD_185349_01-26-2018.pdf (last visited
28 December 27, 2017).

1 operative complaint challenges Defendants’ collection of electric rates under the *2016* Rate
2 Ordinance and any corresponding transfer of funds from the LADWP to the City of Los
3 Angeles pursuant to the *2016* Rate Ordinance. Despite this significant limitation, the proposed
4 Settlement purports to waive Class Member claims for amounts collected from ratepayers or
5 transferred from the LADWP to the City of Los Angeles pursuant to the *2008*, *2012*, and *2016*
6 Rate Ordinances up until the time the Court grants Final Approval of the Settlement.
7 (Settlement, ¶ 86.). The \$241 million transfer appears to be pursuant to the *2008* Rate
8 Ordinance.

9 Second, Class Notice is inadequate and misleading because it failed to inform Class
10 Members that Defendants planned to transfer \$241 million to the City of Los Angeles during
11 the Fiscal Year 2017/2018, while claiming a \$243 million savings to Class Members over the
12 same time period. Critically, the class notice only states that no “future” transfers of funds
13 will be made to the City of Los Angeles pursuant to the *2016* Ordinance and that transfers
14 pursuant to the *2008* Ordinance would be capped. (*See, e.g.*, Long Form Notice, P. 3.)
15 Therefore, Class Members were not given sufficient information to decide whether they should
16 accept the benefits offered, opt out and pursue their own remedies, or object to the settlement.

17 Third, the Settlement should be denied as it is an attempt to improperly inoculate the
18 City against a pending action under review by the California Supreme Court. In fact, the
19 Injunctive Relief provisions of the proposed Settlement anticipate and allow future transfers
20 between the LADWP and the City of Los Angeles under the *2008* Rate Ordinance. California
21 law is clear – exemptions from liability for intentional wrongs, gross negligence, negligent
22 misrepresentation, and violations of the law are unenforceable. It follows that neither the
23 Release and Waiver provisions nor the Injunctive Relief provisions of the proposed
24 Settlement, nor any Final Judgment entered by this Court, can apply to future claims by Class
25 Members for Defendants’ knowing and willful violation of law regarding future financial
26 transfers, especially future transfers made pursuant to previous rate ordinances outside the
27 scope of the operative complaint.

1 Minimally, the Release and Waiver provisions should be revised such that Class
2 Members are only releasing claims under the 2016 Rate Ordinance. Furthermore, the Court
3 should order additional class notice to advise Class Members of the December 13 Transfer.

4 **II. Pre-Certification Settlements Require Careful Scrutiny**

5 In approving a class action settlement, the court must determine whether, as a whole,
6 the settlement is fair, reasonable and adequate. (*Cellphone Termination Fee Cases*, 186
7 Cal.App.4th 1380, 1389 (2010).) “The court has a fiduciary responsibility as guardian[] of the
8 rights of the absentee class members when deciding whether to approve a settlement
9 agreement.” (*Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129 (2008).) In this
10 capacity, the court must conduct “a careful fairness review of the settlement.” (*Wershba v.*
11 *Apple Computer, Inc.*, 91 Cal.App.4th 224, 239-240 (2001).)

13 **III. Final Approval Should Be Denied Because the Release Is Overbroad**

14 The proposed Settlement should be denied because the release is impermissibly broad.
15 The settlement releases all claims:

17 [O]f any kind and/or type relating to the subject matter of the Action arising
18 during the period *between January 29, 2012 and the date on which the Court*
19 *gives final approval of the Settlement*, including, . . . claims that *the 2008 Rate*
20 *Ordinance, the 2012 Rate Ordinance, and the 2016 Rate Ordinance* violate
21 Article XIII C of the California Constitution (commonly known as Proposition
26) *and claims that the City’s transfer of funds from the LADWP to the City*
under Section 344 of the City Charter violates Article XIII-C of the California
Constitution.

22 (SA, ¶ 86, emphasis added.)

23 The scope of the release exceeds the claims stated in the complaint. “Any attempt to
24 include in a class settlement terms which are outside the scope of the operative complaint
25 should be closely scrutinized by the trial court to determine if the plaintiff genuinely contests
26 those issues and adequately represents the class.” (*Trotsky v. Los Angeles Fed. Sav. & Loan*
27 *Assn.*, 48 Cal.App.3d 134, 148 (1975).)

1 The operative complaint—First Amended Consolidated Class Action Complaint
2 (“FAC”)—challenges the 2016 Rate Ordinance (No. 184133), adopted on March 15, 2016.
3 (FAC, ¶ 18.) The complaint was purposefully narrowed to challenge only the 2016 Rate
4 Ordinance after the trial court held that a 120-day statute of limitations applied to Plaintiffs’
5 claims, and ran from the date the 2008 Rate Ordinance was enacted. (Notice of Ruling on
6 Defendants’ Motion for Judgment on the Pleadings, May 10, 2016 p. 9; Plaintiffs Notice of
7 Motion and Motion for Final Approval of Class Action Settlement, Dec. 6, 2017, (“Final
8 Approval Brief”), 5:26-6:5 [“The Court gave Plaintiffs leave to amend to allege claims based
9 on the 2016 Rate Ordinance, which took effect April 15, 2016”].) The Court granted
10 Plaintiffs leave to amend the complaint to “allege claims arising from the City’s new [2016]
11 electric rate ordinance (Ordinance No. 184133).” (Notice of Ruling on Defendants’ Motion for
12 Judgment on the Pleadings, May 10, 2016, p. 9.)

13 On July 1, 2016, Plaintiffs amended the complaint to challenge the LADWP’s
14 collection of electric rates under the 2016 Rate Ordinance. Plaintiffs alleged the rates collected
15 exceeded the cost of providing electric service because embedded in the rates was an 8%
16 surcharge used to fund a discretionary transfer of money to the City of Los Angeles. The
17 excess rates, over and above the cost of providing the service, amounted to a *de facto* tax in
18 violation of the California Constitution (Art. XIII C, § 2 subds. (b) and (d)). (FAC, ¶¶ 21-29.)

19 As noted above, the proposed Settlement expressly waives claims of all Class Members
20 who were charged for electric service under the 2008, 2012, and 2016 Rate Ordinances,
21 including any challenge under Proposition 26, and any claim that a transfer of funds to the City
22 pursuant to the 2008, 2012, and 2016 Rate Ordinances violates the California Constitution (*see*
23 SA, ¶¶ 42, 86.) The effect of the release is an attempt to improperly immunize Defendants
24 from challenges over the constitutionality of the 2008 and 2012 Rate Ordinances as violating
25 Proposition 26, or the transfer of funds to the City of Los Angeles pursuant to those ordinances
26
27
28

1 (again, it appears that the recent \$241 million transfer from the LADWP to the City of Los
2 Angeles was made pursuant to the 2008 Rate Ordinance).⁴

3
4 **IV. Final Approval Should Be Denied Because Notice Is Inadequate**

5 Class notice is inadequate because it failed to inform Class Members that Defendants
6 intended to transfer \$241 million⁵ to the City of Los Angeles during the Fiscal Year
7 2017/2018.

8 On November 28, 2017, *after* notice was distributed to the Class (on October 12,
9 2017), *after* this Court entered an order preliminarily approving the settlement (September 14,
10 2017), and *before* final approval of the settlement (the fairness hearing is set for February 14,
11 2018), the LADWP adopted Resolution No. 018106, authorizing a transfer of \$241,848,000
12 from its Power Revenue Fund to the City’s Reserve Fund.⁶ An ordinance transferring these
13 funds was adopted by the City Council for the City of Los Angeles on December 13, 2017, and
14 will take effect on January 26, 2018. (*See* Flanagan Decl., ¶¶ 4-5, Exs. A and B.) Class
15 members received no notice of this transfer, even though the Release and Waiver provisions of
16 the Settlement Agreement purport to waive their right to challenge it under Proposition 26 or
17 other law.

18 The Long Form Notice is both inadequate and *misleading* as it does not disclose the
19 \$241 million transfer while claiming a *savings* to rate payers of \$243 million over the same
20 period:

21 _____

22
23 ⁴ The “Injunctive Relief” provisions (¶ 61) bar Defendants from transferring any amount
24 pursuant to the 2016 Rate Ordinance. Objector notes the Injunctive Relief provisions are not
25 in effect as the Settlement has not yet been approved, and therefore it is possible the recent
26 \$241 million transfer was made pursuant to the 2016 Rate Ordinance. However, if indeed the
27 \$241 million transfer was made pursuant to the 2016 Rate Ordinance, notice of that transfer
28 should have been provided to Class Members.

⁵ *See* Ordinance No. 185349, Office of the City Clerk, City of Los Angeles,
http://clkrep.lacity.org/onlinedocs/2017/17-1356_ORD_185349_01-26-2018.pdf (last visited
December 27, 2017).

⁶ *See* fn. 6, *infra*.

1 beginning on July 1, 2017, the City and LADWP will deduct eight percent (8%)
2 from the amounts otherwise charged to all LADWP retail electricity customers
3 pursuant to the 2016 Electric Rate Ordinance. *The expected savings for . . . over
the next three fiscal years is estimated to be Two Hundred Forty-Three Million
Dollars (\$243,000,000).*

4 (Long Form Notice, p. 3, emphasis added.). Incredibly, the Final Approval Brief repeats the
5 claim of a \$243 million savings (Final Approval Brief, 11:7-11:8), even though by the time the
6 Final Approval Brief was filed with the Court, LADWP had already submitted the \$241
7 million proposed transfer to the City of Los Angeles. (Fn. 6, *infra.*)

8 The Long Form Notice only states that “the City has agreed to not transfer any funds it
9 collects through the 2016 Electric Rate Ordinance in the future from the LADWP to the City.
10 The City has also agreed to ‘cap’ its transfers from the 2008 Electric Rate Ordinance at eight
11 percent (8%).” (Long Form Notice, p. 3.) The notice, mailed prior to the December 13
12 Transfer, fails to advise Class Members that Defendants intended⁷ to transfer \$241 million for
13 Fiscal Year 2017/2018 prior to final approval of the settlement.

14 A settlement cannot release claims for which Class Members did receive adequate
15 notice. “[N]otice given to the class must fairly apprise the class members of the terms of the
16 proposed compromise and of the options open to dissenting class members.” (*Wershba*, 91
17 Cal.App.4th at 251-52 (citing *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975), 48
18 Cal.App.3d 134, 151–52).) Moreover, the purpose of class notice is to give class members
19 sufficient information to decide whether they should accept the benefits offered, opt out and
20 pursue their own remedies, or object to the settlement. (*Id.*) “[N]otice that fails to inform the
21 class of the full extent of their release of liability is a material omission that renders the notice
22 inadequate.” (*Nunez v. BAE Sys. San Diego Ship Repair, Inc.*, No.: 16-CV-2162 JLS (NLS),
23 2017 WL 3276843 at *3-4 (S.D. Cal. August 2, 2017) (holding that the class notice did not

24
25 ⁷ Plaintiffs note that the LADWP submitted the \$241 million proposed transfer to the City of
26 Los Angeles on November 28, 2017 for review under the Fiscal Year 2017/2018 budget. (*See*
27 *Agenda for November 28, 2017 LADWP Board of Commissioners, Item 24*,
28 [https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-whoware/a-wwa-
boardofcommissioners?_adf.ctrl-state=qfcilskq_4&_afLoop=584172660913356](https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-whoware/a-wwa-boardofcommissioners?_adf.ctrl-state=qfcilskq_4&_afLoop=584172660913356) (last visited
December 27, 2017).). As noted above, the City approved the transfer on December 13.

1 adequately inform Class Members regarding the claims they would be releasing and directing
2 further class notice); see also *Shaffer v. Cont'l Cas. Co.*, 362 Fed.Appx. 627, 631 (9th Cir.
3 2010) [“Notice is not adequate if it misleads potential class members.”].)

4 Defendants’ class notice, which failed to notify Class Members of the imminent
5 2017/2018 Fiscal Year transfer that would occur just two months after class notice was
6 provided, failed to “inform the class of the full extent of their release of liability [which
7 constitutes] a material omission that renders the notice inadequate.” (*Nunez*, 2017 WL
8 3276843 at *3-4.) Therefore, Class Members were not given sufficient information to decide
9 whether they should accept the benefits offered, opt out and pursue their own remedies, or
10 object to the settlement. (*Wershba*, 91 Cal.App.4th at 251-52.)

11 Furthermore, the class notice is misleading as it states Class Members will save \$243
12 million during the three-year period “beginning on July 1, 2017” without accounting for the
13 recent \$241 million transfer.

14 **V. The Settlement Should Be Denied As It Attempts to Inoculate the City and**
15 **LADWP Against Future Claims Pursuant to a Pending Supreme Court Decision**

16 California Civil Code section 1668 prohibits “[a]ll contracts which have for their
17 object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful
18 injury to the person or property of another, or violation of law, whether willful or negligent,
19 [as] against the policy of the law.” California law is clear – exemptions from liability for
20 intentional wrongs, gross negligence, negligent misrepresentation, and violations of the law
21 are unenforceable. (*Farnham v. Super. Ct.*, 60 Cal.App.4th 69, 74 (1997); *Health Net of Cal.,*
22 *Inc. v. Dep’t of Health Servs.*, 113 Cal.App.4th 224, 234 (2003).) It follows that neither the
23 Release and Waiver provision or the Injunctive Relief provision of the proposed Settlement,
24 nor any Final Judgment entered by this Court, can apply to future claims by settlement Class
25 Members for Defendants’ knowing and willful violation of law.

26 First, the Supreme Court will soon decide whether a payment in lieu of taxes (PILOT)
27 transferred from a City of Redding utility to the City’s general fund is a “tax” under
28

1 Proposition 26 in the currently pending matter, *Citizens for Fair Reu Rates v. City of Redding*
2 (2015) 182 Cal.Rptr.3d 722, rev. granted 347 P.3d 89 (granting petition for review.)⁸ Briefing
3 is complete, but no decision has been rendered. The issues in the Redding case overlap issues
4 addressed by the proposed Settlement, including the legality of electricity pricing prior to the
5 passage of Proposition 26 in 2010 and transfers made pursuant to those rate ordinances; in
6 other words, the 2008 Rate Ordinance in this action. (*City of Redding*, 182 Cal.Rptr.3d at 732-
7 734, rev. granted 347 P.3d 89 [Court of Appeals discussion of “grandfathering” doctrine].)
8 Should the California Supreme Court find against the City of Redding, this could sound the
9 death knell for Defendants’ current rate structure and the LADWP’s yearly transfer of funds to
10 the City. However, in its present form the Settlement purports to protect Defendants from
11 future actions challenging the 2008 Rate Ordinance and transfers made pursuant to that
12 ordinance. (SA, ¶ 86.) Clearly, the intended effect of the Release and Waiver provisions is to
13 give Defendants a windfall beyond the scope of the claims in the operative complaint and
14 immunize them from any future challenges under Proposition 26. For this reason, the
15 settlement should not be approved.

16 Second, the Settlement is improper because the Injunctive Relief Provisions (¶ 61)
17 greenlight future financial transfers: “[w]ith respect to funds derived from the sale of
18 electricity . . . pursuant to the 2008 Rate Ordinance and the 2012 Rate Ordinance, Defendants
19 shall not, at any time, transfer . . . to any City Accounts . . . funds that exceed an amount equal
20 to eight percent (8%) of the Retail Operating Revenues . . . billed to Retail Customers . . .”
21 Private parties cannot modify or circumvent California law through a private settlement.
22 (*Gardner v. Downtown Porsche Audi*, 180 Cal.App.3d 713, 716 “[A] party [cannot] contract
23 away liability for his fraudulent or intentional acts or for his negligent violations of statutory
24 law.”].) It is improper for this Settlement to condone such future transfers for the reasons

25
26 ⁸ Appellate Courts Case Information, California Courts, The Judicial Branch of California,
27 http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2102031&doc_no=S224779&request_token=NiIwLSInLkg9W1BFSyM9VEtJQFg0UDxTISNeWz1RICAgCg%3D%3D (last visited December 27, 2017).

1 stated above, especially in light of the fact that the 2008 and 2012 Rate Ordinances are outside
2 the scope of the operative complaint.

3 **VI. Conclusion**
4

5 For the reasons stated herein, and any argument provided by counsel for Objector at the
6 Fairness Hearing, the proposed Settlement should be denied.


7
8 DATED: December 27, 2017

OBJECTOR

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10 _____
11 Carmen Balber

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14 DATED: December 27, 2017

CONSUMER WATCHDOG

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