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Case #2015-1-CV-284956
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

EILEEN A. STAATS,

Plaintiff,

vs.

CITY OF PALO ALTO,

Defendant.

Case No.: 2015-1-CV-284956

ORDER AFTER HEARING ON JUNE 8, 2018

Plaintiff's Motion for Class Certification

The above-entitled matter came on regularly for hearing on Friday, June 8, 2018 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued on June 6, 2018. The appearances are as stated in the record. Having reviewed and considered the written submissions of all parties, having heard and considered the oral argument of counsel, and being fully advised, the Court orders as follows:

This is a putative class action alleging that the City of Palo Alto unlawfully imposed a Utility Users Tax ("UUT") on customers of telephone service providers. Before the Court is plaintiff's motion to certify a class, which the City opposes.

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I. Factual and Procedural Background

According to the allegations of the Class Action Complaint ("Complaint"), plaintiff Eileen A. Staats is a resident of the City and a customer of cellular phone service provider(s). (Complaint, ¶ 1.) Plaintiff has paid and continues to pay the City's UUT to these cellular phone providers. (*Ibid.*) Plaintiff's service providers have collected and continue to collect the UUT as part of their normal billing practice on behalf of the City. (*Ibid.*) Plaintiff alleges that the UUT has been impermissibly assessed and collected from her and similarly situated taxpayers because it does not apply to (1) mobile phone services; (2) services that include long distance telephone service where the charge varies only by time; and (3) charges for "bundled service." (*Id.* at ¶¶ 24, 27.) Internal Revenue Service Notice 2006-50, a key authority supporting plaintiff's interpretation of the relevant statutes, defines "bundled" service as a plan that includes both local and long distance services without separately stating the charge for the local service.

The Complaint, filed on August 27, 2015, asserts the following causes of action: (1) declaratory relief; (2) money had and received; (3) unjust enrichment; (4) writ of mandamus; (5) illegal imposition of tax invalid under Government Code § 53723; and (6) violation of California Constitution Article XIII, C § 2 (also known as Proposition 218), invalid tax due to failure to obtain voter approval. The Complaint defines the putative class as follows:

> All persons, including individuals, non-corporate entities, and corporations, wherever organized and existing, who have paid the [UUT] on mobile phone services and who have paid for telephone services which are not taxable under IRC § 4251. This class includes all cellular customers, long distance landline customers, and customers of "bundled services" who have been improperly taxed since at least the effective date when the I.R.S., in its Notice 2006-50, conceded the tax was improper.

The City answered on December 18, 2015. The parties proceeded with discovery, and plaintiff moved to certify the class on May 5, 2017. Before the City filed its opposition papers, the hearing on plaintiff's motion was vacated on June 23 to allow plaintiff to file additional declarations in support of her motion. Plaintiff filed these declarations on September 7, and the hearing on the motion for class certification was rescheduled for March 16, 2018.

On November 28, 2017, the City filed a motion for leave to amend its answer to assert an equitable setoff defense, and the Court granted its motion on December 28. The Court rescheduled the hearing on plaintiff's class certification motion to April 6, 2018.

On April 5, the Court issued a tentative ruling indicating that it was inclined to certify a class and subclasses. At the hearing on April 6, counsel for both parties requested modifications to the class definition and/or the creation of additional subclasses. The Court continued the matter and ordered the parties to file supplemental briefs setting forth their proposed class and subclass definitions, explaining the need for the modifications they requested, and addressing the need for an additional class representative with regard to any newly proposed subclasses. The parties filed supplemental briefs on April 20 and responsive supplemental briefs on April 27, which the Court has now reviewed.

II. Legal Standard

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines 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.

(*Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted.)

California Code of Civil Procedure section 382 authorizes certification of a class "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 …." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and

1 (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v.*
2 *Superior Court*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the
3 probability that each class member will come forward ultimately to prove his or her separate
4 claim to a portion of the total recovery and whether the class approach would actually serve to
5 deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

6 The plaintiff has the burden of establishing that class treatment will yield "substantial
7 benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court (Botney)*
8 (1976) 18 Cal.3d 381, 385.) The court must examine all the evidence submitted in support of
9 and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of*
10 *Fish and Game v. Superior Court (Adams)* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is
11 considered "together:" there is no burden-shifting as in other contexts. (*Ibid.*)
12
13 III. Evidentiary Issues

14 Plaintiff's request for judicial notice of Internal Revenue Service Notice 2006-50 and of
15 Palo Alto Ordinance No. 5291 (Exs. 1 and 2) is GRANTED. (Evid. Code, § 452, subds. (b) and
16 (c).) The City's request for judicial notice is similarly GRANTED as to ordinances and
17 resolutions adopted by the City, as well as its charter and 2018 budget (Exs. A-H). The City's
18 request is also GRANTED as to a prior order in this action denying the City's motion for
19 judgment on the pleadings (Ex. I). (Evid. Code, § 452, subd. (d).) These requests for judicial
20 notice are unopposed.

21 Plaintiff's request for judicial notice of unpublished California trial court opinions
22 addressing settlement and/or class certification in cases involving other cities' telephone utility
23 users' taxes (which was submitted with her reply brief) is DENIED. Unpublished California
24 opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of
25 Court, rule 8.1115(a).) In any event, these rulings are devoid of analysis regarding the specific
26 issues presented by plaintiff's motion to certify the class. In light of this ruling, the Court need
27 not address the City's challenges to this request presented in the form of objections to evidence.
28 / / /

1 The City's objections to the original Declaration of William Fitzsimmons submitted in
2 support of plaintiff's motion are SUSTAINED with regard to the statements identified in
3 objections no. 1-4. The City correctly contends that Dr. Fitzsimmons lacks personal knowledge
4 of carriers' billing databases and has not shown that he has the knowledge, skill, experience or
5 training to provide an expert opinion on the mechanics of extracting specific customer-level data
6 from such databases, or that an expert opinion would assist the trier of fact on this subject. The
7 City's objections are OVERRULED as to the statement identified in objection no. 5 since expert
8 witnesses may rely on hearsay and Mr. Fitsimmons is qualified to draw a conclusion regarding
9 the availability of historic customer-specific bills based on interviews with and the review of
10 comments by carrier representatives on this subject. The City's objection to Exhibit 1 to Dr.
11 Fitzsimmons's supplemental declaration, an uncertified deposition transcript from another
12 action, is SUSTAINED insofar as that testimony is offered to establish AT&T's specific policies
13 and procedures, rather than to support of Dr. Fitzsimmons's expert opinion that most wireless
14 plans are not billed based on time and distance. (See *People v. Sanchez* (2016) 63 Cal.4th 665,
15 686 [although experts may rely of hearsay in forming their opinion, they may not "relate as true
16 case-specific facts asserted in hearsay statements, unless they are independently proven by
17 competent evidence or are covered by a hearsay exception"].)

18 Plaintiff's objections to the declaration of Christina Lawrence submitted in opposition to
19 plaintiff's motion are OVERRULED. The printouts attached to the declaration are presumed to
20 be accurate representations of the telephone carriers' web sites they purport to represent (Evid.
21 Code, § 1552) and are not offered as business records. As urged by the City, carriers'
22 advertisement of certain service plans is evidence that such plans were offered by the carriers.
23 The variation in plans is relevant to the Court's assessment of the predominance of common
24 factual issues.

25 Plaintiff's objections to the declaration of Ray Horak submitted in opposition to
26 plaintiff's motion are also OVERRULED. Plaintiff argues that Mr. Horak is not qualified to
27 offer an expert opinion regarding the process by which customer-specific information can be
28 retrieved from telecommunications records. While the Court agrees with this conclusion, Mr.

Horak does not purport to offer an opinion on this subject, and plaintiff does not dispute his qualifications to opine on the history of the telecommunications industry, a subject which is relevant to the issues presented by plaintiff's motion.

The City's objection to plaintiff's reply brief and reply evidence is OVERRULED. Plaintiff's reply evidence is responsive to the evidence submitted by the City in support of its opposition and does not raise any new substantive issues. The Court will also exercise its discretion to consider plaintiff's reply brief although it exceeds the page limit established by Judge Kuhnle. It notes that the City's opposition brief similarly appears to avoid the page limit through formatting modifications, and cautions both parties to respect page limitations in the future.

IV. Relevant Substantive Law and Areas of Dispute

The parties agree that during the proposed class period, the Palo Alto Municipal Code required telecommunications providers to collect the UUT from subscribers and remit it to the City on a monthly basis. The Code provided that the UUT would not be imposed with respect to services not subject to taxation under section 4251 of the Internal Revenue Code.

Critically, the parties dispute whether and under what conditions the cellular, long distance landline, and "bundled" services at issue in this action are encompassed by section 4251. While a court generally will not consider merits issues like these on a motion for class certification, sometimes, the merits are "enmeshed" with class action requirements. (*Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1023.) "When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Id.* at pp. 1023-1024.) "In particular, whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits," as the court "must determine whether the elements necessary to establish liability are susceptible of common proof," which "can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits." (*Id.* at p. 1024.) However, "[s]uch inquiries are closely circumscribed. ... [A]ny 'peek' a court takes