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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 COUNTY OF LOS ANGELES

RECEIVED
LOS ANGELES SUPERIOR COURT
FEB 28 2019
I. LOVO

22 EVE KOMESAR, an individual, on behalf of
23 herself and all others similarly situated,
24 Plaintiff,
25 v.
26 CITY OF PASADENA, and DOES 1 through 10,
27 Defendants.
28

CASE NO. BC 677632 [SSC 14]
STIPULATION AND ~~REPOSED~~
ORDER RE CLASS CERTIFICATION
AND STATUTE OF LIMITATIONS
Action Filed: September 29, 2017
Assigned for All Purposes to the Honorable
Kenneth R. Freeman, Department 14

1 This stipulation is entered into between Plaintiff Eve Komesar (`Plaintiff_) and Defendant City of
 2 Pasadena (the `City_), by and through their attorneys of record. Plaintiff and the City are referred to
 3 collectively herein as `the parties._

4 RECITALS

5 1. The City owns and operates a utility that provides retail electric service to its customers
 6 (`Pasadena Water and Power_ or `PWP_). The City collects a number of service charges from its retail
 7 electric customers, at rates set by ordinance or by PWP pursuant to standards established by ordinance
 8 (hereafter, `retail electric rates_). (See Title 13, Chapter 13.04 of the Pasadena Municipal Code.)

9 2. On September 29, 2017, Plaintiff filed a complaint, for herself and on behalf of a putative
 10 class, challenging the validity of the City `s retail electric rates. Plaintiff alleges: (a) that the City `s retail
 11 electric rates are `taxes_ within the meaning of article XIII C, section 1(e) of the California Constitution
 12 because they are `imposed in an amount that exceeds the reasonable cost to the [City] of providing
 13 electricity to [its] customers_ (Complaint ò 30); (b) that these `taxes_ require voter approval under article
 14 XIII C of the California Constitution; and (c) that Pasadena voters have not provided the necessary
 15 approval.

16 3. As an example of why she believes the City `s retail electric rates are `taxes_ within the
 17 meaning of article XIII C, section 1(e) of the California Constitution, Plaintiff alleges, in paragraph 15 of
 18 the complaint:

19 The City sets electric fees and charges at rates that include an amount expected to
 20 finance the City `s anticipated transfer of funds from its electric utility enterprise
 21 fund to its General Fund. The City expends the transferred funds on general
 22 government services and general municipal improvements unrelated to the
 23 provision of electric service. Such transfers include, but are not limited to, an
 24 approximately 8% general fund transfer used for any municipal purpose and an
 additional 8% general fund transfer to be used for general municipal improvements.
 Thus, the amounts transferred represent proceeds of a tax that was not approved by
 voters.

25 The two `general fund transfers_ identified by Plaintiff are governed by article XIV , sections 1407 and
 26 1408 of the Pasadena City Charter, and the City treats them as a revenue requirement of the electric utility
 27 when it sets retail electric rates. The City contends that it uses sources of revenue other than retail electric
 28 rates to reduce the revenue requirement of the electric utility when it sets retail electric rates.

1 4. The putative class alleged in Plaintiff's complaint is defined as "[a]ll customers of City of
 2 Pasadena Department of Water and Power who were billed for electric utility service during the Class
 3 Period" (Complaint ¶ 19.) The "Class Period" is defined as "the period on and after September 20,
 4 2014 through and including the date of entry of final judgment in this action." (Complaint ¶ 21.)

5 5. On January 5, 2018, the Court issued a case management order setting February 6, 2019 as
 6 the deadline for Plaintiff to file her motion for class certification. The Court subsequently extended the
 7 deadline to March 8, 2019.

8 6. Section 10004.5(a) of the Public Utilities Code states, in relevant part, that "any judicial
 9 action or proceeding against a municipal corporation that provides electric utility service, to attack, review,
 10 set aside, void, or annul an ordinance, resolution, or motion fixing or changing a rate or charge for an
 11 electric commodity or an electric service furnished by a municipal corporation and adopted on or after
 12 July 1, 2000, shall be commenced within 120 days of the effective date of that ordinance, resolution, or
 13 motion." The City intends to seek judgment in its favor with respect to any challenges to the validity of
 14 retail electric rates enacted under any City ordinance, resolution, or motion with an effective date of May
 15 31, 2017 or earlier, on the grounds that such challenges are barred by section 10004.5(a).

16 STIPULATION

17 The parties, having met and conferred regarding Plaintiff's motion for class certification and the
 18 City's statute of limitations defense, now stipulate as follows:

19 1. THE PROPOSED CLASS

20 For the reasons set forth in section 2 of this stipulation, and subject to the limitations described in
 21 sections 2 and 3 of this stipulation, Plaintiff and the City agree that it is appropriate at this time for the
 22 Court to certify a class defined as:

23 All persons and entities that, from June 1, 2017 through [the date that the Court
 24 orders class notice to be completed], were billed by the City of Pasadena's
 25 Department of Water and Power for retail electric service provided under any rate
 26 schedule described in Title 13, Chapter 13.04 of the Pasadena Municipal Code.
 27 Excluded from the class are: (i) all persons and entities that make a timely election
 to be excluded from the class; and (ii) any judges assigned to this case, and their
 immediate family members.

28 This proposed class shall be referred to in this stipulation as the "proposed class."

1 2. CLASS CERTIFICATION FINDINGS

2 The parties agree on a number of issues pertinent to the framework for determining, under
3 California law, whether a class may be certified. These points of agreement are set forth below. Nothing
4 in this stipulation is intended to suggest that the Court may not make an independent determination as to
5 whether class certification is appropriate in this case, and the parties will provide any additional
6 information that the Court deems necessary to make such a determination.

7 Ascertainability

8 (a) The parties agree that Pasadena Water and Power provides retail electric service to more
9 than 65,000 customers, and that the proposed class, which consists primarily of PWP's current retail
10 electric utility customers, is sufficiently numerous to make the joinder of each individual class member in
11 a single action impractical. (Code Civ. Proc. § 382.)

12 (b) The parties agree that the proposed class is defined by reference to objective characteristics
13 and common transactional facts. (Marler v. E.M. Johansing, LLC (2011) 199 Cal.App.4th 1450, 1459-
14 60.)

15 (c) The parties agree that the City should be able to identify members of the proposed class
16 from records maintained by PWP. However, nothing in this agreement shall be construed as a
17 representation by the City that PWP's records are entirely complete or accurate or that the City can
18 necessarily identify every member of the proposed class from those records.

19 Common Questions of Law or Fact

20 (d) The parties agree that the theory of liability set forth in paragraph 3 of the recitals to this
21 stipulation presents the following legal and factual questions that are common to the proposed class:

22 (i) whether the City's transfers from the electric utility to the general fund under article
23 XIV, sections 1407 and 1408 of the Pasadena City Charter are a "reasonable cost" of providing retail
24 electric service within the meaning of article XIII C, section 1(e)(2) of the California Constitution;

25 (ii) whether the City may use net electric utility revenue PWP receives from sources
26 other than retail electric rates to offset the City's transfers to the general fund under article XIV, sections
27 1407 and 1408 of the Pasadena City Charter and if so, what the difference is between the amount of the
28 transfers and the amount of such net non-rate revenue;

1 (iii) whether the City's general fund incurs costs on behalf of the electric utility that it
 2 is not currently compensated for through payments other than the transfers to the general fund under article
 3 XIV, sections 1407 and 1408 of the Pasadena City Charter;

4 (iv) whether the City's practice of treating transfers from the electric utility to the
 5 general fund under article XIV, sections 1407 and 1408 of the Pasadena City Charter as a revenue
 6 requirement when setting retail electric rates causes those rates, in the aggregate, to exceed the City's
 7 overall `reasonable cost_ of providing retail electric service within the meaning of article XIII C, section
 8 1(e)(2) of the California Constitution, rendering either the excess or the City's overall retail electric rates
 9 a `tax_ within the meaning of article XIII C, section 1(e) of the California Constitution; and

10 (v) if so, whether the alleged `tax_ has been approved by Pasadena voters.
 11 Nothing in this stipulation shall be construed as an admission by Plaintiff that no other legal or factual
 12 questions in this case are common to the proposed class.

13 (e) The parties agree that the questions listed in section 2(d) of this stipulation predominate
 14 over any individual questions raised by the theory of liability described in paragraph 3 of the recitals to
 15 this stipulation.

16 Typicality

17 (f) The parties agree that Plaintiff is a current retail electric utility customer of Pasadena Water
 18 and Power and, as such, is a member of the proposed class.

19 (g) The parties agree that the theory of liability alleged by Plaintiff on her own behalf, as set
 20 forth in paragraph 3 of the recitals to this stipulation, and the City's defenses thereto, are the same as those
 21 asserted on behalf of and against the proposed class. Subject to this understanding, the parties agree that
 22 Plaintiff's individual claims are typical of the claims asserted on behalf of the proposed class.

23 Adequacy of Representation

24 (h) The parties agree that Kearney Littlefield, LLP and Krause, Kalfayan, Benink & Slavens,
 25 LLP are qualified to represent the proposed class. (McGhee v. Bank of America (1976) 60 Cal.App.3d
 26 442, 450.)

27 (i) The City and Plaintiff represent to each other and the Court that neither is aware, at the
 28 present time, of any conflict of interest between Plaintiff and the proposed class that would prevent

1 Plaintiff from serving as a representative of the proposed class; and that neither is aware, at the present
 2 time, of any conflict of interest between Kearney Littlefield, LLP and Krause, Kalfayan, Benink &
 3 Slavens, LLP, on the one hand, and the proposed class on the other, that would prevent Kearney Littlefield,
 4 LLP and Krause, Kalfayan, Benink & Slavens, LLP from serving as class counsel.

5 Superiority

6 (j) The parties agree that in light of the size of the proposed class and the appropriateness of
 7 addressing, on a classwide basis, the theory of liability set forth in paragraph 3 of the recitals to this
 8 stipulation and the City's defenses thereto, proceeding as a class action is `superior to [any] alternate
 9 means for a fair and efficient adjudication of the litigation._ (Sav-On Drug Stores, Inc. v. Superior Court
 10 (2004) 34 Cal.4th 319, 332, citations, quotation marks omitted.)

11 3. RIGHT TO MOVE FOR DECERTIFICATION

12 (a) The City has entered into this stipulation on the understanding that the primary theory of
 13 liability advanced by Plaintiff in this case is the theory set forth in paragraph 3 of the recitals to this
 14 stipulation. Nothing in this stipulation shall be construed as a waiver of the City's right to move to
 15 decertify the class in the event that Plaintiff asserts a different theory of liability at any point during this
 16 litigation.

17 (b) The parties agree that if Plaintiff advances a theory of liability different from that set forth
 18 in paragraph 3 of the recitals to this stipulation, the advancement of that theory will constitute `changed
 19 circumstances_ for purposes of a motion for decertification, should the City decide to bring such a motion.
 20 (Kight v. Cashcall, Inc. (2014) 231 Cal.App.4th 112, 125.) Nothing in this stipulation shall be construed
 21 as an admission by Plaintiff that advancing a different theory of liability would warrant decertification.
 22 However, Plaintiff will not argue that any motion for decertification is procedurally deficient due to an
 23 absence of `changed circumstances._

24 (c) The City has agreed that the common questions of law or fact, typicality, adequacy of
 25 representation, and superiority elements of class certification are satisfied based on information of which
 26 it is currently aware. Nothing in this stipulation shall be construed as a waiver of the City's right to move
 27 to decertify the class based on new or additional information disclosed or otherwise identified in the future,
 28 and the City expressly reserves its right to bring such a motion.

1 4. STATUTE OF LIMITATIONS

2 The parties agree that the 120 day statute of limitations in section 10004.2 of the Public Utilities
3 Code applies to all causes of action asserted in Plaintiff's complaint. (See Webb v. City of Riverside (2018)
4 23 Cal.App.5th 244, 256-57.) Notwithstanding any language in the complaint to the contrary, Plaintiff
5 agrees that she is not challenging the validity of retail electric rates collected under any City ordinance,
6 resolution, or motion with an effective date of May 31, 2017 or earlier. The complaint, and each cause of
7 action alleged therein, shall be deemed to challenge only the validity of retail electric rates enacted under
8 any City ordinance, resolution, or motion with an effective date of June 1, 2017 or later, and the proposed
9 class shall be certified only as to causes of action that challenge the validity of retail electric rates collected
10 under any City ordinance, resolution, or motion with an effective date of June 1, 2017 or later.


11 5. CLASS NOTICE

12 (a) The parties agree that the City will provide notice to members of the proposed class, in a
13 manner and form to be approved by the Court.

14 (b) The parties will meet and confer in an effort to reach an agreement regarding the
15 appropriate form of the class notice and the appropriate manner of delivering that notice to the proposed
16 class. Within 60 days of the Court's issuance of the proposed order set forth below, the parties will submit
17 a stipulation and proposed order addressing the manner and form of the class notice. If a complete
18 agreement on the manner and form of the class notice cannot be reached, the parties will also submit a
19 joint statement to the Court outlining all remaining areas of dispute.

20 (c) The City and Plaintiff will each pay one half (X) of the cost of providing notice to the
21 proposed class, excluding attorneys' fees and other costs incurred in negotiating and drafting the proposed
22 notice and notice plan. The budget for the class notice must be approved by both parties, subject to any
23 adjustments ordered by the Court.

24 JARVIS, FAY & GIBSON, LLP

25
26 By: 

Benjamin P. Fay
Gabriel McWhirter

Attorneys for Defendant CITY OF PASADENA

26 Dated: February 27, 2019

KRAUSE, KALFAYAN, BENINK & SLAVENS, LLP



By: _____
Vincent D. Slavens
Eric J. Benink

KEARNEY LITTLEFIELD, LLP
Thomas A. Kearney
Prescott W. Littlefield

Attorneys for Plaintiff EVE KOMESAR

[PROPOSED] ORDER

Pursuant to the stipulation between Plaintiff Eve Komesar and Defendant City of Pasadena, above, subject to the limitations set forth in that stipulation, and for good cause shown, the Court HEREBY ORDERS as follows:

1. The following class is certified in this case pursuant to section 382 of the Code of Civil Procedure (hereafter, "the class"):

All persons and entities that, from June 1, 2017 through [the date that the Court orders class notice to be completed], were billed by the City of Pasadena's Department of Water and Power for retail electric utility service provided under any rate schedule described in Title 13, Chapter 13.04 of the Pasadena Municipal Code. Excluded from the class are: (i) all persons and entities that make a timely election to be excluded from the class; and (ii) any judges assigned to this case, and their immediate family members.

2. Plaintiff's complaint, and each cause of action alleged therein, is deemed to challenge only the validity of retail electric rates collected under any City ordinance, resolution, or motion with an effective date of June 1, 2017 or later, and the proposed class is certified only as to causes of action that challenge the validity of retail electric rates collected under any City ordinance, resolution, or motion with an effective date of June 1, 2017 or later.

3. Plaintiff Eve Komesar is appointed to serve as the class representative for the class.

4. Kearney Littlefield, LLP and Krause, Kalfayan, Benink & Slavens, LLP are appointed to serve as class counsel for the class.

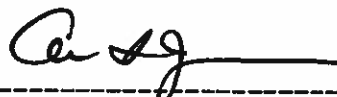
1 5. The City shall retain its right to move for decertification of the class based on any
2 circumstances described in section 3 of the parties' stipulation.

3 6. The City shall provide notice to class members in a manner and form to be approved by
4 the Court. The parties shall meet and confer in an effort to reach an agreement regarding the appropriate
5 form of the class notice and the appropriate manner of delivering that notice to the class. Within 60 days
6 of entry of this order, the parties shall submit a stipulation and proposed order addressing the manner and
7 form of the class notice. If a complete agreement on the manner and form of the class notice cannot be
8 reached, the parties shall also submit a joint statement to the Court outlining all remaining areas of dispute.

9 7. The City and Plaintiff shall each pay one half (X) of the cost of providing notice to the
10 class, excluding attorneys' fees and other costs incurred in negotiating and drafting the proposed notice
11 and notice plan. The budget for the class notice shall be approved by both parties, subject to any
12 adjustments ordered by the Court.

13 IT IS SO ORDERED.

14
15 Dated: 3-4-19



Hon. Kenneth R. Freeman *Ann I. Jones*
Judge of the Superior Court