No. B289717

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SECOND APPELLATE DISTRICT, DIVISION SEVEN**

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**PATRICK ECK**,
*Plaintiff and Respondent*,

v.

**CITY OF LOS ANGELES**, **ET AL.**
*Defendants and Respondents.*

**CARMEN BALBER,**
*Objector and Appellant.*

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# OBJECTOR-APPELLANT CARMEN BALBER'S OPENING BRIEF

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*From an Order and Final Judgment Granting Approval of Class Action Settlement*
*The Hon. Ann I. Jones*
*Superior Court Case No. BC577028 (Lead)*
*Consolidated with Case Nos.: BS153395 & BC583788*

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## CERTIFICATE OF INTERESTED PARTIES

Attorneys of Consumer Watchdog, on behalf of Objector-Appellant Carmen Balber, represents that there are no interested entities or persons pursuant to Cal. Rules of Court, rule 8.208(e)(3).

## AUTHENTICITY OF EXHIBITS

Each exhibit accompanying this Appellant's Opening Brief is a true and correct copy of the original document filed in or issued by the Los Angeles Superior Court. All Exhibits are paginated consecutively, and citations herein are to the consecutive pagination. These exhibits are incorporated herein by reference.

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal seeks to uphold basic due process rights of absent class members in class action settlements: Objector Carmen Balber (hereafter, "Appellant" or "Balber") contends that the settlement notice in this action ("Notice") failed to provide absent class members material information necessary to fully and knowingly exercise their right to opt-out or object to the settlement.

On February 26, 2018, the trial court entered a Final Judgment approving the Class Action Settlement ("Settlement Agreement" or "the Settlement"). Appellant's Appendix ("A.A."), Vol. 5 at 1061–65. The Settlement purported to resolve a dispute regarding surcharges embedded in the electricity rates of City of Los Angeles ("City") residents, which resulted in hundreds of millions of dollars in annual financial transfers from the Los Angeles Department of Water and Power ("LADWP") to the City. *See, e.g.*, A.A. Vol. 1 at. 165; A.A. Vol. 2 at 347; A.A. Vol. 1 at 34. Illegal taxes fueling such transfers have been the subject of a voter revolt expressed in multiple ballot initiatives over the last four decades.

On December 12, 2017, before final approval of the Settlement and approximately two months after Notice was provided to the Class, the City authorized an additional $241,848,000 transfer ("$242 million transfer") from LADWP to the City. The Class was not given notice of the $242 million transfer even though the City had line-itemed the anticipated revenue as early

as April 20, 2017, and the City Attorney's office, which represented the City and LADWP in the litigation, was aware of the transfer and signed off on its legality on November 17, 2017 and December 5, 2017. A.A. Vol. 5 at 1076–77; A.A. Vol. 5 at 1079–87; A.A. Vol. 5 at 1093, 1097. Respondents did not provide any notice to the Class or the trial court of the $242 million transfer until January 23, 2018—three weeks *after* the opt-out and objection deadline. A.A. Vol. 5 at 980–983.[1] Though the $242 million transfer was not disclosed to Class members in time to exercise their right to opt-out or object, the Settlement's Release and Waiver provisions purport to release any claims Class members might have to challenge it. A.A. Vol. 1 at 75-76.

The Respondents attempt to flip Balber's objection to the Settlement by arguing that though Respondents failed to give any notice of the $242 million transfer to the Class, the Long Form Notice posted on the settlement website contained the complex general Release and Waiver provisions of the Settlement. A.A. Vol. 5 at 1159–60. However, the Release and Waiver provisions do not mention the $242 million transfer. Instead, those provisions broadly state that Class members release all claims they might have against LADWP and the City regarding utility ratemaking up until the time of the Final Fairness Hearing. A.A. Vol. 1 at 75.

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[1] This notice consisted of a single line of text on the final page of a declaration; Appellant is not aware of any evidence that the trial court was aware of the $242 million transfer prior to Balber's objection.

By analogy, if an insurance company told its insured, "You will be solely responsible for all auto-related accidents over the next two weeks," the insured would act accordingly. For example, the insured might decide not to drive during that two-week period. But what the insurer did not tell the insured is that the company had already planned to have a truck driven through the insured's living room window in that time period. That would certainly be material information the insured would have liked to have, notwithstanding the general statement releasing the insurer from liability. Similarly, to satisfy due process concerns, class notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." 4 William B. Rubenstein, *Newberg on Class Actions* § 8.39 (2002).

Appellant Balber contends that final approval of the Settlement was improper because by not disclosing the $242 million transfer, the Notice provided to Class members was misleading and inadequate and violated the due process rights of absent Class members. As a result, as explained below, the trial court's approval of the Settlement was incorrect as a matter of law and must be reversed.

## II. STATEMENT OF APPEALABILITY

The California Supreme Court recently clarified that objectors to a class action settlement must be a party to the action—for example, by

intervening in the action—in order to preserve their right to appeal. *Hernandez v. Restoration Hardware, Inc*., 4 Cal.5th 260, 267 (2018). Furthermore, "although not a method of intervention, an unnamed party to the action may also become a named party ["with the right to appeal a class action settlement or judgment"] by filing an appealable motion to set aside and vacate the class judgment under section 663." *Id*. at 267–68. For four decades prior to the *Restoration Hardware* decision, the California Court of Appeal consistently held that a class member who appears at the fairness hearing and objects to the settlement has a right to appeal regardless of whether they intervened in the action. *See, e.g., Trotsky v. Los Angeles Fed. Sav. & Loan Assn.*, 48 Cal. App. 3d 134, 139 (1975) (member of affected class whose objections to settlement were overruled is aggrieved party with right to appeal), *disapproved of by Restoration Hardware*, 4 Cal. 5th at 287; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 253 (2001) (holding that unnamed class members who appeared at final fairness hearing and objected to proposed settlement have standing to appeal), *disapproved of by Restoration Hardware*, 4 Cal. 5th at 287.

Appellant Balber filed a timely objection to the Settlement on December 27, 2017. A.A. Vol. 5 at 665, A.A. 671–701. Shortly after the *Restoration Hardware* decision, Balber brought an ex parte application to intervene. A.A. Vol. 5 at 984–1021. The application was denied at the outset of the Fairness Hearing on February 14, 2018, where she appeared personally

and through counsel, on the grounds that it was "untimely." A.A. Vol. 5 at 1053–1058. On March 5, 2018, Balber subsequently brought a noticed Motion to Set Aside and Vacate the Final Judgment approving the Class Action Settlement pursuant to Code Civ. Proc. § 663 ("Motion"). A.A. Vol. 5 at 1130–1186. The fully briefed Motion was denied by operation of law as the trial court failed to hear the motion before 60 days had elapsed. Reporter's Transcript of Proceedings, Vol. 1, p. 59.

## III. QUESTIONS PRESENTED

Whether in approving the Settlement, the trial court erred as a matter of law where the Notice failed to disclose material information to Class members concerning the $242 million transfer from the LADWP to the City?

## IV. STANDARD OF REVIEW

Appellant Balber contends that the Notice of settlement given to Class members was inadequate and misleading, amounting to a due process violation. As such, the standard of review applicable to this appeal is *de novo*. While this Court's

> review of the trial court's fairness determination and manner of giving notice is governed by the abuse of discretion standard, [] review of the *content* of notice may be de novo. 'To the extent the trial court's ruling is based on assertedly improper criteria or incorrect legal assumptions, we review those questions de novo.'

*Cho v. Seagate Technology Holdings, Inc*., 177 Cal. App. 4th 734, 745 (2009) (internal citations omitted), *In re Cellphone Fee Termination Cases,* 186 Cal.

App. 4th 1380, 1390 (2010); *see also Hypertouch, Inc., v. Superior Court*, 128 Cal. App. 4th 1527, 1536–37 (2005).

In *Seagate Technology Holdings Inc.*, the issue decided *de novo* by the Court of Appeal was the "purely legal question . . . [of] whether notice that contains an ambiguous definition of class membership is authorized by or consistent with the California Rules of Court relating to management of class action cases." 177 Cal. App. 4th at 745. Similarly, federal courts within the Ninth Circuit and other circuits review *de novo* whether the content of notice of a proposed settlement in a class action satisfies due process. *See, e.g., In re Online DVD-Rental Antitrust Litigation,* 779 F.3d 934, 946 (9th Cir. 2015); *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1440 (9th Cir. 1987), *rev'd on other grounds by California v. ARC America Corp*. 490 U.S. 93, 109 (1989); *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1373–74 (9th Cir. 1993).

> Although [Rule 23(e)] accords a wide discretion to the District Court as to the form and content of the notice, due process requires its presence and constitutional adequacy. To meet this standard, the notice given must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

*Mendoza v. Tucson School Dist. No. 1,* 623 F.2d 1338, 1350–51 (9th Cir. 1980) (citing *Mullane v. Central Hanover Bank & Trust Co et al.*, 339 U.S. 306, 314 (1950)), *disapproved of on other grounds by Evans v. Jeff D.*, 475 U.S. 717 (1986).

## V. STATEMENT OF THE CASE

### A. The Lawsuit and Settlement

Through a series of voter initiatives—Proposition 13 in 1978, Proposition 218 in 1996, and Proposition 26 in 2010, among others—the California Constitution has been amended to place limitations on the authority of state and local governments to collect revenue through taxes, fees, charges, and other types of levies. A particular focus of these efforts was to halt illegal tax schemes involving cities and municipal-owned utilities. *See, e.g., City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191, 1197 (2017).

The settlement at issue in this appeal concerns the City and LADWP Respondents' practice of transferring hundreds of millions of dollars of LADWP electricity revenue to the City each year. A.A. Vol. 1 at 34. Plaintiff Respondents ("Eck Respondents") alleged that LADWP charged more for electricity than the cost of providing electric service—a tax under California law—in order to transfer the excess funds to the City. The Eck Respondents alleged that this practice is illegal under Propositions 26 and 218 because the excess amount was a tax that the voters did not approve. Plaintiffs sought refunds of all such taxes collected. A.A. Vol. 2 at 347; 350–51; *see also* A.A. Vol. 1 at. 165; A.A. Vol. 1 at 168; A.A. 109.

According to Eck Respondents, the rates for electrical power provided by LADWP are currently imposed through two separate City Ordinances:

City Ordinance No. 180127 (the "2008 Rate Ordinance") and City Ordinance No. 184133 (the "2016 Rate Ordinance"). A.A. Vol. 2 at 349–50. The Eck Respondents have contended that the $242 million transfer excluded any 2016 Rate Ordinance revenue (A.A. Vol. 5 at 980–983), and thus the $242 million subject to the December 2018 transfer from LADWP to the City was collected pursuant to the 2008 Rate Ordinance. *See* A.A. Vol. 3 at 380. ("Thus, beginning April 15, 2016, the LADWP began imposing, and continues to impose, electric rates on its retail customers through the 2008 Rate Ordinance and the 2016 Rate Ordinance.") Furthermore, the Release and Waiver provisions of the Settlement Agreement purport to release all potential Class member claims flowing from the 2008, 2012 (superseded by the 2016 Rate Ordinance), and 2016 Rate Ordinances, including fund transfers from the LADWP to the City. The claims release includes:

> all claims…arising between January 29, 2012 and the date on which the Court gives final approval of the settlement…, including but not limited to claims that the 2008 Rate Ordinance, the 2012 Rate Ordinance, and the 2016 Rate Ordinance violate 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.

A.A. Vol. 1 at 76; A.A. Vol 5 at 1063–64.

On September 14, 2017, the trial court preliminarily approved the settlement. A.A. Vol. 1 at 174–80. On October 12, 2017, a Postcard Notice was mailed to Class Members and a Long Form Notice was posted to the

settlement website. A.A. Vol. 4 at 662–63. Notice was also provided by internet advertisement and a publication notice (together with the Postcard Notice and Long Form Notice, "Notice"). A.A. Vol. 1 at 67. Neither the Notice nor the Settlement Agreement mentions the $242 million transfer even though the City was aware of the impending transfer as early as April 20, 2017.

**B. $242 Million Transfer[2]**

Unbeknownst to Class members, on or before April 20, 2017, the proposed City budget anticipated a $242 million transfer from the LADWP. A.A. Vol. 5 at 1079-87.

On November 16, 2017, the LADWP Board received a staff recommendation to transfer $242 million to the City of Los Angeles for Fiscal Year 2017/2018. A.A. Vol. 5 at 1089. The next day—November 17, 2017—the City Attorney's Office signed off on the $242 million transfer, approving it as to "form and legality." A.A. Vol. 5 at 1093. On November 28, 2017, the LADWP Board authorized the transfer of $242 million to the City of Los Angeles. A.A. Vol. at 1076.

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[2] For the Court's convenience, a timeline of events has been provided in Section V.C.

On December 6, 2017, the City Attorney's office once again signed off on the transfer. A.A. Vol. 5 at 1097. The next day, the Eck Respondents' Final Approval and Attorneys' Fees briefs were posted to the settlement website to allow Class members the opportunity to consider them before the Opt-Out and Objection deadline. A.A. Vol. 4 at 664–65. However, no notice of the $242 million transfer was provided on the settlement website.

On December 12, 2017, approximately two months after Notice was provided to the Class and two weeks before the December 27, 2017 opt-out and objection deadline (A.A. Vol. 2 at 276), the Los Angeles City Council adopted a city ordinance authorizing the $242 million transfer from LADWP to the City (A.A. Vol. 5 at 1096–97); the ordinance was signed by the mayor the next day and became effective on January 26, 2018. *Id.* at 1097. Once again, no notice of any kind was posted to the settlement website or provided in any way to Class members.

### C. Timeline of Relevant Events

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| **Apr. 20, 2017** | Unbeknownst to Class members, the proposed City budget, dated April 20, 2017, anticipated a $242 million transfer from the LADWP. A.A. Vol. 5 at 1079-97. |
| **Sept. 14, 2017** | The Court preliminarily approves the settlement. AA Vol. 1 at 174-80. The Settlement Agreement does not mention the $242 million transfer. |
| **Oct. 12, 2017** | Postcard Notice is mailed. Long Form Notice is posted to settlement website, and internet and publication notice is provided. A.A. Vol. 2 at 274-75. None mention the $242 million transfer. |
| **Nov. 16, 2017** | LADWP Board receives staff recommendation to transfer $242 million to City of Los Angeles for FY 2017/2018. A.A. Vol. 5 at 1089. |
| **Nov. 17, 2017** | City Attorney's Office signs off on the $242 million transfer: "Approved as to form and legality." A.A. Vol. 5 at 1093. |
| **Nov. 28, 2017** | LADWP Board authorizes transfer of $242 million to the City of Los Angeles. A.A. Vol. at 1076. |
| **Dec. 5, 2017** | City Attorney's office once again signs off on transfer. A.A. Vol. at 1097. |
| **Dec. 6, 2017** | The Final Approval and Attorney Fees briefs are posted to the settlement website to allow Class members opportunity to consider them before the Opt-Out/Objection deadline. A.A. Vol. 4 at 664–65. No notice of the $242 million transfer was provided on the settlement website. |
| **Dec. 12/13, 2017** | Two weeks prior to Opt-Out/Objection deadline, the City Council adopts an ordinance approving the $242 million transfer on December 12, 2017. The ordinance is signed by Mayor Garcetti on December 13, effective January 26, 2018. A.A. Vol. at 1097. No notice of the |

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|---|---|
| | $242 million transfer was provided on the settlement website. |
| **Dec. 27, 2017** | Deadline to Opt-Out and Object. A.A. Vol. 1 at 178. |
| **Jan. 23, 2018** | The Declaration of Ben Truong of the LADWP for the first time discloses (on the final page) the $242 million transfer three weeks too late for Class members to consider whether to Opt-Out or Object. A.A. Vol. 5 at 983. |
| **Feb. 14, 2018** | The "Released Claims" and "Release and Waiver" provisions of the Settlement Agreement purport to release all claims pursuant to the '08, '12, and '16 Rate Ordinances and any financial transfers between LADWP and the City through the date of the Final Fairness Hearing February 14, 2018. A.A. Vol 1 at 57-58, 75-76. |

## VI. ARGUMENT

The Notice does not comport with due process requirements, warranting corrective action by this Court. This Court should vacate the trial court's final judgment approving the Settlement, and remand for purpose of removing the $242 million transfer from the Release and Waiver provisions of the Settlement in order to comport with the Notice. *See Seagate Technology Holdings, Inc.*, 177 Cal. App. 4th at 747–48, (internal citations omitted) (holding that where class notice misrepresented the class definition, "the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable."); *Duran v. Obesity Research Institute, LLC*, 1 Cal. App. 5th 635, 638 (2016) ("Remand cannot be limited to giving a corrected class notice. The judgment must be reversed because the class notice failed in its fundamental purpose—to apprise class members of the terms of the proposed settlement.")

### A. The Notice Omits Material Information, Rendering It Inadequate in Violation of Due Process

It is well accepted that "settlement class actions present unique due process concerns for absent class members . . . ." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). To protect absent class members,

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

*Mullane*, 339 U.S. at 314; *see also Duran*, 1 Cal. App. 5th at 647–48 (2016); *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.*, 127 Cal. App. 4th 387, 399, fn. 9 (2005), *disapproved of on other grounds by Restoration Hardware*, 4 Cal. 5th at 287. "Class notice is . . . designed to present the relevant facts in an unbiased format." *Hernandez v. Vitamin Shoppe Industries Inc.*, 174 Cal. App. 4th 1441, 1455 (2009).

In particular, the notice to class members must "communicate[] the essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way." *Rodriguez v. West Publ'g Corp.,* 563 F.3d 948, 963 (9th Cir. 2009). Thus, the notice must be structured to enable class members to rationally "decide whether to intervene or object, 'opt out,' or accept the settlement." *Trotksy v. Los Angeles Fed. Sav. & Loan Assn.,* 48 Cal. App. 3d 134, 152 (1975) (internal citation omitted), *disapproved of on other grounds by Restoration Hardware*, 4 Cal. 5th at 287. To that end, the notice "must fairly apprise the class members of the terms of the proposed compromise . . . ." *Trotksy*, 48 Cal. App. 3d at 151. Furthermore, due process in class action settlements requires that affected parties be provided with the "right to be heard at a meaningful time and in a meaningful manner." *In re Vitamin Cases*, 107 Cal. App. 4th 820, 829 (2003). In sum, to satisfy due process concerns, class notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final

judgment." 4 William B. Rubenstein, *Newberg on Class Actions* § 8.39 (2002).

Here, on November 28, 2017, *after* the trial court entered an order preliminarily approving the Settlement (September 14, 2017), *after* notice was distributed to the Class (October 12, 2017), and *before* the Final Fairness Hearing (February 14, 2018), the LADWP adopted Resolution No. 018106, authorizing a transfer of $241,848,000 from its Power Revenue Fund to the City's Reserve Fund ("$242 million transfer"). An ordinance approving the $242 million transfer was adopted by the City Council for the City of Los Angeles on December 12, 2017, and took effect on January 26, 2018, a month *after* opt-out requests and objections were due. A.A. Vol. 5 at 1097.

The Notice was clearly inadequate to satisfy basic due process requirements, as it strategically failed to inform Class members that the City and LADWP Respondents would transfer nearly $242 million to the City of Los Angeles from the LADWP two months after Notice was provided to the Class. Instead, the Long Form Notice posted on the settlement website only obliquely stated that "the City has agreed to not transfer any funds it collects through the 2016 Electric Rate Ordinance in the future from the LADWP to the City. The City has also agreed to 'cap' its transfers from the 2008 Electric Rate Ordinance at eight percent (8%)." A.A. Vol. 1 at 112; A.A. Vol. 5 at 1171. The Postcard Notice, internet advertisement, and a publication notice

only state that there will be no *future transfers* pursuant to the 2016 Electric Rate Ordinance:

> The City and LADWP have also agreed to deduct 8% from the amounts otherwise charged to LADWP retail electricity customers pursuant to its 2016 Electric Rate Ordinance and will no longer transfer any funds LADWP collects through the 2016 Electric Rate Ordinance to the City.

A.A. Vol. 1 at. 165–66, 168. These statements misled Class members as to the true nature of the Settlement as noted below.

The LADWP, City of Los Angeles, and their counsel, the City Attorney's Office, were in the best position to provide notice of the imminent $242 million transfer and could have easily done so with a line or two of additional text in the Notice, yet chose not to. It would be contrary to due process principles to deprive absent Class members of the opportunity to make an informed, rational decision whether to exercise their right to object to or opt out of the Settlement Agreement, especially considering illegal taxes and financial transfers between the City and LADWP were central to the very subject matter of the underlying litigation and the Settlement.

In *Trotsky*, the Court of Appeal was presented with issues similar to those in this action. In *Trotsky*, the trial court approved a settlement agreement even though the parties failed to provide notice to the class as to the release of claims outside the scope of the action, as well as "the effect" of the release on the rights of the class. *Trotsky,* 48 Cal. App. 3d at 148.

Reversing the judgment of the trial court, the Court of Appeal held that the settlement agreement was not valid. *Id.* at 154.

This Court should reach the same conclusion. As in *Trotsky*, this case "could have taken a completely different turn had the parties disclosed" information that was "highly significant to the members of the [] class in deciding whether they should object to the [] settlement or request exclusion from the class." *Id.* at 150, 152. Due process concerns about adequacy of class notice do not turn on whether "large numbers" of Class members would have acted differently if accurate notice had been used.

> We have no impression that there are large numbers of claimants who will come forward if the class definition and notice are corrected, but the problem with this notice creates more than a remote theoretical possibility that the claims of unsuspecting class members will be brushed aside. An ambiguous class definition does not provide adequate notice. It was error for the trial court to approve this settlement without correcting the ambiguous definition of the plaintiff class.

*Seagate Technology Holdings, Inc.*, 177 Cal. App. 4th at 747 (internal citations omitted).

Moreover, the $242 million transfer was clearly information a reasonable person would have found material in deciding whether to opt out or object to the Settlement, especially given that the Settlement purports to release any claims absent Class members may have regarding the undisclosed $242 million transfer. A.A. Vol. 1 at 57–58, 75–76. In other words, the Notice utterly failed to inform Class Members of the scope of the

Settlement's release of claims. *See Wershba*, 91 Cal. App. 4th at 251–52 (citing *Trotsky,* 48 Cal. App. 3d at 151–52) ("[N]otice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members."), *disapproved of on other grounds by Restoration Hardware*, 4 Cal. 5th at 287; *see also Molski v. Gleich*, 318 F.3d 937, 952 (9th Cir. 2003) ("By failing to explain that only claims involving literally physical injuries were not released under the proposed consent decree, the notice misled the putative class members."), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

Notification of the pending $242 million transfer from LADWP to the City was essential in order for allow all Class members to rationally decide whether to accept the Settlement, opt out and pursue their own remedies, or object to the Settlement Agreement. Failure to provide such notice constitutes a "material omission that renders the notice inadequate." *Nunez v. BAE Sys. San Diego Ship Repair, Inc*., No.: 16-CV-2162 JLS (NLS), 2017 WL 3276843, at *3 (S.D. Cal.).

In *Nunez v. BAE Sys. San Diego Ship Repair, Inc*., a class member alleged that absent class members were not given adequate notice in violation of due process because the notice did not properly disclose the correct period through which all asserted claims would be released. *Id*. at *2–3. Because the notice neglected to provide a complete picture of the effect of the proposed

settlement agreement, the court found that the notice failed to comply with due process and required the parties to send a corrective notice. *Id*. at *3.

> To be sure, not every fact missing from the notice sent to potential class members would render the notice inadequate under Rule 23(e)(1). But a notice that fails to inform the class of the full extent of their release of liability is a material omission that renders the notice inadequate.

*Id.* at *3. In *Nunez*, the court found the notice to be inadequate even though the settlement agreement, which was available to class members, provided the correct date for the claims release period. *Id.* at *3. Here the Notice "failed to inform Class Members of the potential scope of their release of liability" (*id*. at *2) by failing to mention the imminent $242 million transfer. Moreover, neither the Notice, the Settlement Agreement, or any settlement document provided any notice of the $242 million transfer until after the opt-out and objection period, and then only in passing. A.A. Vol. 5 at 983.

The court in *Nunez* was concerned that "[t]he burden should not be on Class Members to sift through the Settlement Agreement to find all material terms, especially the important ones like the extent of their release of liability." *Id*. That principal applies equally here. Absent Class members would have had to engage in a complicated research mission far outside of any settlement document to uncover the truth about the $242 million transfer and the intended effect of the Settlement's Waiver and Release provisions. It is well settled that due process protections prohibit the Settlement from releasing claims for which Class members did not receive adequate notice,

as such a failure robs Class members of their right "to be heard at a meaningful time and in a meaningful manner." *In re Vitamin Cases*, 107 Cal. App. 4th at 829; *see also Molski*, 318 F.3d at 951 (holding notice was deficient because it did not explain in detail which claims were preserved under a consent decree).

In *Molski*, unnamed class members objected to a consent decree arguing, *inter alia*, that the settlement notice did not satisfy the requirements of due process since the notice inaccurately described the claims released under the proposed consent decree. *Id*. at 951–52. Specifically, the "notice misled the putative class members" because it gave class members the false impression that their right to bring personal injury actions would be preserved. *Id*. at 952. However, in reality the settlement released all claims, except those involving physical injury. *Id*. ("[T]he language of the notice was inadequate.").

Like the class members in *Molski*, due to the inadequacy of the Notice here, absent Class members were not informed that they would release the ability to challenge the $242 million transfer. As such financial transfers between LADWP and the City formed the very essence of the litigation and the Settlement, the omission is sufficiently egregious to warrant corrective action by the Court. *See, e.g. Duran*, 1 Cal. App. 5th at 638 (reversing judgment because "[t]he erroneous notice injected a fatal flaw into the entire settlement process and undermines the court's analysis of the settlement's

fairness"); *Trotsky,* 48 Cal. App. 3d at 146 ("[T]he failure to give notice to the trial court and the class concerning the existence of the second class action, and the effect on the proposed settlement upon it, prevented a full and fair consideration of the adequacy of the settlement."); *Molski*, 318 F.3d at 956 (reversing the certification of the class and approval of a settlement agreement); *Nunez*, 2017 WL 3276843, at *3–4 (directing further class notice because the class notice did not adequately inform class members regarding the claims they would be releasing.)

### B. The Notice Is Misleading, Rendering It Inadequate in Violation of Due Process

As a separate basis for this Court finding class notice violated due process, the Notice is materially misleading in the context of the Settlement as a whole as it did not disclose the imminent $242 million transfer while trumpeting a *savings* to ratepayers of $243 million. *See Shaffer v. Cont'l Cas. Co.*, 362 Fed. Appx. 627, 631 (9th Cir. 2010) ("Notice is not adequate if it misleads potential class members."). Though the statement regarding the $243 million savings may be literally true, in the absence of any notice of the $242 million transfer, it tends to mislead Class members as to the true impact of the Settlement. The disingenuous language in the Notice fails to advise Class members that Defendants intended to imminently transfer $242 million for Fiscal Year 2017/2018 prior to final approval of the Settlement. In fact, as noted in the timeline above, unbeknownst to Class members, the

proposed City budget dated April 20, 2017, anticipated a $242 million transfer from LADWP.

The Long Form Notice posted on the settlement website stated that,

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

A.A. Vol. 5 at 1171 (emphasis added); *see Chavez v. PVH Corp.,* 2015 WL 581382, at *6–7 (N.D. Cal.) ("[N]otice is not adequate if it misleads potential class members."). As noted above, the Long Form Notice obliquely stated, with no further explanation, "the City has agreed to not transfer any funds it collects through the 2016 Electric Rate Ordinance *in the future* from the LADWP to the City" and that the "City has also agreed to 'cap' its transfers from the 2008 Electric Rate Ordinance at eight percent (8%)." A.A. Vol. 5 at 1171. The Postcard Notice, internet advertisement, and publication notice only state that there will be *no future transfers* pursuant to the 2016 Electric Rate Ordinance.

> The City and LADWP have also agreed to deduct 8% from the amounts otherwise charged to LADWP retail electricity customers pursuant to its 2016 Electric Rate Ordinance and will no longer transfer any funds LADWP collects through the 2016 Electric Rate Ordinance to the City.

A.A. Vol. 1 at. 165–66, 168.

In *Seagate Technology Holdings*, *Inc.*, the court found the notice to be misleading and therefore inadequate where the class definition in class notice created "confusion over class membership due to an ambiguous . . . notice of settlement." 177 Cal.App. 4th at 745. The Notice here is similarly misleading.

First, the Long Form Notice is misleading in the context of the Settlement as a whole because without any notice of the $242 million transfer, Class members are misled into believing the net benefit of the Settlement is potentially greater than it actually is. In other words, the fact that $242 million in ratepayer money collected under the 2008 Rate Ordinance would be transferred from LADWP to the City is essential information to help inform Class members as to the actual value of the claimed $243 million savings regarding future collections from ratepayers. This is especially true since the lawsuit had sought refunds of all such taxes collected and the Waiver and Release provisions purport to release all Class member claims regarding the 2008 Rate Ordinance. A.A. Vol 2. at 347. Incredibly, the Eck Respondent's Motion for Final Approval of Class Action Settlement repeats the same claim of a $243 million savings that appeared in the Long Form Notice (A.A. Vol 2. at 349), even though by the time the brief was filed with the trial court, LADWP had already submitted the $242 million transfer to the City for approval.

Second, the Long Form Notice is misleading because the average Class member would have no idea (and neither the Notice nor the Settlement itself explains) that revenue collected under the *2008* Rate Ordinance was still available to fund "future" transfers, including the undisclosed $242 million transfer (effective three months after Notice was sent and just one month prior to the Final Fairness Hearing). This is especially true since the promised relief under the Notice and the Settlement provided that Defendants/Respondents would not make any *future* transfers from "any funds derived from the sale of electricity to Retail Customers pursuant to the 2016 Rate Ordinance." A.A. Vol. 5 at 1171; A.A. Vol 1 at 62.

Moreover, the last transfer listed in the Operative Complaint was approved by an ordinance adopted by the City on April 21, 2016 in the amount of $266,957,000. A.A. Vol. 1 at 34. In fact, the chart in the Operative Complaint listing financial transfers between LADWP and the City only lists a single transfer pursuant to a 2008 ordinance—in 2008! *Id.* Merely advising Class members in the Long Form Notice that LADWP and the City would "cap" transfers from the 2008 Rate Ordinance, while also stating that no transfer would be made "in the future" pursuant to the 2016 Rate Ordinance, was misleading by failing to adequately inform Class members of the imminent $242 million transfer.

Based on these misleading statements in the Notice, the Final Judgment approving the Settlement should be vacated. For example, in

*Duran,* objectors asserted claims that the class did not receive sufficient notice of the settlement due to significant discrepancies between the claim form given to class members and the terms of the settlement agreement. In particular, the claim form misrepresented material terms of the settlement agreement in that it (a) misstated the amount of payment to each class member and (b) incorrectly claimed class members would receive payment for a product that was not associated with the underlying lawsuit. *Id*. at 645. The notice in *Duran*, which was deemed defective, mischaracterized the settlement agreement because, depending on a claimant's particular circumstances, the claim form undervalued or overvalued a claimant's potential settlement award. *Duran*, 1 Cal. App. 5th at 637–38. "[T]he adequacy of the class notice of settlement is intertwined with the court's assessment of the reasonableness of the settlement" and "the material inconsistencies" between the notice and the settlement agreement "undermined the [trial] court's analysis of fairness of the settlement." *Id.* at 647.

Similarly, the Notice at issue here was silent as to the $242 million transfer, and in the context of that omission, the statements in the Long Form Notice that LADWP ratepayers would save $243 million and that no future transfers would be made from funds collected pursuant to the 2016 Rate Ordinance are misleading, rendering the Notice defective.

## VII. CONCLUSION

In sum, Respondents made no effort to apprise the Class of the $242 million transfer; they did not do so in the Postcard Notice, Long Form Notice, internet notice, publication notice, or the Settlement Agreement. Nor did they post notice of the transfer on the settlement website, even as the Parties updated the website with the Eck Respondents' motion for attorneys' fees to give Class members an opportunity to consider that information before the deadline to exercise their right to opt-out or object. Omitting material information regarding the $242 million transfer robbed all Class Members of the ability to make a fully informed decision whether to opt-out of or object to the Settlement and was therefore a violation of due process.

It appears that the goal of this omission is to improperly immunize Defendants from legal challenges to the undisclosed $242 million transfer, even though Class members were not given proper notice of the transfer. As noted above, due process protections prohibit a class action settlement from releasing claims for which class members did not receive adequate notice.

For the reasons set forth above, the trial court's order and final judgment approving the class action settlement should be reversed.

Dated: October 12, 2018

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## WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rules 8.204(c)(1), I certify that Objector-Appellant Carmen Balber's Opening Brief contains 6,295 words, not including table of contents, table of authorities, the caption page, the declaration or this Certification page.

Dated: October 12, 2018

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## DECLARATION OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address 6330 San Vicente Blvd., Suite 250, Los Angeles, CA 90048. On October 12, 2018, I served the following documents:

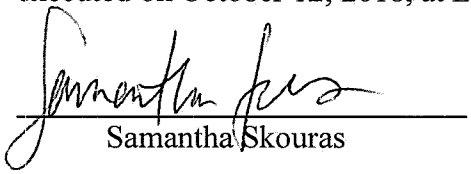
- **OBJECTOR-APPELLANT CARMEN BALBER'S OPENING BRIEF**
- **OBJECTOR-APPELLANT CARMEN BALBER'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT, VOLS. 1 THROUGH 5**
- **OBJECTOR-APPELLANT CARMEN BALBER'S MOTION FOR JUDICIAL NOTICE**

On the interested parties in this action as follows:

X **Electronic Service**: By causing such document(s) to be electronically served through the Court's electronic filing system operated by ImageSoft TrueFiling to each addressee listed below for the above-entitled case. The transmission was complete and confirmed.

X **Mail**: I enclosed the documents in a sealed envelope or package addressed to the person(s) at the address(es) listed and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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 October 12, 2018, at Los Angeles, California.



Samantha Skouras

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