SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LORIN M. ENGQUIST, an individual, and ANGELICA G. DIVINAGRACIA, a sole proprietor, dba FUN FIT FACTORY, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF LOS ANGELES, a public entity, Defendants.	LASC Case No: BC591331 COURT'S FINAL RULING AND ORDER RE: PLAINTIFFS' MOTION FOR CLASS CERTIFICATION Supplemental Papers Filed June 29, 2018, October 19, 2018, November 28, 2018, and May 7, 2019.

I. BACKGROUND[1]

On August 13, 2015, Plaintiffs Lorin M. Engquist and Angelica G. Divinagracia, dba Fun Fit Factory ("FFF"), filed suit against Defendant City of Los Angeles ("City" or "Defendant") alleging a common count for money had and received based on the City's purported unlawful collection of taxes on certain gas utility charges. They seek declaratory relief, permanent injunctive relief, and an accounting.

Plaintiffs contend that the City, by and through Southern California Gas Company ("SoCalGas"), unlawfully assessed and collected the Gas User Tax ("GUT") of Los Angeles Municipal Code ("LAMC") section 21.1.5[2] (the "GUT ordinance") against the entire balance of

[1] The Court incorporates by reference its discussion of the factual background of the case set out in its January 11, 2018, tentative order regarding Plaintiffs' Motion for Class Certification.

[2] LAMC section 21.1.5(a) provides, in relevant part, that: "There is hereby imposed a tax upon every person in the City of Los Angeles using in the City gas which is delivered through mains or pipes. The tax imposed by this section shall be at the rate of 10 percent of the charges made for such gas and shall be paid by the person paying for such gas, provided, however, that as to any non-profit educational institution, as defined in subdivision 3 of Subsection (c) of Section 21.190 of this Code, the tax imposed by this section shall be at the rate of 5 percent of the charges made

putative class member's gas bills, including amounts billed for the "Customer Charge"—a charge to recover costs of gas delivery, including reading meters, preparing bills, and processing payments—and the "Service Establishment Charge"—a one-time charge due for initiation of gas services. See Pls.' Mem. of P. & A. Supp. Class Cert. 2:3-5. Plaintiffs' theory is that only the "commodity cost of gas" (and not the "administrative" Customer and Service Establishment Charges) can be lawfully taxed as "charges made for such gas . . . ." LAMC § 21.1.5(a).

Accordingly, Plaintiffs seek to certify a class of: "All persons, including individuals, non-corporate entities, and corporations, wherever organized and existing, that have paid the City of Los Angeles [GUT] imposed by [the GUT ordinance] on amounts charged by [SoCalGas] for reading meters, preparing bills, processing payments[,] and establishing service." Pls.' Notice of Mot. for Class Cert. 1:8-12. The proposed class period is April 16, 2014 (one year prior to when Plaintiffs submitted their written claim—pursuant to the Government Claims Act—to the City), to the present. *Id.* at 1:12-14; *see* Gov't Code § 945.4; Pls' First Amended Compl. ¶ 17, Ex. A.

On January 11, 2018, this Court heard Plaintiffs' Motion for Class Certification and issued a tentative order finding the proposed representatives' claims to be typical of putative class members that paid a Customer Charge, but atypical of putative class members that paid a Service Establishment Charge. *See* Dkt.; Min. Order, 1-2, Jan. 11, 2018; Byrd Decl. Supp. Pls.' Suppl. Reply Br. ("Byrd Suppl. Decl.") ¶ 2, Ex. A. Upon Plaintiffs' request at the hearing, the Court issued a briefing schedule for Plaintiffs to move for leave to amend their complaint to name an additional plaintiff to represent the class. Min. Order, 1-2, Jan. 11, 2018. The Court continued the hearing on Plaintiffs' Motion for Class Certification to: (1) hear Plaintiffs' interim motion for leave to amend their complaint, which could potentially cure the Court's concerns with typicality; and

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for such gas."

(2) permit Plaintiffs to file a trial plan and demonstrate that the proposed class action is manageable. *Id.*; Byrd Suppl. Decl. ¶ 2, Ex. A, at 7-9.

On July 9, 2018, the Court heard argument on Plaintiffs' Motion for Leave to File a First Amended Complaint seeking to name David Bernstein ("Bernstein") as an additional plaintiff. Min. Order, July 9, 2018. The Court granted Plaintiffs' motion on July 10, 2018, *see* July 10, Min. Order, and Plaintiffs filed their first amended complaint on July 16, 2018. *See* Dkt.; Pls' First Amended Compl. at 1.

The parties subsequently submitted their supplemental briefing on Plaintiffs' instant motion for class certification. *See* Dkt. On April 23, 2019, the Court: heard Plaintiffs' motion; suggested certifying the class as a mandatory non-opt-out class action, whereby class notice could be delayed until after judgment; and invited the parties to submit further briefing on that issue. The parties submitted their second round of supplemental briefing on May 7, 2019, and the Court heard final argument on Plaintiffs' motion on May 13, 2019.

II. DISCUSSION

California Code of Civil Procedure section 382 permits the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." Civ. Proc. Code § 382. To certify a putative class, the moving party must show the superiority of pursuing the representative action on behalf of a sufficiently numerous and ascertainable class with a well-defined community of interest. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012). The community of interest requirement entails showing that: (1) predominant common questions of law or fact exist; (2) the class representatives have claims or defenses typical of absent class members; and (3) the class representatives and their counsel can adequately represent the interests of the class. *Id.*

California courts consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 333 (2004). The burden is on the party seeking class certification to establish each of the class prerequisites through substantial evidence. *Id.* at 327. When determining certification, the Court examines all presented evidence "under the prism of [the] plaintiff's theory of recovery." *Dep't of Fish & Game v. Super. Ct.*, 197 Cal. App. 4th 1323, 1349 (2011).

When weighing the evidence, the Court does not evaluate the merits of the asserted claims. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000). Rather, the primary question on certification is "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Sav-On*, 34 Cal. 4th at 327. Nevertheless, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." *Bartold v. Glendale Fed. Bank*, 81 Cal. App. 4th 816, 829 (2000); *see Brinker*, 53 Cal. 4th at 1023-24 ("In many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct. In such circumstances, it is not an abuse of discretion to postpone resolution of the disputed issue.").

A. Ascertainability, Numerosity, and Preferred Treatment as a Mandatory Non-Opt-Out (b)(1)/(b)(2) Class Action.

A proposed class must be sufficiently ascertainable and numerous to be certified. Civ. Proc. Code § 382; *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704 (1967). First, "[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 914 (2001).

"Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." *Reyes v. San Diego Cnty. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The plaintiff bears the burden of establishing the existence of an ascertainable class. *Sav-on Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004). Second, the identified class must be so numerous as to make joinder of all parties impractical. *Hendershot v. Ready to Roll Transp., Inc.* 228 Cal. App. 4th 1213, 1222 (2014). "No set number is required as a matter of law for the maintenance of a class action." *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981).

First, the Court finds that the proposed class is sufficiently numerous. As the Court noted in its January 11, 2018, tentative order: "Defendant does not challenge numerosity. Defendant itself repeatedly states that SoCalGas has 1.3 million customers (although it contends that not all of these customers paid the Customer Charge and the Service Establishment Charge in the same way)." Byrd Decl. Supp. Pls.' Suppl. Reply Br. ("Byrd Suppl. Decl.") ¶ 2, Ex. A, at 4.

Next, with respect to ascertainability, the Court stands by its previous finding that "the class definition is based on objective criteria (i.e., persons who paid the GUT on charges by SoCalGas for reading meters, preparing bills, processing payments[,] and establishing service)," and that "there is an objective method for identifying class members at the remedial stage. For example, putative class members can present customer invoices showing Customer Charges and/or Service Establishment Charges as line items for which they were charged." Byrd Suppl. Decl. ¶ 2, Ex. A, at 5.

Nevertheless, as the City notes, this remedial identification measure would not ameliorate concerns with the principal objective of ascertainability, as a means of identifying and "giv[ing] notice to putative class members as to whom the judgment in the action will be res judicata." *Hicks*, 89 Cal. App. 4th at 914. The City does not have—nor is it required to retain—records related to

any individual class members that paid the GUT on Customer and Service Establishment Charges. Def.'s Suppl. Br. 9:16-18. Rather, such information must be obtained from non-party SoCalGas—the GUT-collecting and remitting entity. *See* LAMC § 21.1.5(c) ("The tax imposed in this section shall be collected from the service user by the person selling gas"). Plaintiffs have neither seen nor analyzed the GUT customer data stored by SoCalGas, Reply Macartney Decl. ¶ 6, yet they nevertheless "surmise that the data is stored in a common data format well suited to statistical software used by economists," Macartney Decl. ¶ 19.

Defendant counters that—despite Plaintiffs' unsupported certainty—the costs of ascertaining and curating a list of customers that paid the Service Establishment Charge during the class period could be quite costly. Indeed, as the Court noted in its January 11, 2018, tentative order, Defendant submitted the declaration of Bill Carrigan, a Customer Service Technology Project Management Officer with SoCalGas, who is "knowledgeable about SoCalGas' storage and maintenance of customer information, information technology capabilities, and programs." Carrigan Decl. ¶ 2. Carrigan declared that "[i]t would be extremely difficult, burdensome, and expensive—if not impossible—for SoCalGas to compile a list of" each individual customer in Los Angeles that paid the GUT, Customer Charge, and Service Establishment Charge during the class period, because such information is not maintained in a readily accessible format on a central database and it "would [therefore] require an individual review of every single customer's monthly invoices since April 2014." Carrigan Decl. ¶ 4.

As the Court noted then, these assertions are somewhat in tension with "SoCalGas's ability to provide a breakdown, in less than six weeks, of the total GUT collected during the class period for Customer Charges and Service Establishment Charges." Byrd Suppl. Decl. ¶ 2, Ex. A, at 5. However, Defendant persuasively notes that SoCalGas's ability to calculate the aggregate amount of taxes collected on the Customer Charge and Service Establishment Charge over the class period

does not necessarily mean that SoCalGas can easily "delineate just those customers that paid GUT on the challenged Service Establishment Charge for the past three years, and how much." Def.'s Suppl. Br. 11:16-18.

Thus, Defendant "essentially argues the class is unmanageable because of the cited administrative cost in identification . . ." of class members for prejudgment notice purposes. *Reyes*, 196 Cal. App. 3d at 1275. This issue "is intertwined not only with the question of ascertainability, but also the underlying admonishment the Supreme Court has given the trial courts to carefully weigh the respective benefits and burdens of a class action and to permit its maintenance only where substantial benefits will be accrued by both litigants and the courts alike." *Id.* (citing *Blue Chip Stamps v. Super. Ct.*, 18 Cal. 3d 381, 385 (1976)).

Plaintiffs' expert calculated one month's damages for Plaintiff Engquist, a residential customer of SoCalGas, to be $0.48. Macartney Decl. ¶ 11. Assuming this figure represents her average monthly damages, Plaintiff Engquist's presumed total damages (for the proposed sixty month class period ranging from April 2014 to present) are $28.80. Presumably, this rough estimate of damages will be similar for the average residential customer of SoCalGas. *See* Pls.' Reply 14:16-17 ("the amounts at issue here are relatively small for individuals"). Thus, the Court must weigh these marginal benefits against the relative "burdens of a class action . . ." on the City, non-party SoCalGas, and the Court to determine whether "substantial benefits will be accrued by both litigants and the court[] alike." *Reyes*, 196 Cal. App. 3d at 1275.

"[W]here the administrative cost in identification and processing of past general relief recipients' claims is so substantial to render the likely appreciable benefits to the class de minimis in comparison, the class action should not be certified." *Id.* Nevertheless, "a court should not decline to certify a class simply because it is afraid that insurmountable problems may later appear at the remedy stage." *Id.* Thus, even though it is Plaintiffs' burden to demonstrate ascertainability

and manageability, "unless the unmanageability of the class action is essentially without dispute or clearly established, it should not foreclose class certification." *Id.*

Here, although the Court has concerns with the relative marginal monetary benefits of this class action compared to the financial burdens to be potentially borne by non-party SoCalGas, the Court is unconvinced that "the unmanageability of the class action is essentially without dispute or clearly established . . . ." *Id.* Similarly, although the Court is satisfied with available procedures at the remedial stage (such as special master or claim presentment proceedings), its concerns with the relative burdens of class notice (in particular prejudgment class notice) remain—especially since those burdens will be primarily placed on a non-party.

Nevertheless, the Court is convinced that any burden concerns with prejudgment notice and undue expense arising therefrom can be properly alleviated by certifying the class here as a mandatory non-opt-out class action, akin to a Federal Rule of Civil Procedure 23(b)(1)/(b)(2) class action, *see Reyes*, 196 Cal. App. 3d at 1274, since it is well established under California law, that "prejudgment notice is not required in . . . class actions where declaratory and injunctive relief are the primary objectives." *Id.*; *see, e.g.*, *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1603-06 (1991) (approving class certification under Federal Rule of Civil Procedure 23(b)(2) of mandatory non-opt-out class claims arising from alleged title insurance fee abuses); *compare* Cal. R. Ct. 3.766(a) (Before judgement, "the court may require either party to notify the class of the action in the manner specified by the court."), *with* Cal. R. Ct. 3.771(b) ("Notice of the judgment must be given to the class in the manner specified by the court.").

Mandatory non-opt-out treatment of class claims is appropriate: (1) "where 'the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class," *Bell*, 226 Cal.

App. 3d at 1604; *see* Fed. R. Civ. P. 23(b)(1), or (2) "when 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ,'" *Bell*, 226 Cal. App. 3d at 1605; *see* Fed. R. Civ. P. 23(b)(2).

Indeed, it is the preferred practice to certify a class as a mandatory non-opt-out class whenever possible. *See, e.g.*, *Bell*, 226 Cal. App. 3d at 1608 (noting that "'class actions that qualify for class certification under subdivision (b)(1) or (b)(2) should not normally be certified under (b)(3),' even though (b)(3) is such a broad category that it would comprehend all class actions" (quoting 1 Newberg on Class Actions, § 4.20, at 310); *Frazier v. City of Richmond*, 184 Cal. App. 3d 1491, 1501 (1986) ("any doubts as to whether an action should be classified under 23(b)(2) or 23(b)(3) should be resolved in favor of (b)(2) status").

Accordingly, the Court finds that such treatment is appropriate here. First, Plaintiffs' requested relief is entirely equitable in nature—they seek declaratory relief, an injunction, and return of the allegedly wrongfully collected taxes (i.e. restitution). *See Frazier*, 184 Cal. App. 3d at 1501 (holding mandatory non-opt-out (b)(2) treatment proper where case not predominantly for money damages, and monetary relief sought was integrally related to and would directly flow from the injunctive relief). Second, Plaintiffs seek to challenge the City's uniform tax collection practice: a practice generally applicable to the class, which—if challenged in a piecemeal fashion—would create the risk of inconsistent adjudications and prospective tax practices with respect to each individual class member. Moreover, certifying the class as a mandatory non-opt-out class would obviate the need for prejudgment notice, and thereby alleviate any concerns with manageability prior to "the remedial stage." *Reyes*, 196 Cal. App. 3d at 1275.

Moreover, as Plaintiffs note, any burden concerns with regard to either costs placed on

non-party SoCalGas, or the relative costs of delivering class notice by mail[3]—even if that notice is sent post-judgment—can be respectively alleviated by Public Utility Code section 799(a)(3), which requires municipalities to reimburse utilities for costs incurred in issuing ordered tax refunds, and California Rule of Court 3.766(f), which permits notice by publication through newspaper, broadcast, internet, or posting.

Therefore, the Court finds that the class is properly ascertainable and—as discussed more in-depth in Part C below—manageable as a mandatory non-opt-out class action, with appropriate notice by publication or other less costly means to be given after judgment.

B. Community of Interest:

The community of interest requirement entails showing that: (1) predominant common questions of law or fact exist; (2) the class representatives have claims or defenses typical of absent class members; and (3) the class representatives and counsel can adequately represent the interests of the class. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012).

1. Predominance of Common Questions of Law or Fact

"As part of the community of interest requirement, the party seeking certification must show that issues of law or fact common to the class predominate." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 28 (2014) (citing *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981)). The "ultimate question" in predominance analysis is 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." *Collins v. Rocha*, 7 Cal. 3d 232, 238 (1972). That answer hinges on "whether the theory of recovery

[3] *See* Pls.' Second Suppl. Reply Br. 8:16-20 n.6 (noting that SoCalGas has approximately 1.3 million customers in the City of Los Angeles, and that "[j]ust the postage to mail 1.3 million letters would cost approximately $500,000.00, and postage to mail 1.3 million postcards would cost approximately $334,000.00. (citing *Business Price Calculator*, USPS, https://dbcalc.usps.com/ (last visited May 7, 2019)).

advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 327 (2004). Generally, if the defendant's liability can be proved by common facts, then a class will be certified, even if its members must prove their damages individually. *Duran*, 59 Cal. 4th at 28 (citing *Brinker Rest. Corp.*, 53 Cal. 4th at 1021-22). Nevertheless, class certification is inappropriate "if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment'" on common issues. *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 459 (1974); *see Arenas v. El Torito Rest., Inc.*, 183 Cal. App. 4th 723, 732 (2010) ("If the class action 'will splinter into individual trials, common questions do not predominate and litigation of the action in the class format is inappropriate.'").

With regards to commonality, the Court refers to, and hereby incorporates, its January 11, 2018, tentative order as follows:

> Here, Plaintiffs contend that common questions of fact and law predominate regarding Defendant's imposition of the GUT on particular charges. They include:
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> > • Whether Defendant collected GUT for charges to which the GUT ordinance did not apply
> > • Whether Plaintiffs and class members are entitled to recover the illegally collected GUT, and if so, for what charges and for what period of time
> > • Whether Defendant is legally required to refund the illegally collected GUT
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> Defendant, on the other hand, contends that individual questions predominate given that "[e]ach customer is different." Specifically, Defendant argues: "[S]ome may have paid the Service Establishment charge during the class period, while others (like Plaintiffs) have not; some may pay substantial Customer Charges, and others may not. Some may have received the CARE discount, but most have not. Some will have paid the lower 5 percent non-profit GUT rate and others the higher 10 percent rate." Def.'s Opp'n 12:27-13:3.
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> But as Plaintiffs correctly reply, the individual questions identified by Defendant relate to damages (i.e., the amount of refunds), not liability. "[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages." *See Emp't Dev. Dept. v. Super. Ct.*, 30 Cal.

> 3d 256, 266 (1981); *see also Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1022 (2012) ("As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.").
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> The Court finds that common questions of fact and law predominate.

Byrd Decl. Supp. Pls.' Suppl. Reply Br. ("Byrd Suppl. Decl.") ¶ 2, Ex. A, 6-7.

In any event, the Court finds it relevant to note that as a mandatory non-opt-out class action, akin to a Federal Rule 23(b)(1)/(b)(2) class action, Plaintiffs arguably may not need not establish predominance. Rather, a mere showing that there are *at least some* questions of law or fact common to the class could be sufficient. *See Bell*, 226 Cal. App. 3d at 1603 (holding Federal Rule of Civil Procedure 23(b)(1)-(2) class treatment proper and noting that "in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure . . . ."); *compare* Fed. R. Civ. P. 23(a)(2), (b)(1)-(2) (no predominance requirement), *with* Fed. R. Civ. P. 23(b)(3) (certification proper where "the court finds that the questions of law or fact common to class members predominate"); *but see Hefczyc v. Rady Children's Hosp. San Diego*, 17 Cal. App. 5th 518, 533 (2017) (noting that "case law consistently holds that ascertainability, predominance and superiority are always required to certify a class action in California under Code of Civil Procedure section 382"). Regardless, the Court need not decide whether applying the lesser standard is proper, since Plaintiffs have established predominance here.

2. Typicality (And Enmeshed Issues with The Government Claims Act)

Similar to the adequacy of representation requirement discussed below, *see* Part B.3, the typicality requirement exists to ensure that the interests of the named representatives align with the interests of the class. *Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497, 1509 (2008). "Typicality refers to the nature of the claim or defense of the class representative, and not to the

specific facts from which it arose or the relief sought." *Id.* (internal quotation marks and citations omitted). Thus, the crux of the typicality inquiry relies on "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.*

"[A] defendant's raising of unique defenses against a proposed class representative does not automatically render the proposed representative atypical." *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1091 (2007). Thus, whether "a representative is subject to unique defenses is one factor to be considered in deciding the propriety of certification." *Id.* at 1090. "The specific danger a unique defense presents is that the class 'representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class.'" *Id.* (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006)).

With regards to typicality, the Court first refers to, and hereby incorporates, its January 11, 2018, tentative order as follows:

> The typicality test has been met as to the Customer Charge. Plaintiffs, like the class members they seek to represent, were subjected to the same practice (i.e., charging of the GUT on the Customer Charge).
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> The same cannot be said as to the Service Establishment Charge. As Defendant points out (and Plaintiffs admitted in their respective depositions), Plaintiffs did not pay the Service Establishment Charge during the class period commencing April 16, 2014. *See* Graham Decl., Ex. A (Engquist Depo.), 36:7-13, Ex. B (Divinagracia Depo.), 20:1-6. Thus, Plaintiffs cannot represent the class members who paid the Service Establishment Charge.

Byrd Suppl. Decl. ¶ 2, Ex. A, 6-7.

As discussed above, to remedy the typicality issues identified by the Court with respect to the Service Establishment Charge, Plaintiffs subsequently amended their complaint to name Plaintiff Bernstein in this action. Plaintiff Bernstein paid the GUT on a Service Establishment Charge during the class period. Byrd Suppl. Decl. ¶ 4, Ex. C, 18:5-21. Therefore, the Court finds

Plaintiff Bernstein's claims to be typical of class members that seek return of the GUT collected on Service Establishment Charges assessed during the class period.

Defendant raises two arguments in opposition to Plaintiff Bernstein's typicality. First, Defendant argues that Plaintiff Bernstein is an atypical representative of the class because he only lives in his Los Angeles apartment part-time and is therefore less damaged by Defendant's allegedly unlawful practices. Defendant's argument is not well taken. Even if Plaintiff Bernstein's damages are less than other class member's damages, it would not change the fact that Bernstein nevertheless suffered "the same or similar injury . . . based on . . . the same course of conduct." *Johnson*, 166 Cal. App. 4th at 1509.

Second, Defendant argues that Plaintiff Bernstein's failure to be named in the original government claim filed with Defendant in April 2015 dooms his reimbursement claims for the months of April 2014 to January 2017, thereby rendering him an atypical representative for that period—since he would face the unique defense of a failure to exhaust administrative remedies.[4] *Lozada v. City & Cnty. of San Francisco*, 145 Cal. App. 4th 1139, 1156 (2006) (failure to present a claim conforming to the Government Claims Act subjects the plaintiff to an exhaustion defense). Plaintiffs counter that Bernstein can relate his claims back to the filing date of the original April 2015 claim presented by Plaintiffs Engquist and FFF, since that claim adequately identified an ascertainable class seeking to recover taxes collected on the Service Establishment Charge. Pls.' Suppl. Reply Br. 12:6-12; *Cal. Rest. Mgmt. Sys. v. City of San Diego*, 195 Cal. App. 4th 1581, 1597-98 (2011). Defendant responds that Plaintiff Bernstein and the class cannot relate back to that original claim filing date because Plaintiffs Engquist and FFF were subsequently found to be

[4] Plaintiff Bernstein filed a separate government claim with the City in January 2018, and the City concedes that Plaintiff Bernstein could therefore represent a Service Establishment Charge class from January 2017 to present. Def.'s Suppl. Br. 13:27-15:2.

atypical of the Service Establishment Charge subclass. Def.'s Suppl. Br. 16:11-23.

In any event, the potential presence of this unique defense strikes at the heart of the typicality inquiry. It is well-settled that courts may resolve "issues affecting the merits of a case [that] may be enmeshed with class action requirements, such as . . . whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Miller v. Bank of Am., N.A.*, 213 Cal. App. 4th 1, 11 (2013). Thus, the Court finds that "this case is governed by the exception applicable when class certification issues are 'enmeshed' with the merits, rather than by the general rule" that courts should refrain from addressing the merits of a particular claim or defense on a motion for class certification. *See id.*

The Government Claims Act provides that "no suit for money or damages may be brought against a public entity on a cause of action . . ." unless the plaintiff first presents a written claim that is subsequently acted on—or deemed rejected by—such public entity. Gov't Code § 945.4. A claim must contain: (1) the claimant's name and address; (2) the preferred address for receiving claim-related communications; (3) the date, location, and circumstances of the loss or occurrence; (4) a general description of the known injuries, damages, or other losses suffered; (5) if known, the names of any public employees responsible for the loss; and (6) if less than $10,000 is claimed, the amount requested. Gov't Code § 910. "Compliance with the claims statutes is mandatory . . . and failure to file a claim is fatal to the cause of action." *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 454 (1974).

Nevertheless, failure to file a perfect claim is not fatal to a cause of action, so long as the plaintiff "substantially complied" with the claim requirements. *Id.* at 456. When assessing substantial compliance, the Court asks two questions: First, "[i]s there some compliance with *all* of the statutory requirements; and, if so, is this compliance sufficient to constitute *substantial* compliance?" *Id.* at 456-57. In the context of class actions, "to satisfy the claims statutes, the class

claim must provide the name, address, and other specified information concerning the *representative* plaintiff and then sufficient information to identify and make ascertainable the class itself. *Id.* at 457.

Here, Plaintiffs' April 2015 claim filed with Defendant provided that: "SoCalGas . . . collected from [SoCalGas Los Angeles customers], and remitted to the City, GUT charged upon the total amount of their customers' bills, including the Customer Charge and the Service Establishment Charge. However, neither the Customer Charge nor the Service Establishment Charge are . . . taxable under [Los Angeles Municipal Code section 21.1.5]." Pls.' First Amended Compl. ¶ 17, Ex. A. Plaintiffs then specifically demanded, on behalf of themselves "and all other similarly situated taxpayers[,] . . . refunds of all GUT collected on the Customer Charge and the Service Establishment Charge for the past year, along with interest." *Id.*

The Court finds that Plaintiffs' April 2015 claim: (1) adequately identified the proposed class; (2) apprised Defendant of the potential outer limits of its liability; and (3) provided Defendant with "sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." *City of San Jose*, 12 Cal. 3d at 455; *see Dhuyvetter v. City of Fresno*, 110 Cal. App. 3d 659, 663 (1980) ("[T]he city was placed on notice as to the nature of the damages sought . . . ."). Thus, it cannot seriously be disputed that this notice was sufficient to satisfy the claim requirement for the putative class members here with respect to both the Customer Charge and Service Establishment Charge. *Cal. Rest. Mgmt. Sys.*, 195 Cal. App. 4th at 1592 ("[A] claim by the class representative for himself and others similarly situated can be found sufficient to support an action on behalf of the others in the class without the necessity for each individual to file a claim, provided the filed claim is sufficient to satisfy the statutory purposes . . . .").

Aside from having fiduciary obligations to the class, there is no significant difference

between a class representative and class member—at least with respect to their legal rights and obligations. *Cf. Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393-94 (2010) (noting incentive awards are entirely discretionary and solely "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general"). Thus, the Court is unaware of—and Defendant does not provide—any persuasive reason or authority counseling against finding that the April 2015 claim presented by Plaintiffs Engquist and FFF substantially complied with (and therefore satisfied) Plaintiff Bernstein's claim requirements. *See City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 457 (1974) (rejecting "the suggested necessity for filing an individual claim for each member of the purported class" and holding that requiring "such detailed information in advance of the complaint would severely restrict the maintenance of appropriate class actions—contrary to recognized policy favoring them").

Indeed, it would be absurd if Plaintiff Bernstein's willingness to step up and actively assist in prosecuting this action could—in and of itself—destroy his claim for monetary relief. Moreover, a subsequent determination that Plaintiffs Engquist and FFF are atypical in some regards to the putative class—i.e. a procedural determination, *see Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 440 (2000) (noting questions of certification are procedural in nature)—is irrelevant to the inquiry of whether the April 2015 claim gave Defendant "sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." *City of San Jose*, 12 Cal. 3d at 455.

Finally, "in holding that the original claim was sufficient . . . discussion as to whether the claim was filed within the time limits prescribed in Government Code section 911.2 becomes academic. The original claims were timely filed (the tort, if any, being a continuing tort) and the

original complaint thereon was timely filed." *Dhuyvetter v. City of Fresno*, 110 Cal. App. 3d 659, 665 (1980). With respect to relation back on the complaint itself, the Court finds that the claims forwarded by Plaintiff Bernstein arise out of the same operative facts as those forwarded by Plaintiffs in their original complaint. Accordingly, Plaintiff Bernstein's claims relate back to the original filing date of this action as well. *See Pointe San Diego Residential Cmty., L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP*, 195 Cal. App. 4th 265, 276 (2011) ("[A]n amendment relates back to the original complaint if the amendment (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality.").

Therefore, the Court finds that: (1) Plaintiffs Engquist and FFF are typical of the subclass seeking reimbursement of GUT collected on Customer Charges from April 2014 to present; and (2) Plaintiff Bernstein is typical of the subclass seeking reimbursement of GUT collected on Service Establishment Charges from April 2014 to present.

3. Adequacy of Representation

Adequacy of representation must be shown as to both the class representatives and the putative class's counsel. *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462 (1981). Adequacy ordinarily turns on whether there is a conflict as to the litigation itself. *See Capitol People First v. State Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 696-97 (2007). When resolving adequacy questions, the Court evaluates "the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented." *Id.* at 697 (internal quotation marks omitted).

Serious "[c]redibility problems can [also] be an appropriate ground to reject the adequacy of a class representative." *Payton v. CSI Elec. Contractors, Inc.*, 27 Cal. App. 5th 832, 843 (2018).

With respect to class antagonism, only widespread class member opposition that concerns the subject matter of the litigation itself (i.e., not a general dislike of the proposed class representative personally) can successfully challenge a representative's adequacy of representation. *Richmond*, 29 Cal. 3d at 470-72; *compare Fanucchi v. Coberly-West Co.*, 151 Cal. App. 2d 72 (1957) (one-third of putative class members opposing suit insufficient to defeat certification), *and Hebbard v. Colgrove*, 28 Cal. App. 3d 1017 (1972) (several putative members out of a class of fifty insufficient to defeat certification), *with Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1116-17 (7th Cir. 1970) (over 80% class antagonism defeats certification).

With regards to adequacy of representation, the Court refers to, and hereby incorporates its January 11, 2018, tentative order as follows:

> The adequacy requirement has been met. Plaintiffs' counsel is qualified to represent the class, and there is no indication that Plaintiffs' interests are antagonistic to those of the class.

Byrd Suppl. Decl. ¶ 2, Ex. A, at 8.

With respect to Plaintiff Bernstein, the Court finds that he has adequately declared—under oath—that he is aware of his obligations to the class as a representative. Byrd Suppl. Decl. ¶ 2, Ex. C, 48:9-19. His sitting for a deposition only further demonstrates his commitment to adequately represent the class. *Id.* Defendant has presented no evidence indicating otherwise.

Therefore, the Court finds that all three proposed Plaintiffs and Plaintiffs' Counsel are adequate representatives.

C. Superiority, Manageability, and the Proposed Trial Plan

As a preliminary matter, the Court finds it relevant to note that for the proposed class to be certified as a mandatory non-opt-out class action, akin to a (b)(1)/(b)(2) class action, Plaintiffs arguably may not need to establish superiority—and consequently manageability. *See Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1603 (1991) (holding Federal Rule of Civil Procedure

23(b)(1)-(2) class treatment proper and noting that "in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure . . . ."); *compare* Fed. R. Civ. P. 23(b)(1)-(2) (no superiority requirement), *with* Fed. R. Civ. P. 23(b)(3) (certification proper when "a class action is superior"), *and* Fed. R. Civ. P. 23(b)(3)(D) (a class action is "superior" when there are few "difficulties in managing a class action"); *but see Hefczyc v. Rady Children's Hosp. San Diego*, 17 Cal. App. 5th 518, 533 (2017) (noting that "case law consistently holds that ascertainability, predominance and superiority are always required to certify a class action in California under Code of Civil Procedure section 382"). Thus, whether "Plaintiffs fail to meet their burden to show a class action is superior . . ." is arguably irrelevant to the propriety of class certification here. Def.'s Suppl. Br. 19:13.

Nevertheless, the Court finds it incumbent upon itself—at least for practical purposes—to assess the superiority of the proposed action and the manageability of Plaintiffs' trial plan pursuant to this Court's previous tentative order and the directive in *Duran v. U.S. Bank National Ass'n*, 59 Cal. 4th 1 (2014).

Courts are required to carefully weigh the respective benefits and burdens, and to allow maintenance of the class action only where substantial benefits accrue, both to litigants and the courts. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000). Trial courts must pay careful attention to manageability concerns "when deciding whether to certify a class action." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 29 (2014). This is especially true when a plaintiff seeks to rely on statistical and sampling evidence in place of common proof. *Id.* In a court's consideration of whether a class action is a superior device for resolving a controversy, "the manageability of individual issues is just as important as the existence of common questions uniting the proposed class." *Id.* Thus, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination

of liability to the class as a whole. *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 459 (1974).

Pursuant to *Duran*:

> [I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling. Statistical methods cannot entirely substitute for common proof, however. There must be some glue that binds class members together apart from statistical evidence. While sampling may furnish indications of an employer's centralized practices, no court has "deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist." In addition, . . . a statistical plan for managing individual issues must be conducted with sufficient rigor.
>
> If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.

Duran, 59 Cal. 4th at 31-32 (internal citations omitted). Further, a plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show that its liability is reduced. *Id.* at 38. The plan must also allow the defendant to litigate its affirmative defenses. *Id.* at 49.

The Court has read and considered Plaintiffs' trial plan, Defendant's reply thereto, and Plaintiffs' supplemental response. Plaintiffs state that they intend to file a motion for summary judgment, which they believe will resolve the principal legal issue in this case (i.e. whether the Defendant is unlawfully assessing taxes against the Customer Charge and Service Establishment Charge) and permit judgment to be entered in their favor based on the underlying undisputed facts. In the alternative, Plaintiffs propose a unified trial to determine Defendant's liability, class damages, and individual damages. Plaintiffs propose calling: (1) themselves to establish that they

were personally charged the GUT on their Customer Charges and Service Establishment Charge during the class period; (2) SoCalGas manager Bill Carrigan to establish that SoCalGas collected from class members and remitted to Defendant "$1,195,799.35 in GUT charged on the Service Establishment Charge . . . and $17,896,815.68 in GUT charged on the Customer Charge . . . ," Pls.' Trial Plan 4:22-24; and (3) Plaintiffs' expert witness, Dr. Gareth Macartney, who will testify to his methodology for determining individual damages from SoCalGas's databases using statistical and other software. Plaintiffs then note that "after judgment has been entered, the Court can allocate damages among the Class members using individual hearings or a claims procedure." *Id.* at 5:19-21.

Accordingly, the Court finds that: (1) Plaintiffs have presented a manageable trial plan with sufficient particularity to meet the requirements of *Duran*; and (2) that the proposed action here is superior. Defendant's arguments to the contrary are unavailing.

III. CONCLUSION

Plaintiffs Engquist, FFF, and Bernstein's amended motion for class certification is **GRANTED** as a mandatory non-opt-out class action. Having considered all moving, opposing, reply, and supplemental papers, as well as the oral argument of counsel, the Court finds:

(1) It is impracticable to bring all members of the class before the Court;

(2) The class is ascertainable and is sufficiently numerous to warrant class treatment;

(3) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;

(4) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class;

(5) The representative plaintiffs and their counsel will fairly and adequately protect the interests of the class; and,

(6) A class action is the superior means for adjudicating the claims in the litigation.

Therefore, it is **ORDERED** that:

(1) A class action is proper as to all causes of action of the Complaint herein.

(2) The Court certifies a mandatory non-opt-out class, akin to a (b)(1)/(b)(2) class action, defined as: All persons, including individuals, non-corporate entities, and corporations, wherever organized and existing, that have paid the City of Los Angeles Gas Users Tax imposed by section 21.1.5 of the Los Angeles Municipal Code on amounts charged by Southern California Gas Company for reading meters, preparing bills, processing payments, and establishing service (the "Class").

(3) Wolf Haldenstein Adler Freeman & Herz LLP and Tostrud Law Group, P.C. are appointed Class Counsel.

(4) Plaintiffs are appointed Class representatives.

(5) The Class is further divided into two subclasses: (i) a Customer Charge subclass represented by Plaintiffs Engquist and FFF, with a class period of April 2014 to present; and (ii) a Service Establishment Charge subclass represented by Plaintiff Bernstein, with a class period of April 2014 to present.

(6) The Court defers issuance of notice to the Class until after judgment to allay Defendant's concerns with the accompanying costs of notice and potential burdens placed on non-party SoCalGas. The manner and method of such notice shall be determined by the Court at a later, appropriate date.

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(7) Plaintiffs' Request for Judicial Notice is **GRANTED** as to Exhibit E appended to the Declaration of Rachele R. Rickert in Support of Plaintiffs' Motion for Class Certification. Plaintiffs' other Requests for Judicial Notice are **DENIED** as irrelevant.

Dated: May __, 2019

Daniel J. Buckley
Judge of the Superior Court