No. B289717

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

PATRICK ECK,
Plaintiff and Respondent,

v.

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

CARMEN BALBER,
Objector and Appellant.

OBJECTOR-APPELLANT CARMEN BALBER'S REPLY BRIEF IN SUPPORT OF APPEAL

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, represent 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 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION AND SUMMARY OF ARGUMENT

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

None of the arguments raised in Respondents' Brief ("RB") change the conclusion that the trial court's decision to give Final Approval to the Settlement[1] was in error. Moreover, there is no evidence in the record that the trial court was even aware of the $242 million transfer until the Final Fairness Hearing.[2]

First, Respondents argue that the Notice provided to Class Members contained sufficient information to satisfy due process rights such that, despite the information being omitted from the Notice, Class members "could have easily learned" about the omitted information. (RB at p. 27.) As explained below, class members should not have to engage in a complicated research mission to uncover material facts necessary to evaluate whether to

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[1] Defined terms have the same meaning as those used in the Opening Brief.
[2] The only mention of the $242 million transfer by the settling parties was three weeks after the opt-out and objection deadline buried on the final page of the Declaration of Ben Truong. A.A. Vol. 5 at 983.

accept a settlement, opt out, or object. Respondents' attempt to shirk responsibility for providing a sufficient Notice should not be countenanced.

Next, Respondents then repeat arguments made in their Motion to Dismiss this appeal regarding the California Supreme Court's decision in an unrelated case, *Citizens for REU Rates v. City of Redding* (2018) 6 Cal.5th 1. Respondents argue that they need not have disclosed the $242 million transfer in the Notice even though the Settlement Agreement purports to release any claims absent Class members may have regarding it because, *after Notice was provided* to Class members, the *City of Redding* decision was published. According to Respondents, Class members did not have a "reasonable" interest in being provided notice of the $242 million transfer—a financial transfer that goes to the heart of the underlying litigation and the precise type of activity the Settlement purported to terminate—on the grounds that *City of Redding* forever inoculates from any legal challenge on any legal theory all financial transfers between the LADWP and the City of Los Angeles. This is not what the Supreme Court held. And, it is not proper for Respondents to attack basic due process rights based on their wholly self-serving position that the $242 million transfer cannot be challenged.

In effect, Respondents are improperly asking this Court to issue an advisory opinion regarding whether any future legal challenge to the $242 million transfer could be successful. (*See Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 ["judicial

decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy."] [citing *Pacific Legal Foundation v. California Costal Com.* (1982) 33 Cal.3d 158, 170].) In other words, it would be improper for this Court to address whether an absent Class member *could* challenge the $242 million transfer under any legal theory.

Moreover, as discussed in Appellant's Opposition to the Motion to Dismiss, the potential success of any future claim a Class member might bring is entirely irrelevant to adjudication of the question presented to this Court in this appeal—whether the Notice provided by Respondents to Class members satisfied *due process* requirements. Notice of the $242 million transfer was material to Class members' right to opt-out or object to the terms of the Settlement, which requires a Class member to remain part of the Class and forgo pursuing their own legal challenges.

Finally, Respondents futilely attempt to explain that the language of the Notice was not in fact misleading by extolling the "benefits" of the Settlement while concealing its shortcomings. The deficiency of the Notice cannot be explained away.

Balber's appeal does not challenge whether the trial court appropriately approved the Settlement as a "fair and reasonable" compromise that would require an analysis of the substantive terms of the Settlement and the risks of continuing to litigate the matter. (Objector-Appellants'

Opposition to Respondents' Motion to Dismiss Appeal ("Opposition to Motion to Dismiss"), pp. 22–23.) Yet, Respondents defend the deficient Notice by implying that this Court should refrain from reversing the trial court's final approval of the Settlement because doing so would harm the Class. However, Appellant has narrowly requested that the case be remanded for purposes of addressing the deficient Notice provided to the Class. Appellant's goal in this appeal is not to deprive the Class of any benefit; it is to protect the integrity of the class action process and protect Class members' due process rights.

Moreover, the Settlement in fact does little except to codify the status quo. As discussed throughout Appellant's briefing, though the underlying litigation sought to stop the LADWP's practice of transferring funds to the City of Los Angeles, the Settlement permits these transfers to continue. Another component of the Settlement—a $52 million fund—will be provided to Class members in the form of a "credit" on their electric bills, *after* deductions for administrative fees, costs, and $15 million in attorneys' fees. (Appellant's Appendix ("A.A.") Vol. 5. at 1063, 1171; *see also infra*, n. 4.)

In short, Respondents have failed to rebut Appellant's clear showing that the Notice was deficient, and this Court should therefore reverse the approval of the Settlement.

II. STANDARD OF REVIEW

While Balber has already explained in Appellant's Opening Brief ("Opening Brief") why this appeal is subject to *de novo* review, Respondents' Brief evinces a clear misunderstanding of what constitutes a "factual" determination. Respondents claim that "[Balber] disagrees with the trial court's *factual* determination that the information contained in the Notice sufficiently apprised the Class of the material terms in the Settlement." (RB at p. 23.) Respondents' own framing of the issue defeats their argument. Whether the information contained in the Notice "sufficiently apprised the Class of the material terms in the Settlement" is plainly a question of law, as it requires this Court to determine whether the information contained in the Notice comports with due process requirements. As noted in Balber's Opening Brief, 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*. (2009) 177 Cal.App.4th 734, 745.)

Indeed, other than failing to adequately distinguish the cases Balber cites on this point in her Opening Brief, Respondents cite to only one additional case, *Duran v. Obesity Research Inst., LLC* (2016) 1 Cal.App.5th

635, 647, describing the court there as "applying abuse of discretion standard to review of ruling concerning contents of class notice, because 'the adequacy of class notice of settlement [was] intertwined with the court's assessment of the reasonableness of the settlement.']." (RB at p. 23.) Respondents have misread this case entirely. First, the *Duran* court never discussed a standard of review. Second, and critically, the approval of the settlement in that case was reversed.

III. STATEMENT OF THE CASE

In the interest of efficiency, Appellant respectfully refers the Court to the Statement of the Case presented in the Appellant's Opening Brief and the Opposition to Motion to Dismiss the appeal.

IV. ARGUMENT

Respondents' Brief is a rehash of arguments previously addressed to this Court. In the interest of efficiency, we summarize our responses here and refer the Court to the pertinent briefing on each matter.

A. DUE PROCESS REQUIREMENTS

The trial court was required to protect the due process rights of absent Class members by assuring that adequate class notice was provided. (*See Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 289 [trial court acts as "a fiduciary guarding the rights of absent class members"] [internal quotation marks omitted] [citing *Laffitte v. Robert Half Internat., Inc*. (2016) 1 Cal.5th 480, 510].) The trial court erred as a matter of law by

approving the Settlement even though the Notice failed to disclose material information to Class members concerning the $242 million transfer from the LADWP to the City.

Respondents' discussion of due process requirements reveals the extent of their misunderstanding of the issues at stake. (RB at pp. 23–24.) For example, Respondents rely on cases such as *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811–812, for their assertions that they were only required to provide "minimal" due process protections for the Class members they sought to represent in the underlying case. *Phillips*, however, and the proposition it is cited for, are completely inapposite here. The language quoted by Respondents addresses the issue of personal jurisdiction over an absent class plaintiff in federal court, not California class notice requirements with regard to a class action settlement. (RB at pp. 23–24.)[3] The only other case Respondents cite on this point provides the same general due process principles noted by Appellant. (*See Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883) [notice "must fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members"] [internal quotation marks omitted].)

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[3] In fact, while the *Phillips* court noted that the class notice in that case did satisfy federal due process requirements, the court pointed out that the notice was, unlike the notice at issue here, "fully descriptive." (*Phillips, supra,* 472 U.S. at 812.)

Respondents cite to zero authority addressing the fact that they omitted information from the Notice that was paramount to the central issue of the litigation itself.

As discussed in Appellant's Opening Brief (pp. 19–21), due process requires that notice to the class must "communicate[] the essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way." (*Rodriguez v. West Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 963.) To satisfy this requirement, the notice must be structured to enable class members to rationally "decide whether to intervene or object, 'opt out,' or accept the settlement." (*Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n* (1975) 48 Cal.App.3d 134, 152 [internal citation omitted], *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 287; 3 William B. Rubenstein, Newberg on Class Actions § 8.17 (2018) ["To safeguard class members' opportunity to object, notice must be sufficiently clear and informative to make those opportunities meaningful."]; 1 Class Action Playbook § 8.04 ["Courts look down upon descriptions that do not adequately describe the effect of the settlement on the absent class members"].)

> 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.*

(*Nunez v. BAE Sys. San Diego Ship Repair, Inc*., No.: 16-CV-2162 JLS (NLS), 2017 WL 3276843, at *3 (S.D. Cal.) [emphasis added].)

Here, the Notice was plainly inadequate to satisfy basic due process requirements as 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 such transfers were at the heart of the underlying litigation *and the Settlement Agreement's Waiver and Release provisions release any claims absent Class members may have regarding it*. (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 Agreement's release of claims. (*See Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, 952 ["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.* (9th Cir. 2010) 603 F.3d 571.)

In sum, Notice simply did not provide the class with sufficient information to satisfy due process requirements under California law. (*See* Opening Brief at pp. 19–21.) In no way did the notice to Class members "communicate[] the essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way," (*Rodriguez, supra,* 563 F.3d at 963), and Respondents' citations to general due process principles do nothing to justify the Notice's deficiencies.

B. RESPONDENTS FAIL TO JUSTIFY THE COURT'S ERROR IN DEPRIVING CLASS MEMBERS OF DUE PROCESS RIGHTS

1. The Notice Was Not "Full and Fair"

In arguing that the Notice sets out "verbatim" the claims release provisions contained in the Settlement, Respondents spend much of their brief discussing what was contained in the Notice, and very little analysis of what *wasn't.* Nowhere do these documents disclose the $242 million transfer.

Respondents argue that though they 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 any and all claims they might have against LADWP and the City arising up until the time of the Final Fairness Hearing. (A.A. Vol. 1 at 75.) What Class members were not told is that *after* notice was distributed to the Class on October 12, 2017 (A.A. Vol. 2 at 274–75), and *before* the Final Fairness Hearing on February 14, 2018, the LADWP would transfer $242 million to the City of Los Angeles even though that transfer had been planned for almost a year and the City Attorney's Office, counsel for Defendants-Respondents the LADWP and City of Los Angeles, had approved it multiple times. (A.A. Vol. 5 at 1093, 1097.)

Indeed, the crux of Appellant's appeal is not that the Notice did not include the terms of the Release and Waiver provisions; it is that Respondents failed to include information that would have plainly been material to Class members in order to understand the import of the Release and Waiver provisions and make an informed decision about whether to accept the settlement, object, or opt out.

Respondents' single conclusory statement that the "Notice is more than sufficient," (RB at p. 26), does not change this conclusion.[4]

2. Class Members Could Not Have "Easily Learned" About the $242 Million Transfer

As any practicing class action litigator knows, providing notice to absent class members of an impending settlement is one of the most critical responsibilities of the settling parties. (*See* 1 Federal Class Action Deskbook § 6.02 ["The requirement for notice of a proposed settlement should not be taken lightly."].) "The 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." (*Nunez, supra,* 2017 WL

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[4] Respondents attempt to bolster their claims that the notice was acceptable by stating that the notice was drafted "in consultation with the class notice experts at Kurtzman Carson Consultants ('KCC') a professional and experienced notice administrator." (RB at p. 16.) Respondents' use of a settlement administrator has absolutely no bearing on their responsibility to provide due process protections to class members.

3276843, at *3. Here, no settlement document contained mention of the $242 million transfer. 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 hidden effect of the Settlement's Waiver and Release provisions.

Despite this, Respondents argue that it was the responsibility of *absent Class members* to investigate whether the Notice they received was in fact forthcoming about essential information necessary to make an informed decision about whether to opt out or object. Respondents assert that Class members could have "easily" pored over a "lengthy and public process over a period of months at noticed public hearings" in order to determine that the $242 million transfer would take place during the period after Notice was provided and before the date of the Final Fairness Hearing. (RB at p. 28.) Respondents fail to address, however, the fact that it would have been categorically easier for Respondents to simply include mention of the $242 million transfer in the Notice. This is especially critical given that it was the only such financial transfer from the LADWP to the City of Los Angeles taking place in the period after Notice was provided and before final approval of the Settlement, during which time Class members weighed their options of whether to accept the Settlement, opt out, or object.

Further, it is clear that neglecting to mention the $242 million transfer in the Notice was a strategic decision. Plaintiffs-Respondents, and

Defendants-Respondents 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. Respondents' Notice therefore plainly obfuscated the one event yet to occur shortly before the Final Fairness Hearing that they knew had the potential to draw objections or opt-outs from Class members.

3. The Notice Did Not "Plainly Anticipate Future Transfers"

Respondents next argue that they should be excused from failing to include notice of the $242 million transfer because a "reasonable Class Member would have understood that the City would continue to make transfers of revenue from rates imposed by the 2008 Rate Ordinance," which apparently includes the $242 million transfer.[5] (RB at p. 30.)

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[5] According to the Long Form Notice, the City of Los Angeles has "agreed to 'cap' its transfers from the 2008 Electric Rate Ordinance at eight percent (8%)." (A.A. Vol. 5 at 1171.) However, this claimed "injunctive relief" (A.A. Vol. 1 at 62) will have little if any impact on current practices and was apparently specifically designed to allow the City of Los Angeles and LADWP to continue to make quarter-of-a-billion dollar transfers each year. (A.A. Vol. 3 at 380–383.)

As explained on page 28 of Appellant's Opening Brief, no reasonable Class member would have concluded based on the Notice that financial transfers would continue unabated. The Long Form Notice posted on the settlement website 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 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 without limitation, including the undisclosed $242 million transfer (effective three months after Notice was sent and just one month prior to the Final Fairness Hearing).

The fact is that 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.) Merely advising Class members in the Long Form Notice that LADWP and the City would "cap" transfers from the 2008 Rate Ordinance, and stating that no transfer would be made "in the future" pursuant to the 2016 Rate Ordinance while omitting mention of the imminent $242 million transfer, was plainly

inadequate, particularly given that the Waiver and Release provisions would bar a Class member from challenging the transfer. It is well settled that due process protections prohibit the Settlement from releasing claims that Class members did not receive notice of, 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* (2003) 107 Cal.App.4th 820, 829.)

Moreover, the Postcard Notice, internet advertisement, and publication notice only stated that there would be *no future transfers* without qualification:

> 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, emphasis added.) Therefore, the Postcard Notice, which was mailed directly to Class members and was therefore most likely to actually be seen by the Class, also failed to provide any notice of the $242 million transfer and likely led Class members to believe that Respondents had successfully achieved cessation of the practice entirely.

4. The *City of Redding* Case Has No Bearing on What Information Is "Material" to Class Members

Contrary to Respondents' assertions, the $242 million transfer was unequivocally material to Class members. (Opening Brief at section VI.A.)

As an initial matter, Respondents have attempted to frame the situation as though when crafting the Settlement Notice, Respondents did so with the California Supreme Court's holding in *City of Redding* in mind. Respondents fail to note, however, that the *City of Redding* decision was handed down in August of 2018, almost an entire year after the Notice was sent to Class Members.

Under Respondents' wholly self-serving position that the later in time *City of Redding* decision forecloses *any and all* claims regarding the $242 million transfer, Respondents argue it was immaterial to omit that information from the Notice. However, as explained in Appellant's Opposition to Motion to Dismiss, *City of Redding* did not foreclose *any and all* potential legal claims against the $242 million transfer. (Opposition to Motion to Dismiss at p. 26.) That case, involving the city of Redding, clearly did not discuss or decide the legality under Article XIII C or any other legal theory of the extraction of money from LADWP ratepayers to fund transfers to the City of Los Angeles. Respondents' *nunc pro tunc* attempt to overread *City of Redding* for the self-serving purpose of responding to Appellants' due process concerns should not be tolerated by this Court.

Moreover, for two reasons, discussed more fully in Appellant's Opposition to Motion to Dismiss, the holding in *City of Redding* is irrelevant for purposes of Appellant's appeal.[6]

First, it is not for Respondents or this Court to gauge the relative strength or anticipated defenses against any potential claim a Class member may bring to challenge the $242 million transfer. (Opposition to Motion to Dismiss at p. 26.) Indeed, while Appellant does not concede this to be the case here, the California Supreme Court itself has even held as recently as 2017 that a plaintiff has "the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 778.) The viability of any such claim should not be adjudicated in this appeal, which solely addresses the due process deficiencies of the Notice. Moreover, deciding the viability of a hypothetical legal challenge of a case or cases not before this Court would constitute an

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[6] Respondents insist that there is some significance to be read into Appellant's not discussing *City of Redding* in her Opening Brief, repeating the same points raised in their Motion to Dismiss Appeal. It is unclear from Respondents' brief just what they contend regarding Appellant's "conspicuous" decision not to discuss *City of Redding*. For example, Respondents' claim that "she made it clear that her objection was based on an Article III C (Proposition 26) claim," citing to Appellant's initial objection wherein she discussed *City of Redding* as considering issues that "overlap issues addressed by the Settlement." (RB at p. 33.) Assuming Respondents meant "Article XIII C," it is unclear what, if anything, such a conclusion means. The language in Appellant's initial objection cited by Respondents on this point does not even remotely stand for what they declare. Appellant's appeal is solely based on a deficient class notice.

improper advisory opinion. (*See People v. Slayton* (2001) 26 Cal.4th 1076, 1083–84 ["As a general rule, we do not issue advisory opinions indicating what the law would be upon a hypothetical state of facts."] [internal citation omitted]; *see also People v. Chadd* (1981) 28 Cal.3d 739, 746 ["We will not…adjudicate hypothetical claims or render purely advisory opinions."].)

Second, contrary to Respondents' blatant misrepresentations of the Settlement's Release and Waiver provisions in its Motion to Dismiss Appeal, the Settlement required class members to release *any* claim over the undisclosed $242 million transfer, not just Article XIII C claims that were the subject of the *City of Redding* case:

> any and all claims…related, arising from, connected with, and/or in any way involving the Litigation, that are or could have been, defined, alleged or described in the Litigation, *including, but not limited to*…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.

(Opposition to Motion to Dismiss Appeal at p. 26.) In other words, it is the Settlement Agreement, not *City of Redding* as Respondents contend, that bars Class members from challenging the undisclosed $242 million transfer. If absent Class members had been made aware of the $242 million transfer, they may have wished to opt out of the Settlement to bring a claim challenging it, or remain subject to the Settlement and object. It was their right to do so, either under an Article XIII C challenge (by no means barred by *City of Redding* addressing a different factual scheme of another

municipality) or under any other theory. That right was wrongly extinguished, however, by the deficient Notice, resulting a in a violation of due process.

As discussed, due process requires that class members be given enough information to intelligently decide whether to opt out of, accept, or *object to* a settlement. (*See Trotsky, supra,* 48 Cal.App.3d at 152.) By failing to properly inform class members about the $242 million transfer, Class members were unable to make an informed decision about whether to object to the settlement. It is not difficult to conceive, for example, of Class members who, upon learning that mere weeks after the lawsuit had apparently been "resolved," the LADWP was planning yet another transfer of money to the City of Los Angeles, would object to the Settlement in order to raise such concerns with the trial court. The deficient Notice deprived these Class members of that right, and the approval of the Settlement must be reversed.

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.

Cho, *supra,* 177 Cal.App.4th at 747 (internal citations omitted).

5. Respondents Cannot Say That "Any Indirect Challenge" Has Been Foreclosed

Respondents next make the grand assertion that "[a]s confirmed by *Redding,* the only avenue one has to stop a local government's general fund transfer from electricity surcharges under Article XIII C is by challenging the electric *rates* that fund such transfers in the first place." (RB at p. 34.) As discussed above as well as in Appellant's Opposition to Motion to Dismiss (pp. 21–26), *City of Redding* said no such thing, despite Respondents' continued attempts to overread that case in order to attack Balber's due process concerns.

Paradoxically, Respondents appear to contend that even if the Notice is deemed constitutionally deficient, Class members are still subject to the Settlement's Release and Waiver provisions on the grounds that "Balber does not contend that this release or the notice of such release was deficient or improper in any respect." (RB at p. 34.) It is unclear how Respondents can take such a position despite the fact that the crux of Appellant's appeal is indeed the deficiency of the Notice. If this Court agrees the Notice is

insufficient, Ms. Balber has requested this Court to 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. (Opening Brief, p. 19.)

Respondents also contend that any challenge to *electricity rates* under the 2008 Rate Ordinance is time-barred, consistent with the trial court's ruling on the City of Los Angeles's Motion for Judgment on the Pleadings and *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244. (RB at p. 34.) This argument is unavailing. While it is true that Plaintiffs-Respondents lost the statute of limitations issue prior to settlement and chose not to appeal that issue, that does not mean that a challenge to the December 2017 $242 million transfer in a future case under a different legal theory would be ruled to be subject to the same statute of limitations. It is simply not for Respondents or this Court to decide the application of *City of Redding* or *Webb* to any potential legal claims absent Class members have regarding the $242 million transfer.

Respondents' contention that "there is no constitutionally protected liberty or property interest in a 'claim' that is barred to begin with," (RB at p. 35), is entirely inapposite. First, the authority provided for such a contention, *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1030, does not even remotely stand for such a proposition. *Galland* provides only general background principles regarding what constitutes a procedural due process

claim; it does not discuss "constitutionally protected liberty or property interest[s]" in "claims" as Respondents contend, and has no relevance to Respondents' specific arguments regarding due process violations in the context of deficient class notice. This is abundantly clear from the fact that Respondents quote only to general language from the case reciting the elements of a due process claim. (RB at p. 35.). But for the deficient Notice and subsequent Release and Waiver provisions of the Settlement, Class members would still have had the right to bring claims challenging the $242 million transfer. Class members were deprived of all of these rights due to the deficient Notice, as well as the opportunity to decide to object or opt out of the Settlement after being fully informed of the circumstances.

6. The $242 Million Transfer Is Significant Because It Is the Only Such Transfer That Came After the Notice and Before Final Approval

That Respondents feigned failure to grasp the significance of the $242 million transfer is perhaps unsurprising considering the cavalier attitude they have taken toward the rights of absent Class members. Respondents note that "had the Notice identified the December 2017 Transfer, but none of the others, it would have elevated its importance without any good reason." (RB at p. 36.) Respondents have chosen to completely ignore the fact that the $242 million transfer is in fact unique in that *it is the only transfer that occurred after Notice was provided and before final approval.* This is a critical fact, because that particular window of time is central to Appellant's

contentions that the Notice was strategically misleading as that was the precise time Class members were weighing whether to opt out or object to the Settlement. Respondents' failure to understand this does not absolve them from responsibility for disseminating a deficient class Notice. Moreover, the failure to mention the $242 million transfer is particularly deafening considering that the Release and Waiver provisions *were carefully tailored to sweep in all claims arising up until the time of the Final Fairness Hearing*. (A.A. Vol. 1 at 75–76.)

7. All of Appellant's Cited Authorities Support Reversing Approval of the Settlement

In a last-ditch effort to cast doubt on Appellant's position, Respondents attempt to distinguish some of the authorities relied upon by Appellant. Despite attempts to distance this case from the facts of those cases, Respondents fail to do so, and in the case of *Trotsky*, Respondents' own framing of the case actually supports Appellant's position.

In *Trotsky, supra,* 48 Cal.App.3d at 152, disapproved of on other grounds in *Hernandez,* 4 Cal.5th at 267, the Court of Appeal found a class notice deficient because it omitted information relating to a separate pending class action that implicated similar issues. As Respondents point out, the *Trotsky* court reversed final approval of the class action settlement because had the information about the separate action been included, "class members

would have had a powerful incentive to investigate to determine whether the Trotskys or appellant better represented their interests." (*Id.* at 152.)

Contrary to Respondents' allegations, the scenario in *Trotsky* is in fact remarkably similar to that presented here. Had class members been informed that a $242 million transfer—to be clear, *the exact type of transfer that the underlying lawsuit alleged was unlawful*—would be taking place just weeks after Notice was provided, Class members would most certainly have had "a powerful incentive" to investigate to determine whether the Respondents had adequately represented their interests in the case, and as a result whether they should opt out, object, or accept the settlement. This is especially true considering that in reality the Settlement did not succeed in stopping the annual financial transfers whatsoever; Class members had a right to know that the Settlement they were being asked to accept, and release claims under, contemplated ongoing financial transfers of funds that Respondents alleged are unlawful.

The remainder of Respondents' attempts to distinguish Appellant's authorities are facially unavailing. Indeed, the glaring problems with the Notice at issue here sit squarely in the same category as the clear deficiencies recognized by the courts in those cases. (*See Cho, supra,* 177 Cal.App.4th at 747 [ambiguous class definition]; *Nunez, supra,* 2017 WL 3276843, at *1, 2 [mismatched release period dates]; *Molski, supra,* 318 F.3d 938 at 952 [overruled on other grounds by *Dukes v. Wal-Mart Stores, Inc.* (9th Cir.

2010) 604 F.3d 571] [release provisions broader than indicated by class notice]; *Duran, supra,* 1 Cal.5th at 644 [claim form provided for a "full refund" while settlement agreement provided for "a single refund of double the purchase price"].) Respondents attempt to "distinguish" the facts of each case without reference to the underlying rationale of the courts' decisions—a clear indication that these authorities do in fact control here.[7]

8. The Notice Was Plainly Misleading in Its Claims of Massive Savings to Taxpayers

Finally, Respondents attempt to explain away yet another misleading aspect of the Notice—that it permitted (and indeed, contemplated as the release period was specifically tailored to sweep in any claims that could arise up until the time of the Final Fairness Hearing)—the imminent transfer of $242 million from LADWP to the City, while at the same time touting a "savings" to ratepayers of $243 million. This argument is fully addressed in

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[7] Respondents also claim that Balber waited until the morning of the Final Fairness Hearing to file her ex parte application to intervene. This is untrue. As noted on page 10 of the Opening Brief, shortly after the *Hernandez* decision, Balber brought an ex parte application to intervene. (A.A. Vol. 5 at 984–1021.) Due to the time to prepare the filing of the application, supporting brief, and complaint in intervention, and limitations imposed by the trial court on when ex parte motions could be heard, Balber's application to intervene was scheduled by the trial court to be heard on the same day as the Final Fairness Hearing on February 14, 2018. Moreover, the timing of the ex parte hearing is irrelevant. Appellant Balber sought intervention in the wake of *Hernandez* for the sole purpose of having standing to appeal in the event the trial court overruled Balber's objection regarding the deficiencies of the Notice.

Appellant's Opening Brief at p. 29; nothing in the Respondents' Brief changes the conclusion that the Notice was plainly misleading.

As discussed on pages 27–30 of Appellant's Opening Brief, *as a separate basis* for this Court finding the 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.* (9th Cir. 2010) 362 Fed. Appx. 627, 631 ["Notice is not adequate if it misleads potential class members."].)

Respondents claim that there is no "direct link between the amount Class Members will save from the eradication of the 8% surcharge embedded in the 2016 Rate Ordinance on the one hand, and the December 2017 transfer…on the other hand, as if the City is taking money out of the pocket of ratepayers and putting back in another." (RB at p. 41.)

Respondents have no explanation, however, as to why they opted to include information about such "savings" in the Notice, while neglecting to include information about what is effectively a *loss* to ratepayers of $242 million, just weeks after the Notice was sent out.

Respondents cannot have it both ways. Either both pieces of information were material, and thus should have been included in the Notice, or both pieces were immaterial, and the former was strategically included in the Notice in order to puff up the positive aspects of the settlement while

obfuscating the negative.[8] Respondents should not be permitted to profit from their obfuscation.

V. CONCLUSION

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

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. (Appellant's Opening Brief, at 19; *see Cho, supra,* 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, supra,* 1 Cal.App.5th at 638 ["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."].)

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[8] In an effort to further puff up the positive aspects of the Settlement, Respondents claim that "but for the Settlement, the December 2017 Transfer would have been $46.2 million higher." (RB at p. 41 [citing A.A. Vol. 3 at 645].) However, on April 20, 2017, long before the settlement was finalized, the City of Los Angeles' proposed budget anticipated a transfer of $242,500,000 for the 2017–2018 fiscal year. (Appellants' Request for Judicial Notice, Ex. A.)

In the alternative, this Court could remand the action to the trial court with direction that corrective notice be provided to include a disclosure of the $242 million transfer with a renewed opt-out and objection opportunity. (Appellant's Opening Brief at 19.) However, Balber is concerned about the practicality of such an approach. The previously-provided Notice has "poisoned the well" and it is unclear to Balber how corrective notice could be constructed in such a way as to ensure Class members review it instead of dismissing it as merely duplicative of the previously provided Notice.

Respectfully submitted,

Dated: March 25, 2019

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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rules 8.204(c)(1), I certify that Appellant Carmen Balber's Reply Brief contains 6,817 words, not including table of contents, table of authorities, the caption page, or this Certification page.

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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 March 25, 2019, I served the following documents:

OBJECTOR-APPELLANT CARMEN BALBER'S REPLY BRIEF IN SUPPORT OF APPEAL

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's 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 March 25, 2019, at Los Angeles, California.

Kaitlyn Gentile

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