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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

TERRY HOUSER, TERRY ODEGARD,  
THOMAS ZURBUCHEN, ROGER WEBB, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

-v-

CITY OF BILLINGS,

Defendant.

Cause No. DV 18-0778

Judge Michael Salvagni

**JOINT MOTION FOR  
PRELIMINARY APPROVAL OF  
SETTLEMENT AGREEMENT**

Defendant City of Billings and Plaintiffs, through their counsel, move this Court under Mont. R. Civ. P. 23(e) for preliminary approval of the settlement agreement reached between the parties. The Settlement Agreement is attached as Exhibit 1. The Settlement Agreement proposes a resolution to both this litigation and the *McDaniel* case via a proposed consolidation of the plaintiff classes. Filed contemporaneously with this Motion is a separate Motion to Amend Class Definitions to effectively consolidate the *McDaniel* and the *Houser* cases. The parties provide the following in support of this Motion.

**A. The Settlement Process.**

The Parties anticipate filing the following motions to formalize the Settlement Agreement that is attached hereto:

- This Joint Motion for Preliminary Approval of the Settlement;
- Joint Motion to Amend the Class Definitions in the Houser Case and to add Susan McDaniel as a Class Representative;
- Joint Motion to Certify the Interlocutory Judgments in the McDaniel case as Final Judgments and to Dismiss the remaining claims in the McDaniel case, with prejudice, except for the claims that will be asserted in the Houser case;
- Joint Motion to Approve the Form of Class Notice, and Summary Class Notice, Postcard Notices and Tear-Off Claim Form, the Claim Form, and the Opt-Out Form; and
- Motion for Approval of Plaintiffs' Attorney Fees and Expenses, which will be filed at least thirty (30) days before the Opt-Out and Objection Deadlines (August 31, 2023).

The Parties contemplate sending a single Class Notice to all Members of the Houser Class (after the Class Definitions have been amended) that would include the Notice of Class Certification; Notice of Settlement; Notice of the Fairness Hearing and an opportunity to participate; and Notice of an Opportunity to Opt-Out. After Class Notice has been distributed, the Billings City Council will hold a regular publicly noticed hearing to approve the terms of the Settlement and the Settlement Agreement. The City Council meeting shall take place prior to the Fairness Hearing under Rule 23, M. R. Civ. P. The

Parties anticipate a Fairness Hearing in November after the Opt-Out deadline, the Claim Filing deadline, and the Objection deadline.

## **B. Background of the Class Action**

On April 13, 1992, the Billings City Council enacted a resolution establishing a franchise fee on water and wastewater services. The Billings City Council also assessed a franchise fee on solid waste disposal services, which was increased by resolution beginning on July 1, 2012. The franchise fees were established by City resolution and were charged in connection with using City water, wastewater, and solid waste disposal services.

On May 16, 2018, Class Plaintiffs filed their original Complaint against the City. Class Plaintiffs challenged the legality of the franchise fees. The original Complaint sought a declaration that the franchise fees imposed by the City were sales taxes that violated Mont. Code Ann. § 7-1-112(1). The Complaint requested judgment declaring the franchise fees to be an illegal tax and an injunction against further collection of the franchise fees. Plaintiffs also sought a refund of all amounts paid to the City as Franchise fees. Plaintiffs later amended their Complaint to add federal and state constitutional claims, also seeking a refund of the franchise fees.

The City stopped charging franchise fees on water, wastewater, and solid waste disposal services effective June 30, 2018. On November 12, 2019, the Billings City Council formally adopted a resolution repealing Resolution 92-16531, the resolution that originally added a franchise fee to the cost of water and wastewater service beginning in 1992.

## **C. Certification of the Plaintiff Class**

On April 10, 2019, the Court entered an Order Granting Plaintiffs' Motion for Class Certification. In its order, the Court found that the requirements under Mont. R. Civ. P.

23(a) and (b) were met. The Court also defined the Water Class, the Wastewater Class, and the Solid Waste Disposal Class. In its Order granting Class Certification, the Court also specifically excluded certain parties who paid franchise fees under a Subdivision Improvements Agreement as well as those who paid the franchise fees pursuant to written contracts.<sup>1</sup> (Doc. 74 & 123). On October 9, 2019, Class Counsel, on behalf of Gary and Susan McDaniel filed a second Class Action Complaint. The second case, *McDaniel v. City of Billings*, Cause No. 19-1444, is also before this Court. The *McDaniel* Plaintiffs seek relief from the City for those parties that paid franchise fees under a Subdivision Improvements Agreement.

#### **D. Dispositive Pretrial Motions**

Plaintiffs and Defendants have filed multiple pretrial motions in both the *Houser* and *McDaniel* cases. In *Houser*, the Court determined that it could not issue Orders that were binding upon the Plaintiff Classes in the *Houser* certified class action until the class members received class notice. However, in *McDaniel*, the Court recognized that it could delay ruling of Plaintiffs' motion for class certification until after it issued rulings on the parties' respective dispositive motions. The Court has entered the following Orders in *McDaniel* on the parties' respective motions:

- On January 5, 2022, the Court granted Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise Fees." (*McDaniel*, Doc. No. 99). The Court entered judgment declaring that the franchise fees were unlawful, finding that provisions in City Subdivision Improvements Agreements obligating Plaintiffs to pay franchise fees were unenforceable, and enjoining the City from imposing sales taxes in the future upon Plaintiffs. (Doc. 102). As part of the foregoing Judgment, the Court enjoined the City of Billings, its officers, agents, servants,

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<sup>1</sup> The entities with written contracts who were excluded from the Classes were: County Water District of Billings Heights; Lockwood Area/Yellowstone County Water and Sewer District; Phillips 66 Refinery; Meadowlark Capital, LLC; City of Powell, Wyoming; City of Laurel, Montana; Mackenzie Disposal, Inc.; Republic Services of Montana; Stillwater County, Montana; Two Tough Guy Services, LLC; and Yellowstone County Solid Waste Disposal District.

employees, or persons in active concert with any of them from imposing illegal sales taxes in the future on Plaintiffs. (Doc. 102).

- On January 5, 2022, the Court granted the City's Motion for Partial Summary Judgment on Plaintiff's Breach of Contract and Restitution claims. (*McDaniel*, Doc. No. 98). The Court determined that Plaintiffs failed to comply with Mont. Code Ann. § 7-6-4301 and entered judgment dismissing Counts II (breach of contract) and III (restitution) of Plaintiffs' Complaint. On January 19, 2022, the Court entered judgment in favor of the city and against the Plaintiffs on Counts II (breach of contract) and III (restitution). (Doc. 103).
- On March 1, 2022, the Court granted the City's Motion for Partial Summary Judgment regarding water contract claims under Mont. Code Ann. § 30-2-607. (*McDaniel*, Doc. No. 106). The Court concluded that Plaintiffs receiving water service failed to comply with Mont. Code Ann. § 30-2-607 and entered judgment dismissing with prejudice Plaintiffs' water claims under Counts II and III. The Court entered judgment on March 11, 2022 in favor of the City and against Plaintiffs on their water contract claims pursuant to Mont. Code Ann. § 30-2-607. (Doc. 110).
- On June 2, 2022, the Court granted the City's Motion for Partial Summary Judgment and found that the City did not breach its contracts with ratepayer plaintiffs because it did not violate the implied covenant of good faith and fair dealing. (*McDaniel*, Doc. No. 126). The Court entered judgment dismissing Count II (breach of contract) of Plaintiffs' Complaint. On June 7, 2022, the Court entered judgment in favor of the City and against the Plaintiffs on their breach of contract claims. (Doc. 129).
- On July 19, 2022, the Court entered an order granting in part and denying in part the City's Motion for Summary Judgment on Plaintiffs' state and federal Due Process claims. (*McDaniel*, Doc. No. 134). The Court confirmed that the statute of limitations for Plaintiffs' Due Process claims is three years and that Plaintiffs' Due Process claims that accrued prior to August 2, 2015 are barred by the statute of limitations. The Court found that Plaintiffs' claims that came into existence after August 2, 2015 were not barred. The Court also dismissed Gary McDaniel as a Plaintiff, finding that Gary McDaniel never had an account for City services. (*McDaniel*, Doc. No. 139) On July 27, 2022, the Court entered partial summary judgment on Counts IV and V (due process). (Doc. 140).
- On July 19, 2022 the Court also entered an order denying the City's request for summary judgment under the Voluntary Payment Doctrine. (*McDaniel*, Doc. No. 131). The Court found that the Voluntary Payment Doctrine does not bar Plaintiffs' federal and state Due Process claims.

Due to the unique procedural posture of the case, the Orders entered above are only binding upon the named plaintiffs in *McDaniel*. However, many of the orders mirror similar factual and legal arguments made by the City and the Class Plaintiffs in *Houser*. Thus, the outstanding unresolved issues between the parties have been narrowed by the Court's orders on the pretrial motions.

#### **E. Mediation and Settlement**

After more than 4.5 years of complex and contentious litigation, this Court has before it a proposed resolution to both the *Houser* and *McDaniel* cases. The proposed Settlement Agreement described in this Motion offers a global resolution of the remaining outstanding issues involved in both *Houser* and *McDaniel*. The proposed Settlement Agreement is the result of extensive efforts by the parties to achieve a resolution that will fully and finally resolve the substantial, complex issues raised in this action. The settlement was reached in arm's-length negotiations conducted in good faith.

The City filed a motion to compel Plaintiffs to mediate this case on December 13, 2019. (Doc. 126). The Court granted the City's motion on March 2, 2020. (Doc. 129). The Parties formally mediated this case before Jonathan McDonald on May 13, 2020. The mediation failed and did not achieve a settlement.

On March 11, 2022, the City filed a second Motion to compel the Plaintiffs to mediate this case. (Doc. 248). The Court granted the City's motion. (Doc. 267). The Court ordered the Parties to mediate these cases a second time again using independent mediator, Jonathan McDonald. The Parties participated in a second formal mediation conference in Billings on September 15, 2022. The second mediation conference was not successful. However, after the failed mediation conference, the Mediator continued to press for a

settlement. On October 17, 2022, the Mediator wrote to Class Counsel and counsel for the City stating the Mediator's recommendations for the terms of a settlement, including the settlement amount of \$3.6 million. Ultimately, the Parties agreed to settle these cases when Plaintiffs and the Defendant accepted and agreed to the settlement terms proposed and recommended by the Mediator. The proposed Settlement Agreement is based upon the Mediator's recommendations.

The record before the Court demonstrates that the Settlement was not the result of any collusion, but rather was achieved because of the extraordinary efforts of the Mediator after years of extensive litigation. The fact that the Settlement Amount (\$3.6 million) and many of the material terms of the Settlement were suggested by the Mediator, and not the parties, demonstrates the absence of any collusion in connection with the Settlement. Therefore, the record of litigation over 4.5 years and the manner in which the Settlement was achieved demonstrates that the proposed Settlement is fair, adequate and reasonable.

The Court has previously found that Class Counsel met the requirements to serve as Class Counsel under Rule 23(g). The Court has also recognized Class Counsel's diligence in pursuing the present litigation. *See Houser*, (Doc. No. 230, p. 27). Class Counsel has adequately represented the Water Class, the Wastewater Class, and the Solid Waste Disposal Class.

The Class Representatives have adequately represented the Water Class, the Wastewater Class, and the Solid Waste Disposal Class.

#### **F. Approval before the City Council**

As a component part of this Motion and settlement, the City seeks an Order from this Court permitting communications about this litigation, and this settlement, by the City

Council, the City Attorney, the City administration and its counsel. The Settlement Agreement must be approved by the Billings City Council at a properly noticed public meeting. However, the City does not want to run afoul of attorney-client communication or unintentionally create a situation where potential class members hear about the Settlement Agreement before the time that they receive the Settlement Notice. Class Counsel represents the class members in this case. The *Houser* classes have been certified by this Court since April 8, 2019. Since that time, all class members—a substantial portion of the City of Billings’ population—are considered clients of class counsel.<sup>2</sup> Further, this Court previously rejected the City’s request to make certain communications about this litigation. *See Houser*, Doc. No. 166. Since the City Council meeting needs to be a public meeting before the very same citizens that are class members in this case, the City requests that the Court enter an Order (1) allowing the City to discuss the Settlement Agreement after Class Notice has been mailed out, and (2) allowing the City Council, the City administration, City Staff, the City Attorney, and defense counsel to discuss and respond to any questions or public comments..

The City is mindful that the Plaintiffs are represented by counsel and that neither the City nor its counsel may communicate with represented parties without the consent of their counsel or the Court. *See Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002). Further, Rule 4.2 of the Montana Rules of Professional Conduct provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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<sup>2</sup> Restatement (Third) of the Law Governing Lawyers § 99 (2000), cmt. 1 (“once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyers for the class.”); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440, n.15 (2d Cir. 1978), *aff’d*, 444 U.S. 472 (1980) (“A certification under Rule 23(c) makes the Class the attorney’s client for all practical purposes”)

In order to comply with Rule 4.2, the Parties stipulate that after Class Notice has been sent out, the City of Billings, Billings City Council, the Billings Mayor, the City Administration, City Staff, the City Attorney, and Defense Counsel may discuss the Settlement and the Settlement Agreement after the Court approved Class Notice has been mailed to Class Members. The Parties stipulate and agree that the anticipated City Council meeting shall not violate Rule 4.2 of the Montana Rules of Professional Conduct and the Parties additionally seek a Court Order authorizing the City Council meeting and the anticipated public discussion of this case, the Settlement, and the Settlement Agreement.

**G. Legal Authority Authorizing Settlement**

Under Mont. R. Civ. P. 23(e), a settlement can only be entered with the Court's approval. Mont. R. Civ. P. 23(e) also applies certain procedures to a proposed settlement of a class action case. Those specific procedures are discussed in turn below. Accordingly, the parties request that the Court provide preliminary approval of the attached settlement agreement. Further, the parties request that the Court approve the parties' notice to class members and set a final settlement hearing to find that the settlement agreement is fair, reasonable, and adequate. The Settlement must be approved by the Billings City Council at a regularly noticed public hearing. The Parties stipulate that the Billings City Council shall consider the Settlement at a regularly noticed public hearing, after the Settlement Notice has been provided, and before the date of the Fairness Hearing. Plaintiffs stipulate and agree that at the City Council meeting, the City Council members, the City Administrators, the attorneys for the City, and the Mayor shall be permitted to discuss the litigation in the Houser and McDaniel cases and the proposed settlement and that they shall be permitted to answer questions regarding the foregoing.

I. The Settlement Notice and Summary Notice direct notice in a reasonable manner to class members who would be bound by the settlement proposal.

Under Mont. R. Civ. P. 23(e)(1), the Court must direct notice of a proposed settlement “in a reasonable manner to all class members who would be bound by the proposal.” Mont. R. Civ. P. 23(e)(1). The Court has entered certain Orders regarding the delivery of class notice in this case. *See* Doc. 257, Order Granting City of Billings’ Motion to Extend Time to Send Out Notices; Doc. 259, Order Requiring Additional Class Notice. In its Order Granting City of Billings’ Motion to Extend Time to Send Out Notices, the Court ordered that the City “shall have 60 days to send out the Notices after approval of the Class Notice and the Summary Class Notice. The Summary Class Notice and the Class Notice have not received final approval by the Court, so notice has not been delivered to the certified class to date.

The notice procedures in the Settlement Agreement provide reasonable notice to all class members who would be bound by the proposal. The parties’ proposed methods of distributing the notice of settlement essentially mirror the notice distribution methods that were previously approved by the Court for providing notice of class certification under Mont. R. Civ. P. 23(c)(2)(B). The Settlement Notice will be distributed to each individual class member that remains a customer of the City. The Settlement Agreement also provides for public notice via local and regional press outlets, including those methods ordered by the Court in its Order Requiring Additional Class Notice. Further, the parties also propose that the Summary Class Notice be published in the *Great Falls Tribune* and the *Missoulian*. Great Falls and Missoula have been identified as the top two locations for class members that moved from Billings but remained in Montana. The proposed methods of notice

distribution in the Settlement Agreement meet the requirements of Mont. R. Civ. P. 23(e)(1).

The parties filed a Joint Motion to appoint Simpluris as the Class Administrator. Pursuant to the terms of the Settlement, the parties contemplate Notice being sent to class members in the following manner:

- a. Simpluris shall mail a postcard to all current customers that it has identified as Class Members. The postcard shall tell them that they have been identified as a Class Member and that they do not need to file a claim.
- b. Simpluris shall also mail a postcard to all former customers who have been identified as Class Members informing them that they must file a Claim Form in order to receive a settlement payment, (“Eligible Former Customers”). The Postcard Notice shall include a tear-off claim form that can be returned to the Class Administrator.
- c. Simpluris shall also mail a postcard to all current customers who have not been identified as Class Members, (“Excluded Current Customers”). If an Excluded Current Customer had water, wastewater, and/or solid waste disposal services during the Claim Period, they must file a Claim Form to receive a settlement payment. The Postcard Notice shall contain a tear-off claim form.
- d. The City shall insert the one-page Summary Notice with monthly invoices to all current customers.
- e. Simpluris shall e-mail the Notice and Summary Notice to all current and former customers for which the City has e-mail addresses;
- f. Simpluris shall mail the Summary Notice to all former customers that it has identified as Class Members for which it can locate current mailing addresses.

II. The parties propose that the Settlement Agreement be binding upon class members only after a Court hearing.

Mont. R. Civ. P. 23(e)(2) requires that a proposal that is binding upon class members may only be approved after a hearing on finding that the settlement is “fair, reasonable, and adequate.” At the preliminary approval stage, many courts adhere to the standard of approving the proposed settlement if the settlement “appears to fall within the range of possible approval” or if the Court would “likely be able to” grant final approval of the settlement. *In re National Football League Players' Concussion Injury Litigation*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014); 4 Newberg and Rubenstein on Class Actions § 13:13.

Further, Fed R. Civ. P 23(e) provides that notice of a proposed settlement should be approved and distributed to a settlement class when a court “will likely be able to (1) approve the proposal under Rule 23(e)(2) and (2) certify the class for purposes of judgment on the proposal.”<sup>3</sup> Note that Mont. R. Civ. P. 23 does not contain the standards that were adopted into Fed. R. Civ. P. 23 in 2018; however, the Federal changes are intended to “focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the [settlement] proposal.” Fed. R. Civ. P. 23, Advisory Committee notes to 2018 Amendment.

In addition to the standards above, Montana courts have recognized a presumption of fairness exists when “(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar

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<sup>3</sup> Federal authority is instructive regarding interpretation and the procedure for approving settlement under Rule 23. *See Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 28, 371 Mont. 393, 310 P.3d 452. Note, before 2018, the Montana and Federal Rule 23(e) provisions were essentially identical. In 2018, Federal Rule 23(e) was amended “mainly to address issues related to settlement.” Fed R. Civ. P 23, Advisory Committee Notes. Fed R. Civ. P 23(e) still contains the same five settlement requirements as Mont. R. Civ. P. 23, but the federal rule provides additional detail regarding each requirement.

litigation; and (4) only a small fraction of the class objected.” *Pallister v. Blue Cross & Blue Shield of Montana, Inc.*, 2012 MT 198, ¶ 27, 366 Mont. 175, 285 P.3d 562 (citing *In re CertainTeed Corp. Roofing Shingle Products Liability Litigation*, 269 F.R.D. 468, 484 (E.D.Pa.2010)).

The proposal contained in the Settlement Agreement is appropriate for preliminary approval and meets the presumption of fairness described above. In its various summary judgment orders issued in *McDaniel*, the court has documented the long and contentious history of this case. The docket for Houser case reflects 272 separate filings. The docket in the *McDaniel* case reflects 143 separate filings. These cases have been litigated for more than 4.5 years, and many of the named class plaintiffs have questioned or challenged the franchise fees years prior to filing the present lawsuit. The parties’ 30+ year contentious relationship and the litigation history demonstrate that settlement negotiations occurred at arm’s length and pursuant to Court Order. Two Court ordered mediation conferences failed to achieve a final settlement.

There has been significant and sufficient discovery in this case and in the *McDaniel* case. The parties have exchanged over 87,000 pages of documentation in discovery and have responded to multiple sets of written discovery requests, including 240 requests for admissions, 96 interrogatories, and 215 requests for the production of documents. There have been numerous depositions, including the following individuals:

- Bruce McCandless, former City Administrator;
- David Mumford, former Director of Public Works;
- Jennifer Duray, the Deputy Director and former Finance Director of the Department of Public Works;

- Patrick Weber, the former Finance Director for the City of Billings;
- Plaintiff Terry Houser;
- Plaintiff Terry Odegard;
- Plaintiff Thomas Zurbuchen;
- Mae Woo, former Plaintiff;
- Plaintiff Roger Webb;
- Plaintiff Clayton Fiscus;
- Gary McDaniel, former Plaintiff; and
- Plaintiff Susan McDaniel.

In addition to the foregoing depositions, there have been several Court hearings where substantial argument and additional testimony and evidence were presented to the Court, including the testimony of Plaintiff Terry Odegard, Plaintiff Thomas Zurbuchen, Plaintiff Roger Webb, and proposed Intervenors, Andrew Billstein, and Jacob Troyer. This testimony is in addition to affidavit testimony from multiple individuals, including:

- Denise R. Bohlman, City Clerk;
- Jennifer Duray, Deputy Director of the Public Works Department and former Finance Director for the Public Works Department;
- David Mumford, former Public Works Director;
- Bruce McCandless, former City Administrator for the City of Billings;
- Chuck Tooley, former Mayor of the City of Billings;
- Brett Rutherford, former Yellowstone County Elections Administrator;
- Chris Hertz, Public Works Department Engineer III;
- Tom Hanel, former Mayor of the City of Billings;

- Andy Zoeller, Finance Director for the City of Billings;
- Christina Volek, former City Administrator for the City of Billings;
- Rod Wilson, real estate broker and developer;
- Carl Peters, Board President for the Lockwood Area/Yellowstone County Water and Sewer District; and
- Debi Meling, Director of the Public Works Department.

The Court ordered the Parties to mediate these cases a second time using an independent mediator, Jonathan McDonald. The second mediation conference was not successful. However, after the failed mediation conference, the Mediator continued to press for a settlement. The Mediator wrote to Class Counsel and counsel for the City stating the Mediator's recommendations for settlement, including the settlement amount of \$3.6 million. Ultimately, the Parties agreed to settle these cases when Plaintiffs and the Defendant accepted and agreed to the settlement terms proposed and recommended by the Mediator. The proposed Settlement Agreement is based upon the Mediator's recommendations. The amount of the Settlement and many of the material terms of the Settlement were proposed by the Mediator as his recommendation for settlement.

Finally, the Court has previously found that Class Counsel met the requirements to serve as Class Counsel under Rule 23(g). The Court has also recognized Class Counsel's diligence in pursuing the present litigation. *See Houser*, Doc. No. 230, p. 27.

Factor 4, regarding objections by class members, is best addressed at the fairness hearing after class members are notified of the proposed settlement. The Court will already need to review those objections under Mont. R. Civ. P. 23(e)(5). However, the terms in the Settlement Agreement treat all class members essentially the same with respect to the

settlement amount each individual class member will receive. The primary difference among class members is that certain class members will need to submit their claims for reimbursement because these parties are not accurately identifiable as class members in the City's Public Works Department records.

III. The Settlement Agreement contains the parties' agreement made in connection with the settlement proposal.

Mont. R. Civ. P. 23(e)(3) requires that the parties file a statement identifying any agreement made in connection with the proposal. The Settlement Agreement meets this requirement, as the Settlement Agreement itself (including its exhibits) identifies and contains the agreements of the parties made in connection with the settlement proposal. Other than the Settlement Agreement, its exhibits and the Motions filed with this Court, there are no other outstanding binding agreements made in connection with the settlement proposal.

IV. The Settlement Agreement affords class members a new opportunity to request exclusion from the class.

The Settlement Agreement meets Mont. R. Civ. P. 23(e)(4). As noted above, this case was previously certified under Mont. R. Civ. P. 23(b)(3), but notice has not been provided to the class. The parties propose that class notice be provided as a Notice of Proposed Class Action Settlement. Individual class members will still have the right to opt out of the settlement by delivering an opt-out form to the Class Administrator using the opt-out provisions provided in the Settlement Notice. By this Motion, the parties request that the Court set timelines upon which class members must postmark opt-out forms in order to request exclusion from the settlement classes.

V. The Settlement Agreement allows class members to object to the settlement proposal.

The Settlement Agreement meets Mont. R. Civ. P. 23(3)(5). As noted in the Settlement Notice and the Summary Notice, class members may object to the proposed settlement by mailing objections to the Class Administrator. By this Motion, the parties request that the Court set timelines upon which class members may object to the settlement proposal.

VI. Other Settlement Factors.

In addition to the Rule 23(e) and presumption of fairness factors described above, the nature of the Plaintiff classes in this case favors approval of this settlement. First, \$3,600,000 is a substantial financial award. While this amount does not represent the total amount of damages alleged in this case, the attendant costs and litigation risks of continuing with the lawsuit make the settlement reasonable. As other Courts have noted, a cash settlement that is only a fraction of the potential recovery does not per se render a settlement inadequate or unfair. *Officers for Justice v. Civil Service Commission of City & County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). This factor is especially true in cases where monetary relief is not the only relief requested by the Plaintiffs. *Id.* Instead, “[i]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Id.*

The main request for relief in this case was always nonmonetary. Class Plaintiffs’ first claim, and one of their primary stated goals, was to obtain a ruling finding that the City’s franchise fees were illegal sales taxes. Plaintiffs received a Summary Judgment Order in the *McDaniel* case finding the franchise fees to be unlawful and enjoining the City from imposing illegal sales taxes upon Plaintiffs in the future. (*McDaniel*, Doc. No. 102). Since the case remains ongoing, the Order finding the franchise fees to be illegal sales taxes is

not a final order. The Settlement Agreement would make the Summary Judgment Order a final order. Further, the Settlement Agreement eliminates the City's ability to appeal and challenge the ruling on the legality of the franchise fees. These two components significantly benefit the class. Any appeal would cause uncertainty and potential risk that the Montana Supreme Court could reverse this Court's decision. Even if the ruling was affirmed, the appeal would still take significant additional time and result in the accumulation of more attorney's fees—fees that will indirectly be borne by the class members that remain citizens and taxpayers in the City of Billings.

The Court must also address the amount of the Proposed Settlement. As noted above, the amount of the Settlement is the amount recommended for settlement by independent mediator Jonathan McDonald.

The first mediation conference in May of 2020 did not achieve a final settlement. However, Court pleadings reveal that the Parties agreed upon the amount of a settlement during that mediation conference, but could not agree upon other material settlement terms. The agreed upon settlement amount in May of 2020 was \$2.6 million, meaning the proposed Settlement is \$1 million more than what the Parties agreed to in May of 2020. Given the extensive litigation since May of 2020, the increased Settlement Amount is not surprising. Since the first mediation conference in May of 2020, the Parties briefed and litigated numerous dispositive motions in both the Houser case and the McDaniel case. As noted below, the Court's Orders on those dispositive motions substantially narrowed the McDaniel case. While the Plaintiffs' damage claims were significantly reduced, those dispositive motions and the on-going litigation required substantial effort by all of the attorneys involved.

In discussing the amount of the Settlement, it is also important to note that the Settlement will be paid out of the General Fund of the City of Billings. Essentially, this means that the Settlement will be paid by funds primarily collected from the Billings taxpayers. The Settlement will not be paid by the Public Works Department and will not be paid with revenue derived from the provision of water, wastewater, and solid waste disposal services. After the payment of attorney fees to Class Counsel, the expenses of the Class Administrator, and other expenses, the balance of the Settlement Amount will be rebated to customers of the Public Works Department of the City. With limited exceptions, the class members receiving settlement money are, for the most part, the very taxpayers who will fund the Settlement. Thus, this case is unique in that the claimants themselves are the parties who will bear the burden of the settlement as taxpayers. Any additional litigation will continue to drive up attorney fees and expenses for both the City of Billings and the Plaintiffs. Indirectly, Plaintiffs bear the burden of both parties' attorney's fees. The Settlement Agreement is a fair, reasonable, and adequate means to resolve this litigation, and the Court should approve the Settlement Agreement.

Other factors to consider in connection with the amount of the Settlement include the cost of continued litigation and litigation risk. This case involves a number of complex legal and factual issues. Many of the legal issues, such as the legality of the franchise fees, were questions of first impression that have not previously been addressed by any Montana court. Without a settlement, it is anticipated that the Parties would proceed to trial in late 2023 or early 2024. Between now and the time of trial, the Parties are expected to incur substantial expert witness fees in preparation for trial. The Settlement eliminates the need and the expense of expert witnesses. The outcome of trial, for either Party, is uncertain.

Regardless of how the trial ends, there is a significant probability that one of the Parties will appeal to the Montana Supreme Court. The Parties recognize that an appeal could delay final resolution of this case for a substantial period of time. Any appeal, regardless of the outcome, would also further increase the attorney fees and costs of this litigation, which further impacts class members as City residents and taxpayers.

The proposed Settlement will minimize future attorney fees and costs and will eliminate litigation risk through a Settlement Agreement that benefits all Parties. The proposed Settlement meets the Rule 23(e) requirements, and it is fair, reasonable, and adequate. The parties believe that the benefits from the proposed Settlement outweigh the risks and costs of continuing this litigation.

THEREFORE, the parties request that the Court:

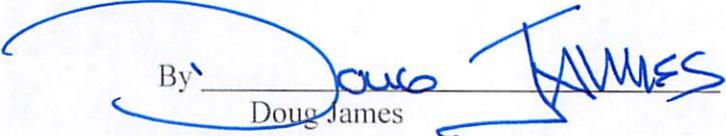
- 1) Schedule a telephonic conference with Class Counsel and counsel for the City for any necessary guidance or assistance in setting the necessary deadlines or other matters discussed in this Motion.
- 2) Find that the Settlement Agreement meets the requirements of Mont. R. Civ. P. 23(e) and grant preliminary approval of the Settlement Agreement reached between the parties.
- 3) Approve the Notice of Proposed Class Action Settlement, the Summary Notice, the Special Notice to those current customers who Simpluris has determined were not customers during the Claim Period (February 2, 2015 through June 30, 2018) and the distribution methods of the Settlement Notice and Summary Notice contained in the Settlement Agreement.

- 4) Approve the Stipulated Motion to Amend Class Definitions, filed concurrently with this Motion.
- 5) Approve the Motion to Certify the Interlocutory Judgments in the McDaniel case to be Final Judgments and then dismiss the remaining issues in the McDaniel case.
- 6) Set the Final Approval Hearing and any necessary time periods for class members to comment, object, or opt out of the settlement.
- 7) Permit the Billings City Council and Mayor to respond to questions regarding the Settlement Agreement that are posed by the public at the City Council meeting.
- 8) Grant any other further relief or orders that are necessary to effectuate the settlement agreement of the parties in accordance with Mont. R. Civ. P. 23(e) and Montana law.

DATED this 20<sup>th</sup> day of March, 2023.

MOULTON BELLINGHAM PC

By

  
Doug James

Bryce Burke

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By

  
Matthew Monforton

32 Kelly Court

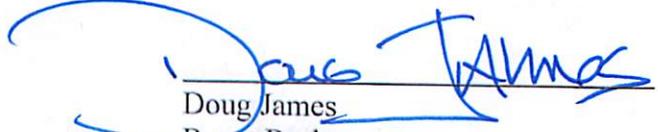
Bozeman, MT 59718

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following person by U.S. Mail, postage prepaid on this 20<sup>th</sup> day of March, 2023.

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Doug James  
Bryce Burke

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