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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

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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

**ORDER FOR PRELIMINARY  
APPROVAL OF SETTLEMENT  
AGREEMENT**

On March 20, 2023, Defendant and Plaintiffs under Rule 23(e), Mont. R. Civ. P. filed a Joint Motion for Approval of Settlement Agreement. Ct. Doc. 282 The Court has reviewed the proposed Settlement Agreement and the Exhibits attached thereto. Ct. Doc. 284. Further, from its involvement in this case and the history of the case and the related case of *McDaniel v. Billings*, DV 19-1444, Mont. 13<sup>th</sup> Jud. Dist. Court, Yellowstone County Court is familiar with the facts and issues involved in these class actions lawsuits.

**Fair, Adequate, and Reasonable.** Based upon a review of the record, the motions and arguments of counsel and the Court's familiarity with the facts and legal issues involved in this case and the Court finds that it has sufficient information to make a preliminary determination of whether the Settlement Agreement is fair, adequate, and reasonable.

From the information provided by the parties and the Court's familiarity with this case and *McDaniel* and the Court finds that the Settlement Agreement was achieved after more than four

and a half years of litigation, including voluminous discovery. The proposed Settlement itself was preceded by two failed Court ordered mediation conferences. The proposed Settlement was achieved, in part, with the assistance and extraordinary efforts on the part of an independent mediator. Mediator Jonathan McDonald mediated this case and *McDaniel* on two separate times through which he developed great familiarity with the facts and issues surrounding these cases. Mediator McDonald kept the court informed of the progress of the mediation efforts. Ct. Docs. 268, 271, 273,274 and 275. Although the formal mediation conferences failed, Mediator McDonald continued to press the parties to settle. After the second failed mediation conference, McDonald wrote to Class Counsel and counsel for the City on October 7, 2022 in order to state his recommendations for settlement, including the settlement amount of \$3.6 million, as well as many of the other material terms of the proposed Settlement.

The Court finds that the Settlement Agreement was reached through arms-length bargaining and that the investigation and discovery over the past four and a half years are sufficient to allow counsel to act intelligently and the Court to act informatively. Both counsel are experienced in similar litigation.

In order for the Settlement to be finalized, the Settlement Agreement must be approved by the Billings City Council at a publicly noticed public meeting. Towards that end, the parties jointly moved and stipulated in the Settlement Agreement that the City of Billings, Billings City Council, the Billings Mayor, the City Administration, the City Staff, the City Attorney, and Defense Counsel be allowed to discuss the Settlement and the Settlement Agreement after the Court Approved Notice has been mailed out. The parties also stipulated that the foregoing discussions and communications shall not be considered violations or Rule 4.2 of the Montana Rules of

Professional Conduct. Because Class Counsel has consented to the communications after Class Notice has been mailed out, there would be no violation of rule 4.2.

## **BACKGROUND**

### **Factual and Procedural Background.**

The Billings City Council adopted “franchise fees” on water and wastewater services on April 13, 1992. Thereafter, the City also assessed a franchise fee on solid waste disposal services. The record reflects that beginning in April 1992, some Billings citizens and Council Members objected to the franchise fees as an illegal sales tax. The City eliminated the franchise fees effective June 30, 2018.

On May 16, 2018, Plaintiffs filed this Class Action in District Court. 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 Section 7-1-112(1), MCA. The Complaint requested judgment declaring the “franchise fee” 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 and also sought a refund of the “franchise fees.”

The City stopped charging “franchise fees” on water, wastewater, and solid waste disposal services on 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.

### **Class Certification.**

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 Rule 23(a), Mont. R. Civ.

P. 23(a) and (b). The Court also defined the Water Class, the Wastewater Class, and the Solid Waste Disposal Class.

The City appealed the District Court's Order on Class Certification to the Montana Supreme Court. On March 3, 2020, the Supreme Court affirmed the District Court's decision certifying the Water Class, the Wastewater Class, and the Solid Waste Disposal Class. *Houser v. City of Billings*, 2020 MT 51, 399 Mont. 140, 458 P.3d 1031.

**The Second Class Action Case: *McDaniel v. City of Billings*.**

In its Order granting Class Certification, the Court also specifically excluded certain parties who paid “franchise fees” under Subdivision Improvements Agreements from the Plaintiff classes. On October 9, 2019, Class Counsel, on behalf of Gary and Susan McDaniel filed a second Class Action Complaint. The second case, *McDaniel*, 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.

**The Litigation.**

This case has been contentious and hard fought. This case and *McDaniel* involve complex issues, voluminous documents, and multiple witnesses over the nearly 30-year history of the “franchise fees.” The proposed Settlement is the culmination of years of extensive litigation and multiple attempts to find resolution. In its various summary judgment orders issued in *McDaniel*, the Court has documented the long and contentious history of this case and *McDaniel*. The docket for *Houser* case reflects 272 separate filings. The docket in *McDaniel* reflects 143 separate filings. These cases have been litigated for four and one-half years, and many of the named class plaintiffs have questioned or challenged the “franchise fees” years prior to filing the present lawsuit. Three of the named Plaintiffs—Terry Houser, Clayton Fiscus, and Kathryn Zurbuchen—died during the

course of this litigation,. The parties' thirty plus 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.

The parties have extensively developed the factual evidence in both cases. The Court is advised that the parties have exchanged over 83,000 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, the Court has heard testimony and other evidence at multiple hearings for this case, 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.

**Dispositive Motions.**

Plaintiffs and Defendants filed multiple pretrial motions in this case and *McDaniel*. The Court determined that it could not issue Orders in this case that were binding upon the Plaintiff Classes until the class members received class notice. However, at the outset in *McDaniel*, the Court recognized that it could issue rulings on the parties' respective dispositive motions prior to

entering its decision on class certification. The Court 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, 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. On July 27, 2022, the Court entered partial summary judgment on Counts IV and V (due process). (Doc. 146).

- 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 *Houser* Class Plaintiffs. Thus, the outstanding unresolved issues between the parties have been narrowed by the Court's Orders on the pretrial motions. Further, the Court's Orders have identified the appropriate limitations periods that would apply to Plaintiffs' remaining due process claims.

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

The City filed a motion to compel Plaintiffs to mediate this case on December 13, 2019. (Ct. Doc. 126). The Court granted the City's motion on March 2, 2022. (Ct. 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. Ct. Doc. 248. The Court granted the City's motion. Ct. Doc. 267. The Court ordered the parties to mediate these cases a second time again using independent mediator, Jonathan McDonald. The Court is advised that the parties participated in a second formal mediation conference in Billings, Montana, on September 15, 2022, which 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 Amount of the Proposed Settlement.**

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. Settlement was achieved after nearly five years of contentious litigation and two failed mediation conferences.

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, one million dollars less than the current settlement. Accordingly, 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 this case and *McDaniel*. As noted below, the Court's Orders on those dispositive motions substantially narrowed the issues in *McDaniel*. While 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. That means that the Settlement will be paid by 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. Those customers 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. Further litigation is likely to drive up attorney fees and expenses for both the City of Billings and the Plaintiffs. Since Plaintiffs are essentially funding both sides of this litigation, prolonging this litigation would not be in the best interests of either party.

The Court appointed Simpluris to act as Class Administrator. The Court is advised that counsel for the parties have worked with Simpluris to structure a settlement that would minimize the costs and expenses of settlement in order to maximize the payments to current and former customers. The amount to be paid to each current or former customer will be the same amount. The amount to be paid to each Class Member shall be determined by using a fraction. The numerator shall be the amount available for payment to Class Members (the Settlement Amount less attorney fees and expenses) and the denominator shall be the total number of Class Members who are Current Customers, plus the number of Allowed Claims filed by Eligible Former Customers and Excluded Current Customers. **After the Claim Filing deadline (August 31, 2023), the parties are directed to file a Joint Motion informing the Court of the number of Allowed Claims and the approximate dollar amount to be paid to each Class Member. The Motion shall request the transfer of a sufficient portion of the Settlement Amount to the Class Administrator to fund the Claim Fund to pay the pro rata share of the settlement to the Allowed Claim holders.**

#### **Rule 23 Preliminary Fairness Determination**

Having certified the Settlement Class, the Court must next make a preliminary

determination as to whether the proposed settlement is “fair, reasonable, and adequate” pursuant to Rule 23(e), Mont. R. Civ. P. Federal courts analyzing Fed R. Civ. P 23, which is similar to Montana’s Rule 23. Relevant factors to this determination include:

...the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 102, (9th Cir. 1998) (citing *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

### **Rule 23(e) Requirements**

Under Rule 23(e), Mont. R. Civ P. “the claims, issues, or defenses of a certified class may be settled . . . only with the court’s approval.” Further, Rule 23(e) provides five procedures that apply to the proposed settlement of a class action case.

The first procedural requirement under Rule 23(e) requires that the Court “must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Further, class members in this case have not received notice of the class action to date. This Court previously certified this case as a class action under Rule 23(b)(3). Since class members have not received notice of class certification, the mandatory notice procedures required by Rule 23(c)(2)(B) must be followed. Rule 23(c)(2)(B) requires that “[f]or any class certified under Rule 23(b)(3) the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”

In addition to the requirements above, Rule 23(c)(2)(B) also requires that the notice itself must clearly and concisely state the following in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

“Notice is satisfactory if it ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). “[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad ‘reasonableness’ standards imposed by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975).

The Court finds that the proposed notices and distribution of those notices meets the requirements of Mont. R. Civ. P. 23(c)(2)(B) and 23(e)(1). The notice and distribution methods in the Settlement Agreement indicate that those class members who can be identified by address will receive individual postcard notices. The Settlement also requires additional broad public notice both in Yellowstone County and regionally. Specifically, notice shall be delivered by the following means:

**Notice By the City. The City shall provide Notice as follows:**

- **City Council Meeting Announcement.** The City of Billings will make an announcement regarding the proposed settlement and the date of the Fairness Hearing at three public and regularly noticed City Council meetings or work sessions. The announcement will direct class members to copies of the Settlement Notice that will be available at the Council meetings.
- **Copies of Notice at City Council Meetings.** The City shall place at least twenty-five (25) copies of the Settlement Notice next to the Meeting Agenda at three (3) consecutive public meetings of the Billings City Council. These Settlement Notices shall be available and designated for members of the public.
- **Public Posting.** The City shall post a copy of the Summary Notice in prominent places within the control of the City of Billings, including City Hall, the Billings Public Library, Municipal Court, the Airport, the City Planning Department, and the office of the Public Works Department. The City will also request that Yellowstone County post the Summary Notice in the Yellowstone County Courthouse, the County Treasurer's Office, and the Clerk and Recorder's Office.
- **Facebook.** The City shall post the Summary Notice on its Facebook page with a hyperlink to the website containing the Settlement Notice and other information regarding the litigation.
- **Direct Mailing to Current City Customers.** The City shall mail the Summary Notice to all of its current water, wastewater, and solid waste disposal customers, with the exception of the Excluded parties. The City shall not be required to mail the notices in the months of July and August. The City may include the Summary Notice with monthly invoices or may separately mail the Summary Notice. The Summary Notice

will be mailed to all current customers within ninety (90) days of the date that the Court provides preliminary approval of the settlement and the Settlement Agreement. The Summary Notices may be mailed to customers on a rolling basis consistent with the Public Works Department's billing practices.

- **Mail or E-mail Notice.** The City shall mail or e-mail a copy of the Settlement Notice to the following local media outlets: (i) the Billings Gazette; (ii) the Yellowstone County News; (iii) the Laurel Outlook; (iv) KTVQ; (v) KULR; (vi) Community 7; (vii) KSVI; (viii) the Montana Free Press; (ix) the Daily Montanan; (x) The Bismarck Tribune; (xi) the Missoulian; (xii) the Great Falls Tribune; (xiii) The Independent Record; (xiv) the Bozeman Daily Chronicle; (xv) the Casper Star-Tribune; (xvi) the Montana Standard; (xvi) and (xvii) the Billings Times. After the City completes the foregoing mailings, it shall file a Report with the Court verifying where the Notice was mailed and the date or dates of mailing.

**Class Administrator Notice.** The Class Administrator shall provide Notice as follows:

- **Postcard Notice.** The Class Administrator shall mail Postcard Notices to all Class Members. The Postcard Notice shall contain the URL for the Class Administrator's website with additional information regarding the Settlement. The Postcard Notices shall contain a tear-off claim form to be used by Eligible Former Customers and Excluded Current Customers. Current Customers who have been identified by the Class Administrator as Class Members will not have to file claims. The Claim Form is attached as Exhibit "D".
- **E-mail Notices.** The Class Administrator shall e-mail copies of the Summary Notice and the Settlement Notice to any current or former water, wastewater, and/or solid

waste disposal customers for whom the City Public Works Utility Department has e-mail addresses. The City has e-mail addresses for approximately 8,700 current customers and for approximately 4,000 former customers. The City shall provide the e-mail addresses to the Class Administrator. The Class Administrator shall use the e-mail addresses exclusively for the purposes of this Settlement and for no other purpose.

- **Settlement Notice Website.** The Class Administrator will provide notice to the Class Members via its website. The website shall include a copy of the Summary Notice and the Settlement Notice. In addition, the website will also include pertinent details about the proposed settlement, the lawsuit, the date of the Fairness Hearing, contact information for Class Counsel, the Claim Form, and the Opt-Out Form, **Exhibit “H”.**
- **Published Notice.** The Class Administrator shall publish an advertisement in the following publications once a week for three consecutive weeks: (a) the Billings Gazette; (b) the Yellowstone County News; (c) the Billings Times; (d) the Missoulian; and (e) the Great Falls Tribune. The advertisement will contain the Summary Class Notice along with the URL to the website for additional information.
- **Big Sky Business Journal.** The Class Administrator shall publish an advertisement in the Big Sky Business Journal for two consecutive editions. The advertisement will contain the Summary Class Notice along with the URL to the website for additional information.

Following the filing of this Order, the City and the Class Administrator shall distribute notice of the proposed settlement as provided in the Settlement Agreement. The Court finds that the individual notice to identifiable class members, coupled with broad public notices and distribution to local news outlets satisfies the requirements of Rule 23(c)(2)(B). Mont. R. Civ. P.

relating to providing notice as broadly and cost-effectively as possible to Class Members. Further, the notices proposed by the parties contain the information specified in Rule 23(c)(2)(B)(i)-(vii). Mont. R. Civ. P. As stipulated in the Settlement Agreement, the City shall not be required to distribute any notice to customers during the months of July and August.

Having thoroughly reviewed the jointly drafted Notice, the Court finds that the method and content of the Notice to be satisfactory. Accordingly, the Court approves the parties' proposed notification plan.

Since the Settlement Agreement would be binding upon all class members (except those that timely opt out), the Court cannot provide final approval until after a hearing upon finding that the Settlement Agreement is fair, reasonable, and adequate. At this preliminary stage, the Court finds that the fairness standard has been met.

A proposed settlement is entitled to a presumption of fairness where: (1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. *Pallister v. Blue Cross & Blue Shield of Montana, Inc.*, 2012 MT 198, ¶ 26, 366 Mont. 175, 184, 285 P.3d 562, 568 (quoting *In re CertainTeed Corp. Roofing Shingle Products Liability Litigation*, 269 F.R.D. 468, 484 (E. D. Pa. 2010)).

As described above, the record before the Court demonstrates that the Settlement Agreement was achieved due to a compromise of the parties' remaining disputed claims, along with extraordinary efforts of the Mediator. The Settlement Agreement was reached by the parties after extensive litigation spanning over 4.5 years. Further, the Settlement Amount (\$3.6 million) and many of the material terms of the Settlement Agreement were reached upon recommendation by the Mediator and approval by the parties. These factors demonstrate the presence of an arm's



length settlement. The record of litigation over 4.5 years and the manner in which the Settlement Agreement was achieved demonstrates that the proposed Settlement Agreement is fair, adequate and reasonable.

Factor two also supports a presumption that the Settlement Agreement is fair. The parties have engaged in exhaustive discovery. The parties have exchanged and reviewed “voluminous documents,” served multiple sets of discovery requests, and completed numerous depositions. It is evident that both parties, through discovery and independent investigation, were able to learn significant information about the facts and law applicable to this case. Accordingly, it appears the parties have entered into the Settlement Agreement with a strong working knowledge of the strengths and weaknesses of their claims and defenses.

The record in this case reflects that the parties have been engaged in extensive litigation for nearly five years. The amount of discovery conducted by the parties and the extensive record of adversarial litigation demonstrates that the proposed settlement was the conscious choice of the parties and is not the product of any collusion. The length of time this case has been litigated and the amount of evidence and other documentation exchanged between the parties has been extensive. The Court finds there was sufficient discovery conducted prior to achieving settlement.

Factor three also supports a presumption of fairness. “In considering the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties.” *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 447 (E.D. Cal. 2013) (citing *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)). The Court has previously found that Class Counsel meets the requirements to serve as Class Counsel under Rule 23(g), Mont. R. Civ. P. The Court has recognized Class Counsel’s diligence in pursuing the present litigation. Doc. No. 230, p. 27. Class Counsel believes

the Settlement Agreement is fair, reasonable, adequate, and in the best interest of the Settlement Classes. Furthermore, the presumption of reasonableness is warranted in this case based on Class Counsel's expertise in complex litigation, familiarity with the relevant facts and law, and experience with other class and collective action settlements. Class Counsel has adequately represented the Water Class, the Wastewater Class, and the Solid Waste Disposal Class.

Likewise, the City's counsel have significant experience and have, in *McDaniel*, successfully resolved several claims in the City's favor by summary judgment. Both parties have been represented by competent counsel with experience in similar litigation. Given the foregoing, and according the appropriate weight to the judgment of experienced counsel, this factor weighs in favor of the proposed Settlement Agreement being fair, reasonable, and adequate.

Factor four is appropriately reserved for the fairness hearing after class members are notified of the proposed settlement. The Court will need to review those objections under Rule 23(e)(5), Mont. R. Civ. P. However, the terms in the Settlement Agreement treat all class members essentially the same with respect to the pro rata settlement amount each individual class member will receive. The primary difference among class members is that certain class members<sup>1</sup> 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.

To succeed on the merits, Plaintiffs would have to prove that Defendant actually engaged in the practices and policies alleged and that those practices and policies violated the law. Were the case to proceed, there is a strong likelihood of more protracted and contentious litigation and appeals. Without a settlement, this case could potentially continue for years. There are still a number of motions for summary judgment pending before the Court. While those

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<sup>1</sup> The terms "Eligible Former Customers" and "Excluded Current Customers", are described in the Settlement Agreement.

motions would likely narrow this case as the motions did in *McDaniel*, it is unlikely that they would resolve all issues. It is unlikely that this case would proceed to trial before 2024. Regardless of the result of the trial, it is probable that there would be an appeal.

The Court is mindful of the cost of litigation. Those costs are particularly relevant in this case since the Plaintiffs, as taxpayers, are funding the defense costs for the City. Similarly, if the Plaintiffs prevail at trial, any judgment would ultimately be paid by the City with tax revenue derived from the Plaintiffs.

The cost of further litigation must also be viewed in the factual context of this case. The City voluntarily stopped charging franchise fees effective June 30, 2018 – nearly five years ago. Subsequently, in *McDaniel* the Court issued an injunction that prohibits the City from imposing “franchise fees” in the future. Given this factual and legal background, it is unlikely that the City will impose “franchise fees” in the future in connection with its water, wastewater, and solid waste disposal services. Given that future “franchise fees” are unlikely, the cost of continued litigation, where the Plaintiffs are effectively funding both sides of the litigation, favors approval of the settlement.

The City has agreed to pay \$3.6 million to settle this lawsuit. Plaintiffs acknowledge serious hurdles and expenses to getting a favorable judgment on the merits. Considering these risks, Class Counsel believes, and the Court preliminarily agrees that the recovery of \$3,600,000 for the Classes is an excellent result. Accordingly, the amount of the settlement weighs in favor of the settlement being fair, reasonable, and adequate, as it assures class members compensation that may otherwise not be available.

As previously discussed in this Order, after conducting this discovery, the parties engaged in two mediations with Mediator McDonald. The mediations were unsuccessful. The

Court is advised that Mr. McDonald made an independent recommendation as to how he believed this case should settle. Plaintiffs and the City ultimately agreed to settle on the terms recommended by the Mediator. It is significant that the settlement was achieved, not through negotiation, but through a recommendation of an independent third party mediator who developed extensive knowledge of the case. The manner in which the settlement was proposed and achieved weighs strongly in favor of the proposed settlement being fair, reasonable, and adequate.

For the reasons stated above, the Court preliminarily finds the Settlement Agreement to be fair, reasonable and adequate.

For all of the foregoing reasons the Court issues the following Order:

### **ORDER**

IT IS HEREBY ORDERED:

1. The Joint Motion for Preliminary Approval of Settlement Agreement is **GRANTED**.
2. The Settlement Agreement Ct. Doc, 284, attached to Ct. Doc. 282 as Exhibit 1 is preliminarily approved as fair, reasonable, and adequate pursuant to Rule 23(e), Mont. R. Civ. P. The relief being provided to the Water Class, the Wastewater Class, and the Solid Waste Disposal Class is fair, reasonable, and adequate. The Members of the Water Class, the Wastewater Class, and the Solid Waste Disposal Class have been treated equitably to each other through the Settlement Agreement.
3. The Court approves the form and substance of the proposed notices attached to the Settlement Agreement (which are also attached to the Joint Motion for Approval of Settlement Notice and Other Settlement Documents) and the form and method for notifying Settlement Class Members of the Settlement Agreement. Their terms and conditions satisfy the requirements of

Rule 23(c)(2)(B) and 23(e), Mont. R. Civ. P.

4. The notice procedure submitted by the parties constitutes the best notice practicable under the circumstances. As provided in the Settlement Agreement, the Class Administrator shall provide notice to Settlement Class Members and respond to class member inquiries.

5. As required by Rule 23(e)(2), Mont. R. Civ. P. a Final Approval/Fairness Hearing shall be held on **Thursday November 16, 2023, at 9:00 a.m.** in Room 414, Yellowstone County Courthouse at 217 N. 27<sup>th</sup> Street, Billings, Montana to consider:

- a. Whether the preliminary Settlement Agreement is fair, reasonable, and adequate;
- b. Plaintiff's request for the award of attorneys' fees and costs;
- c. Objections to settlement; and
- d. Dismissal of this action after the Settlement Amount has been paid and any Cy Pres funds distributed.

6. At the Final Approval Hearing, the parties shall also be prepared to update the Court on any new developments since the filing of the Joint Motion for Preliminary Approval of Settlement Agreement, including any untimely submitted opt-outs, objections, and claims, or any other issues as the Court deems appropriate.

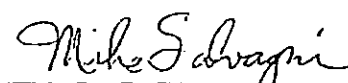
7. The date, time and place of the Final Approval Hearing shall be included in the Notice to be mailed/distributed to all class members.

8. No later than twenty-eight (28) days before the Final Approval Hearing, the parties shall file a Motion for Final Approval of Class Action Settlement. The Motion shall include and address any objections received as of the filing date. In addition to the class certification and settlement fairness factors, the motion shall address the number of putative Settlement Class Members who have opted out and the corresponding number of claims.

9. On or before August 1, 2023, Class Counsel shall file an application for attorneys' fees and costs. Class Counsel shall provide documentation detailing the number of hours incurred by Class Counsel in litigating this action, supported by detailed time records, as well as hourly compensation to which those counsel are reasonably entitled. Class Counsel should address the appropriateness of any upward or downward in the lodestar calculation, or a departure from the benchmark in a percentage-of-the-fund approach to awarding attorney's fees. Class Counsel should be prepared to address any questions the Court may have regarding the application for fees at the Final Approval Hearing.

10. The City of Billings, the Billings City Council, the Billings Mayor, the City Administration, the City Staff, the City Attorney, and Defense Counsel's communications and discussions regarding the settlement and the related Settlement Agreement shall be permitted, after the Class Notice has been mailed out.

Dated March 31, 2023.



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Hon. Mike Salvagni  
Presiding Judge

c: Matthew G. Monforton  
Doug James  
Bryce Burke  
Jonathan McDonald