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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

14 **IN RE: TOLL ROADS LITIGATION**

Case No: 8:16-cv-00262-ODW(ADSx)

Hon. Otis D. Wright II

15 PENNY DAVIDI BORSUK; DAVID
16 COULTER; EBRAHIM E. MAHDA;
17 TODD QUARLES; TODD
18 CARPENTER; LORI MYERS; DAN
19 GOLKA; and JAMES WATKINS on
20 behalf of themselves and all others
21 similarly situated,

**DECLARATION OF HELEN I.
ZELDES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

22 Plaintiffs,

23 vs.

Date: December 10, 2020
Time: 10:30 a.m.
Location: Judicate West
55 Park Plaza, Suite 400
Irvine, CA 92614

24 **FOOTHILL/EASTERN**
25 **TRANSPORTATION CORRIDOR**
26 **AGENCY; SAN JOAQUIN HILLS**
27 **TRANSPORTATION CORRIDOR**
28 **AGENCY; ORANGE COUNTY**
TRANSPORTATION AUTHORITY;
3M COMPANY; BRiC-TPS LLC;
RHONDA REARDON; MICHAEL
KRAMAN; CRAIG YOUNG; SCOTT
SCHOEFFEL; ROSS CHUN;
DARRELL JOHNSON; LORI
DONCHAK; COFIROUTE USA, LLC;
and DOES 3-10; inclusive,

Special Master: Hon. Andrew J. Guilford (ret.)

Defendants.

DECLARATION OF HELEN I. ZELDES

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I, Helen I. Zeldes, declare and state as follows:

1. I am over the age of 18 years and I am competent to make this Declaration. I have personal knowledge of the facts as stated in this Declaration, or if I rely on business records, I will so personally state. I am a partner at the law firm Schonbrun Seplow Harris Hoffman & Zeldes, LLP, attorneys for Plaintiffs and Co-Lead Counsel for the certified Class. I am a member in good standing of the State Bar of California.

2. The facts stated in this declaration are true and based on my own personal knowledge and, if called to testify to them, I would competently do so. As to matters of opinion and belief, I believe them to be true and accurate.

3. I submit this declaration in support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement.

4. Attached as **Exhibit 1** is a true and correct copy of the Settlement Agreement between Plaintiffs and Defendant 3M.

5. Attached as **Exhibit 2** is a true and correct copy of the Settlement Agreement between Plaintiffs and the TCA Defendants.

I. HISTORY OF THE LITIGATION

A. COMPLAINT

6. This action was initially filed in the Orange County Superior Court on or about October 2, 2015, and later removed by the TCA to Federal Court on February 16, 2016. Two additional federal actions were subsequently filed and the three cases were eventually consolidated into the current litigation in 2016. The TCA filed a Motion to Dismiss which was granted in part and denied in part on December 20, 2016. The Court provided Plaintiffs leave to amend the dismissed claims. The operative complaint was filed on January 19, 2017, and Defendants each filed their answer on February 14, 2017.

1 7. This certified class action involves a class claim under California Streets
2 & Highway Code §31490(a), as well as several other consumer, constitutional and
3 common law claims. To Plaintiffs' knowledge, prior to their action, no claim under
4 Streets & Highway Code §31490(a) had been brought, let alone certified for class
5 treatment. In that respect, this case was truly one of first impression. The claims at
6 issue required significant research, involved novel arguments and were vigorously
7 opposed by Defendants' counsel at every step of the litigation.

8 **B. DISCOVERY**

9 8. Based on the novelty, complexity, and issue of first impression
10 concerning §31490(a), discovery too necessarily required the evaluation of many
11 novel legal issues, and significant motion practice as to the contours of appropriate
12 and necessary discovery. Further, Plaintiffs retained a forensics consulting expert to
13 help understand the technical aspects of Defendants' PII practices, which involved
14 the transmission of significant amounts of data from complex databases, information
15 processing between entities, road side servers, and server rooms. The parties
16 engaged in extensive discovery and motion practice, including review of the TCA's
17 production of over 500,000 pages of documents, depositions of more than 34
18 witnesses, expert discovery, and a physical site-inspection of the TCA's VTX System
19 at which Plaintiffs' expert, parties and counsel attended. Discovery took place over
20 the course of 40 months, with multiple motions filed and fully litigated during that
21 time. There were two motions to compel before Magistrate Judge Gandhi that
22 involved complex and novel issues. Defendants sought financial information from
23 the Class Plaintiffs, including their cell phone records and bank account information.
24 Third party subpoenas were issued to 15 parties, and depositions of those third parties
25 were also taken.

26 9. Making matters even more difficult, Streets & Highway Code
27 §31490(c) and §31490(d) contemplate that toll entities purge data that is older than
28 four years and six months. Thus, there was significant litigation and discussions

1 concerning how information would be produced, how the TCA could purge data and
2 comply with the law, and not to interrupt the continuity and the operation of their
3 computer information systems.

4 **C. MOTION PRACTICE**

5 10. All told, the TCA and 3M filed seventeen case dispositive motions in
6 these proceedings, including several summary judgment motions, a motion to decide
7 key questions, motions for judgment on the pleadings, motions to dismiss, and other
8 motions. (*See* Dkt. Nos. 23, 25, 38, 41, 70, 72, 143, 150, 156, 207, 265, 298, 374,
9 377, 396, 422, 426.) Many of the issues raised in each of these motions constituted
10 issues of first impression.

11 **D. CLASS CERTIFICATION**

12 11. Plaintiffs' Motion for Class Certification was filed on April 27, 2018
13 and fully briefed over the course of the next two months, leading to a full class
14 certification hearing before this Court on July 31, 2018. Class certification involved
15 expert proof for damages, a significant evidentiary volume, and further issues of first
16 impression. The Court certified Plaintiffs' proposed Privacy Class on July 31, 2018
17 and amended the class definition a few months later. Almost immediately after the
18 Court ruled on the class certification motion and certified a California privacy class,
19 3M filed a motion for reconsideration. The Court's tentative ruling denied the motion
20 for reconsideration and after argument on those motions in late September of 2018 it
21 was taken under submission. At or around the same time, on October 17, 2018, 3M
22 filed its Rule 23(f) petition with the Ninth Circuit, seeking a reversal of the Court's
23 certification of the Privacy Class. Plaintiffs opposed that 23(f) petition on October
24 30, 2018. On April 24, 2019, the Ninth Circuit denied 3M's petition.

25 **E. SUMMARY JUDGMENT**

26 12. Defendants' First Motion for Partial Summary Judgment was filed on
27 March 21, 2017 and Defendant 3M's Motion for Judgment on the Pleadings followed
28 on March 24, 2017. After oral argument, the Court granted in part and denied in part

1 each motion on August 7, 2017. Defendants' Renewed Motions for Partial Summary
2 Judgment were filed one month later. On January 12, 2018, Plaintiffs' facial
3 challenges to OCTA's enforcement procedures regarding due process protections
4 were dismissed, and discovery continued on the remainder of the claims. Defendants'
5 Third Motions for Summary Judgment were filed on June 18, 2018 (TCA and 3M)
6 and July 16, 2018 (BRiC). On July 31, 2018, Plaintiffs' CLRA, UCL, and
7 constitutional claims and request for injunctive relief against 3M were dismissed. The
8 excessive fines claim against TCA was dismissed, but the individual due process
9 claim survived. The Court held its rulings on Plaintiffs' § 31490 and negligence
10 claims in abeyance, pending the close of the class notice and opt-out period. Almost
11 immediately after the Court ruled on the summary judgment motions, Defendants
12 filed extensive motions for reconsideration. The Court's tentative ruling denied those
13 motions and after argument on those motions in late September of 2018 were taken
14 under submission. On June 10, 2019, Defendants filed their Motion to Decide Key
15 Questions. The Court ultimately heard argument on the Key Questions motion in early
16 January 2020, and issued its order on January 17, 2020, dismissing some of Plaintiffs'
17 claims under § 31490. Dkt. 566. The Court found that certain categories of
18 transmissions specifically related to interoperability and collection/enforcement did
19 not violate California Streets and Highways Code § 31490.

20 **F. MEDIATION**

21 13. On February 25, 2019, Plaintiffs and all defendants participated in a
22 mediation with Robert Kaplan. The mediation was hard fought, intensive and arms'
23 length negotiations over the course of a full day. The mediation did not result in a
24 settlement. On April 25, 2019, Plaintiffs and 3M participated in a second mediation
25 with Mr. Kaplan. The parties made progress toward a resolution and agreed to
26 continue settlement discussions with the assistance of Mr. Kaplan. Over the course of
27 the next three months, involving multiple arms' length communications and further
28 negotiations between and among the parties and Mr. Kaplan, the parties reached a

1 settlement in principle on July 16, 2019. Subsequently, the Parties drafted, negotiated,
2 and exchanged several revisions of the Settlement Agreement and related exhibits in
3 the process of negotiating the best deal for the Settlement Class with respect to class
4 action notice and administration services.

5 14. On August 21, 2019, Plaintiffs and the TCA Defendants participated in
6 a mediation with Rachel Ehrlich, which lasted for 19 hours concluding at 4:30 a.m. in
7 the morning. The mediation resulted in a settlement in principle with the signing of
8 a term sheet. Over the course of the next four months, Plaintiffs and the TCA
9 Defendants spent considerable time with the assistance of Ms. Ehrlich working out
10 the details of the Settlement Agreement.

11 **II. THE SETTLEMENT AGREEMENTS MERIT PRELIMINARY**
12 **APPROVAL**

13 15. In my judgment, as well as the judgment of my fellow Co-Lead Class
14 Counsel, the proposed settlements represent an excellent result for the Plaintiffs and
15 certified Class, and are in all respects fair, reasonable, and adequate.

16 16. Rule 23(e) establishes a two-step process in which the Court first
17 determines whether a proposed class action settlement merits preliminary approval
18 and then, after notice is given to class members, whether final approval is warranted.
19 At final approval, Rule 23 – as amended in 2018 – requires analysis of specific
20 factors: (1) the adequacy of representation by class representatives and class counsel;
21 (2) whether settlement negotiations were arm’s length; (3) the adequacy of relief; and
22 (4) the equity of treatment of class members relative to one another. Fed. R. Civ. P.
23 23(e)(2). In addition, amended Rule 23 requires the court: (5) to balance the proposed
24 relief against the cost, risks, and delay of trial and appeal, as well as the effectiveness
25 of the method for distributing relief to the class; and (6) to consider the terms of the
26 attorneys’ fees award and any agreements made in connection therewith.

27 17. Preliminary approval, however, is only an initial evaluation of the
28 fairness of the proposed settlement. If the settlement appears to be the product of

1 serious, informed, non-collusive negotiation, has no obvious deficiencies, and does
2 not improperly grant preferential treatment to class representatives or segments of
3 the class, then preliminarily approval should be granted. In my opinion, the
4 Settlement Agreements here readily meet the standard for both preliminary and final
5 approval.

6 18. The Settlements were reached with the assistance of two independent
7 mediators, Robert Kaplan and Rachel Erlich, and were completed only after
8 additional, numerous negotiations between both sides.

9 19. The Settlements provide substantial and real benefits to Class Members.
10 Class Members may be eligible to receive cash from one or both Settlement funds
11 which total nearly \$41 million and/or cash equivalents from the penalty forgiveness
12 program totaling \$135 million (total cash and cash equivalents of \$175.95 million
13 dollars), as well as additional injunctive and programmatic relief. Class Members are
14 treated equitably relative to each other.

15 20. Other facts that support preliminary approval are the risk, expense,
16 complexity and duration of continued litigation. This is a large and complex case
17 interpreting a statute for the first time. Prosecuting this litigation through trial and
18 certain appeals would be lengthy, complex, and impose significant costs on all
19 parties. Continued proceedings necessary to litigate this matter to final judgment
20 would also likely include further substantial motion practice. The Settlements
21 guarantee a substantial recovery for the Class Members now while obviating the need
22 for a lengthy, complex, and uncertain trial. These facts all support preliminary
23 approval of the Settlement.

24 **III. EXPERIENCE OF COUNSEL**

25 21. As the Special Master is aware, from the Motion for Class Certification,
26 my co-counsel and I have extensive experience in complex civil class action litigation.
27 My firm and I are qualified to represent the Plaintiffs and proposed classes in this
28 case. Attached hereto as **Exhibit 3** is a true and correct copy of my firm's résumé.

1 22. Attached as **Exhibit 4** and **Exhibit 5** are true and correct copies of the
2 resumes of the firms Cuneo Gilbert LaDuca, LLP and Lindemann Law Firm, the other
3 Co-Lead Class Counsel in this litigation. As evidenced by their résumés, both firms
4 are also well qualified to represent the settlement classes.

5 23. Plaintiffs' counsel extensively investigated this case before it was filed.
6 Since its filing, Plaintiffs' counsel have prepared a number of complaints, the
7 operative of which is the Corrected First Amended Consolidated Class Action
8 Complaint (Dkt. No. 119-1). Plaintiffs have successfully opposed multiple motions to
9 dismiss, motions for judgment on the pleadings, and motions for summary judgment.

10 24. Since discovery commenced, Plaintiffs' counsel have engaged in
11 substantial and time-intensive discovery efforts, including the service of multiple sets
12 of interrogatories, requests for production of documents, requests for admission,
13 prepared for and defended eight Plaintiff depositions, and taken the depositions of
14 over twenty witnesses including witnessed designated by each of the Defendants
15 pursuant to Federal Rule of Civil Procedure 30(b)(6), third party witnesses, and expert
16 witnesses.

17 25. Plaintiffs' counsel have also spent hundreds of hours reviewing and
18 analyzing over 500,000 bates-numbered pages, including many reports containing
19 large amounts of data. Plaintiffs' counsel have spent many hours in the meet and
20 confer process with defense counsel to reach resolution concerning the scope of
21 discovery, as well as conferring about a multitude of discovery disputes. Plaintiffs'
22 counsel have spent additional time preparing responses to Defendants' document
23 requests, interrogatories and requests for admission.

24 26. Plaintiffs' counsel also prepared for and attended a site visit to inspect
25 the computer system of the TCA.

26 27. Plaintiffs' counsel hired James Sevel, a forensic expert with many years
27 of experience with computer databases similar to the ones that Defendants run.
28 Plaintiffs' counsel have spent numerous hours consulting with Mr. Sevel.

1 28. Plaintiffs' counsel hired Heather H. Xitco, C.P.A., M.B.A., C.F.F., an
2 experienced accounting and economic damages expert to prepare a damages model
3 for this case. Plaintiffs have spent numerous hours consulting with Ms. Xitco.

4 29. The collective experience of myself and my firm's attorneys in
5 conjunction with my co-counsel, along with our in-depth knowledge of the facts and
6 law concerning this case, qualifies us to represent the Settlement Classes as Class
7 Counsel.

8 **IV. CLASS REPRESENTATIVES' ADEQUACY**

9 30. Each of the Class Representatives in this action has actively participated
10 in the prosecution of this action by: reviewing and approving their original
11 complaints and the Consolidated Complaint; sitting for a full-day deposition;
12 responding to multiple lengthy sets of written discovery including ones that delved
13 into their finances; communicating regularly with class counsel; submitting
14 declarations in opposition to Defendants' motions for summary adjudication; and
15 generally staying informed about the progress of the litigation and acting in the
16 interests of the proposed classes. Each put their name and reputation on the line for
17 the sake of the Class, and no recovery would have been possible without their critical
18 role. Each of the Class Representatives adequately represented the class members
19 throughout this litigation. None of the Plaintiffs have any interests that conflict with
20 the interest of other class members. Plaintiffs are fully aware of their duties as class
21 representatives and are knowledgeable and informed about the claims in this action.

22 31. Each of the Class Representatives is a member of the proposed
23 Settlement Classes (except for Ebrahim E. Mahda and Todd Quarles who are only
24 members of the TCA class). They have each suffered the same injuries as the rest of
25 the class members: they have each had their privacy rights violated by the improper
26 dissemination of their PII to third parties in excess of what was necessary for
27 interoperability, collection or enforcement purposes. Each of them supported the
28 terms of the Settlements and have expressed their continued willingness to protect

1 the Classes until the Settlements are approved and their administration completed.
2 No Class Representative was promised, nor conditioned their representation on the
3 expectation of a service award.
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5 I, Helen I. Zeldes, declare under penalty of perjury under the Laws of the United
6 States that the foregoing is true and correct.

7 Executed this 4th day of November, 2020, in San Diego, California.
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Helen I. Zeldes