DOCKET NUMBER X07-HHDCV15-6060160-S

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| CONSTANCE JURICH, on behalf of herself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>VERDE ENERGY USA, INC.,<br><br>Defendant. | SUPERIOR COURT<br><br>COMPLEX LITIGATION DOCKET<br>AT HARTFORD<br><br>January 3, 2020 |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR CASE CONTRIBUTION AWARD**

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Plaintiff Constance Jurich ("Plaintiff"), individually and on behalf of the proposed Settlement Class (as defined in the Settlement Agreement), respectfully submits this memorandum of law in support of her Motion for Award of Attorneys' Fees & Expenses in the amount of $1,500,000 ($1,387,079.26 for fees and $112,920.74 for expenses) and a Case Contribution Awards in the amount of $5,000.

## I. INTRODUCTION

In her Fourth Amended Complaint, Plaintiff alleges that Verde's contracts with customers provide that the variable rate for electricity would fluctuate to reflect changes in "market conditions," but that in practice rates failed to do so. Plaintiff further alleges that Verde failed to make the statutorily mandated "clear and conspicuous statement explaining the rates that [the] consumer will be paying" and "the circumstances under which the rates may change." *See generally* [Dkt. No. 234.00]. After over four-and-a-half years of litigation, discovery, mediations and thorough, extensive and lengthy motion practice (including motions for class certification, to decertify the class, and several cross- and renewed- motions for summary judgment), the Parties agreed to a settlement whereby Class Members were eligible to receive cash awards of $0.0095 per Variable Kilowatt Hour of electricity used, constituting between 85% and more than 100% of their actual damages.[1] This Court preliminarily approved the Settlement on October 21, 2019, and authorized Plaintiff to give notice to the Settlement Class. *See* [Dkt. No. 262.00.] Plaintiff has now on this date separately filed a Motion for Final

[1] *See* Memorandum of Law in Support of Modification of the Certified Class Definition and Motion for Approval of Class Action Settlement ("Pl. Sett. App. Mem.") (filed simultaneously herewith) at ___. Plaintiff also relies herein on two affidavits filed by Class Counsel: the previously-filed Affidavit of Seth R. Klein in Support of Preliminary Approval [Dkt. No. 258.00] ("Klein Prelim. App. Aff.") and the Affidavit of Seth R. Klein in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and for Award of Attorneys' Fees and Expenses and for Case Contribution Award ("Klein Final App. Aff."), submitted herewith.

Approval of the Settlement ("Pl. Sett. App. Motion") and a Memorandum of Law in support thereof ("Pl. Sett. App. Mem."). Simultaneously therewith, and by this motion and memorandum, Plaintiff respectfully asks the Court also to approve an award of attorneys' fees and expenses in the amount of $1,500,000. Plaintiff respectfully submits that this amount – which constitutes a 1.4 multiple of Class Counsel's lodestar – is fair and reasonable given the outstanding result obtained by Class Counsel. Plaintiff further respectfully requests the award of a $5,000 Lead Plaintiff case contribution award given her significant efforts throughout this litigation, including responding to Verde's discovery requests, sitting for deposition, and ongoing consultations with Counsel.

## II. FACTUAL BACKGROUND

Over the past four-and-a-half years since the initial Complaint was filed in June of 2015, the parties have engaged in extensive adversarial litigation, including both motion practice and discovery, followed by several rounds of arms'-length negotiations utilizing mediators, before arriving at the Settlement. Plaintiff has obtained and analyzed substantial records concerning Verde's contract language during the Class Period and the electricity that Verde provided to Connecticut variable rate consumers during that time, including Verde's own costs. Klein Prelim. App. Aff. at ¶ 3. Likewise, Defendant has deposed and obtained interrogatory responses and document discovery from Plaintiff and Plaintiff's husband. *Id.* The parties have exchanged initial expert reports, and Verde has deposed Plaintiff's experts. *Id.*

Moreover, the parties' extensive motion practice has allowed them to fully understand the legal and factual issues at play and to obtain guidance as to the Court's view of the strengths and weaknesses of the claims and defenses. Plaintiff filed a motion for class certification on January 27, 2017, including a report from Plaintiff's experts [Dkt. No. 159.00]; following a failed

mediation (as discussed below), Defendant filed its opposition on October 17, 2017 [Dkt. No. 171.00] that included rebuttal experts reports and detailed factual affidavits from Verde's officers; Plaintiff filed her reply on November 8, 2017 [Dkt. No. 176.00]; and the Court issued its ruling certifying a class on December 6, 2017 [Dkt. No. 180.00].

The parties then filed cross-motions for summary judgment on March 16, 2018. *See* [Dkt. Nos. 182.00, 185.00]. The parties filed their respective oppositions on April 6, 2018 [Dkt. Nos. 187.00, 192.00], and their reply briefs on April 16, 2018 [Dkt. Nos. 193.00, 194.00]. At the May 18, 2019, oral argument on the parties' cross-motions, the Court requested supplemental briefing; the parties thereafter filed initial supplemental briefs on May 29, 2018 [Dkt. Nos. 200.00, 202.00], and responsive supplemental briefs on June 4, 2018 [Dkt. Nos. 204.00, 205.00]. The Court issued its ruling on June 21, 2018, granting partial summary judgment to Plaintiff, but otherwise denying the parties' motions. *See* [Dkt. No. 208.00].

On August 24, 2018, Plaintiff moved for permission to file the present Fourth Amended Complaint, in order to include an unjust enrichment and *quantum meruit* legal theory based on the Court's partial summary judgment ruling. *See* [Dkt. No. 212.00]. Verde objected to Plaintiff's motion on September 14, 2019 [Dkt. No. 221.00]. Plaintiff filed her reply on September 27, 2018 [Dkt. No. 225.00], and the Court granted Plaintiff's motion on November 8, 2018 [Dkt. No. 212.86]. Plaintiff filed the FAC on December 18, 2018 [ECF No. 234.00], and Defendant filed its answer and special defenses on January 11, 2019 [Dkt. No. 237.00].

While Plaintiff's motion to file the FAC was pending, Defendant on August 29, 2018, filed a renewed motion for summary judgment [Dkt. No. 213.00] and a motion to amend, alter, or decertify the class [Dkt. No. 215.00]. Plaintiff filed oppositions to Defendant's motions on September 24, 2018 [Dkt. Nos. 222.00, 223.00], and Defendant filed reply briefs on October 9,

2018 [Dkt. Nos. 227.00, 228.00]. Following oral argument on November 6, 2018, the Court on February 1, 2019, denied Defendant's motions. *See* [Dkt. No. 240.00]. The Court noted, however, that, even for a *per se* CUTPA violation, the class must show ascertainable loss. However, the Court held that "ascertainable loss doesn't require individual reliance and individual calculations." *Id.* at 3.[2]

Beyond this motion practice, the parties have participated in three full-day mediation sessions. The parties first agreed to mediate the action in 2017 and retained Brian Mone of Commonwealth Mediation and Conciliation, Inc. to serve as the mediator. Klein Prelim. App. Aff. at ¶ 4. On July 11, 2017, Mr. Mone conducted a full-day mediation; however, the parties were unable to reach agreement at the time. *Id.* Following the discovery and motion practice discussed above, the parties agreed to a second mediation in the Spring of 2019 and retained the Hon. Antonio C. Robaina (Ret.) to serve as the mediator (the "Mediator"). *Id.* at ¶ 5. Judge Robaina conducted two full-day mediation sessions on May 9, 2019, and July 16, 2019. At the conclusion of the mediation on July 16, 2019, the parties both accepted the Mediator's proposed settlement, subject to the satisfaction of certain conditions, including the negotiation of a definitive settlement agreement and approval of the Settlement by the Court. *Id.* The parties thereafter engaged in detailed discussions to negotiate a Memorandum of Understanding and the Settlement Agreement. *See id.* at ¶ 6; *see generally* Settlement Agreement (Klein Prelim. App. Aff. at Ex. 1).

Under the terms of the Settlement, every Class Member who submits a valid claim form will receive $0.0095 per Variable Kilowatt Hour of electricity used from December 1, 2009

[2] In addition to the foregoing motion practice, the parties have also filed and briefed various other motions directed at the pleadings, including motions to strike (*see, e.g.*, [Dkt. Nos. 105.00, 238.00]) and requests to revise (*see, e.g.*, [Dkt. Nos. 126.00, 138.00]).

through September 30, 2016. *See* Settlement Agreement at ¶ 4.2.[3] Notably, this constitutes at least 85% of the Settlement Class' claimed out-of-pocket damages, depending on the methodology used. Specifically, Plaintiff's experts have analyzed Plaintiff's claimed damages under two alternate damages theories.[4]

- Under the first methodology, damages are calculated by comparing the rates charged by Verde to the public utility rates. Here, Verde has provided data showing that Settlement Class Members used a total of 1,028,949,238 Variable Kilowatt Hours. Klein Prelim. App. Aff. at ¶ 7. Based on data also provided by Verde, Plaintiff's experts have calculated that Settlement Class Members overpaid approximately $11,535,920 pursuant to Verde's pricing over contemporaneous public utility rates. *Id.* Accordingly, the average damages allegedly suffered by Settlement Class Members per kWh is $0.0112, and the $0.0095 recovery provided under the Settlement is 85% of that per-kWh damages amount.
- Under the second methodology, damages are calculated by comparing the rates charged by Verde to Verde's actual costs plus a reasonable gross margin. Under this methodology, Plaintiff's expert calculated that Settlement Class Members suffered approximately $7,729,775 in damages. Klein Prelim. App. Aff. at ¶ 8. Accordingly, the average damages suffered by Settlement Class Members under this methodology

[3] Insofar as Verde began transitioning to a form of contract in October 2015 that included an arbitration clause and class action waiver, thereby cutting off the Class' claims for new enrollees thereafter, Plaintiff respectfully submits that the closing date for recoverable losses is reasonable. *See also* n. 10 below.

[4] Plaintiff's expert has used the data provided to-date by Verde to calculate damages under both of the methodologies, which data he believes to be sufficient to calculate a reliable and accurate estimate of damages. However, should the Settlement not proceed for any reason and the parties resume litigation, Plaintiff intends to conduct further discovery as necessary.

is $0.0075, meaning that the $0.0095 per kWh payment under the Settlement would constitute more than full recovery of Settlement Class Member damages.

Verde's total liability for Settlement payments to Claimants is capped at $6 million; should the total calculated loss from Valid Claims exceed that amount, all payments will be proportionally reduced to meet the cap. *See* Settlement Agreement at ¶ 4.1.

Plaintiff and his counsel also negotiated the amount to be paid by Verde for fees and an incentive award under the oversight and with the assistance of Judge Robaina. Klein Prelim App. Aff. at ¶ 9. These negotiations occurred only ***after*** agreement on the substantive amounts to be paid to Class Members had been finalized. *Id*. With Judge Robaina's participation, Verde agreed to pay up to $1,500,000 in attorneys' fees and expenses and up to a $5,000 case contribution award to Plaintiff. Settlement Agreement at ¶ 6.2.a. Notably, Verde has reserved the right to ***object*** to any request for attorneys' fees and expenses, ensuring that any such award of fees and expenses will be the result of an adversarial process and ***not*** the result of any type of collusion. *Id*. Moreover, the Settlement is ***not*** contingent upon approval of these attorneys' fees and expenses, or on any incentive award. *Id.* at ¶ 6.2.d. Rather, the Court's determination of the appropriate amount of fees, costs, and expenses to award to Class Counsel and the appropriate amount of any award to Plaintiff will have no impact on the finality of the Settlement. Nor are Class Members adversely affected by the fees or Lead Plaintiff award that Class Counsel seek. Pursuant to the Settlement Agreement (at ¶ 6.2.c.), Verde has agreed to pay any fees, expenses and case contribution award using its own resources, which means that these payments will ***not*** reduce the benefits provided to Class Members.[5]

[5] Where, as here, "the parties agree to a fee that is to be paid separately by the Defendant[] rather than one that comes from, and therefore reduces, the Settlement Fund available to the class, the

This Court granted preliminary approval to the Settlement on October 21, 2019 [Dkt. No. 262.00] and, *inter alia,* appointed Heffler Claims Group ("Heffler") as Claims Administrator. Pursuant to the Notice Plan approved by the Court, Heffler sent direct mail Notice to the 116,681 Class Members after running the addresses provided by Verde through the U.S. Post Office's national change of address database. Affidavit of Scott Fenwick (Chief of Operations at Heffler) ("Heffler Aff.") at ¶ 4. When 18,752 of those mailed Notices were returned to Heffler as undeliverable, Heffler traced the relevant individuals through an additional private database search and has completed remailing of 13,525 Notices to those Class members for whom Heffler was able to identify a new address. *Id.* at ¶ 12.

Although objections and requests to opt out need not be submitted until January 20, 2020, to date ***no*** Class Members have objected, and none have opted-out. *See* Court docket (lack of objections); Heffler Aff. at ¶¶ 13-14.[6]

Over the course of the litigation, from investigation January 2, 2020, IKR has expended 1,345.25 hours of time with a lodestar of $1,056,705.00. *See* Klein Final App. Aff. at ¶¶ 6-9. Moreover, Class Counsel's current expenses are $112,920.74. *Id.* at ¶¶10-11. Accordingly, the $1,500,000 cap on Verde's payment for fees and expenses constitutes only a 1.3 multiple of Class Counsel's lodestar based on work performed to date, after deduction of expenses from the

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Court's fiduciary role in overseeing the award is greatly reduced because the danger of conflicts of interest between attorneys and class members is diminished." *Kemp-DeLisser v. St. Francis Hospital and Medical Center Fin. Committee,* No. 15-cv-1113 (VAB), 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (internal quotation marks and citation omitted).

[6] Plaintiff will update the Court by February 17, 2020 (the date set by the Court for Plaintiff to respond to any objections) as to the number of timely claims, objections and opt-outs received by the Claims Administrator or filed with the Court.

cap. By the time the settlement process is concluded, including addressing future Class Member communications, the multiplier will be even more modest.

## III. THE COURT SHOULD APPROVE THE REQUESTED AWARD OF ATTORNEYS' FEES AND EXPENSES TO BE PAID BY DEFENDANTS TO CLASS COUNSEL

Wholly separate from the substantial recovery available to Class Members in direct cash benefits (as detailed in Plaintiff's accompanying motion for approval of the Settlement), Verde has agreed to pay Class Counsel up to $1,500,000 in attorneys' fees, costs and other litigation expenses (subject to its objection and if so ordered by the Court). Plaintiff respectfully requests that this Court award this $1,500,000 to Class Counsel in attorneys' fees and expenses, constituting 25% of the $6 million in direct cash available for the Class, or 20% of the $7,500,000 ***total*** value obtained for the Class after inclusion of the requested attorneys' fees and expenses (as discussed in Part III.A. below). Plaintiff further respectfully requests that this Court award her $5,000 as a Lead Plaintiff case contribution award in light of her significant personal efforts in prosecuting this litigation. As set forth below, these requests merit approval.

### A. The Full Value of the Settlement Fund Available Is Considered in Awarding Attorneys' Fees

In a claims-made settlement, attorneys' fees awarded as a percentage of a fund should take into consideration the entirety of the aggregate value of the settlement fund, not only that portion received directly by the class members. *See Taylor v. Hartford Casualty Ins. Co.,* No. HHD-CV16-6072110-S (Conn. Super.) (Moukawsher, J.), at [Dkt. No. 150.00] dated September 12, 2019 ("*Taylor* Fee Order"), ¶¶ 1-3.

As the United States Supreme Court has observed, where plaintiffs obtain a claims-made settlement, they "have recovered a determinate fund for the benefit of every member of the class

whom they represent." *Boeing, Co. v. Van Gemert,* 444 U.S. 472, 479 (1980). Absent Class Members' "right to share the harvest of the lawsuit upon proof of their identity, ***whether or not they exercise it***, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Id.* at 480 (emphasis added). This is true even where a defendant has the right "to the return of money eventually unclaimed[,] contingent on the failure of absentee class members to exercise their present rights" to the money. *Id.* at 482. Accordingly, the Second Circuit held in *Masters v. Wilhelmina Model Agency, Inc.* 473 F.3d 423, 437 (2d Cir. 2007), that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available whether claimed or not. We side with the circuits that take this approach." The Court further noted that "[o]ur own cases refer to 'percentage of the fund,' and 'percentage of the recovery.' We take these references to be to the whole of the Fund." *Id.*(emphasis in original, citations omitted).

As noted above, courts in this state have looked to the ***entire*** fund created by class counsel's efforts in assessing attorneys' fees. *See Taylor* Fee Order at ¶¶ 1-3. Likewise, federal courts in Connecticut have routinely cited *Boeing* and *Masters* to hold that class counsel are entitled to a percentage of the ***entire*** fund their efforts create, regardless of how much absent class members claim from the fund and whether unclaimed amounts revert to Defendants. *See Kiefer v. Moran Foods, LLC*, No. 12-cv-756, 2014 WL 3882504, at *8 (D. Conn. Aug. 5, 2014) (Young, J.) ("In applying the common fund method, the Supreme Court, the Second Circuit, and other Circuit Courts, have held that it is appropriate to award attorneys' fees as a percentage of the entire maximum gross settlement fund, even where amounts to be paid to settlement class members who do not file claims will revert to the Defendants"); *Bozak v. FedEx Ground*

*Package Sys., Inc.*, No. 11-cv-00738, 2014 WL 3778211, at *6 (D. Conn. July 31, 2014) (same); *Caitflo LLC v. Sprint Communications Co., LP*, No. 11-cv-00497, 2013 WL 3243114, at *2 (D. Conn. June 26, 2013) (same); *Aros v. United Rentals, Inc.*, No. 10 Civ. 73, 2012 WL 3060470, at *5 (D. Conn. July 26, 2012) (same).[7] Plaintiff respectfully submits that this Court should follow this long-established precedent as well.

Moreover, it is appropriate to include ***both*** the amount made available to the class ***and*** the amount of attorneys' fees and expenses requested to determine the value of the total fund for purposes of determining the percentage of the fund the fee request represents. *See, e.g., Taylor* Fee Order at ¶¶ 1-3; *Torres v. Gristede's Operating Corp.*, 519 F. App'x 1,5 (2d Cir. 2013); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery."); Manual for Complex Litigation, Fourth, § 21.71 p. 525 ("If an agreement is reached

[7] Courts elsewhere in this Circuit also routinely follow *Masters* and *Boeing*. *See Hart v. RCI Hospitality Holdings, Inc.*, No. 09 Civ. 3043, 2015 WL 5577713, at *17 (S.D.N.Y. Sept. 22, 2015) ("Circuit precedent supports taking the gross monetary settlement into account when calculating the percentage of the fund … even when unclaimed funds were to revert to the defendants"); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405, 2015 WL 10847814, *16 n.10 (S.D.N.Y. Sept. 9, 2015) (citing *Masters*); *In re Nigeria Charter Flights Litig.*, No. 04-cv-304, 2011 WL 7945548, at *5 (E.D.N.Y. Aug. 25, 2011) (citing *Masters* and rejecting argument "that due to the reversionary aspect of the fund, the proper analysis is to compare the fees sought to the actual claims made by the class members"); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (GEL), 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (quoting *Masters*, 473 F.3d at 437) ("[T]his Circuit has ruled that '[a]n allocation of fees by percentage should therefore be awarded on the basis of total funds made available whether claimed or not.'"); *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 443 (S.D.N.Y. 2004) (noting that attorneys' fees equivalent to one-third of common fund of $18.4 million was approved notwithstanding that only $5.6 million of the $18.4 was claimed by class members with the remaining $11.8 million unclaimed and reverting to the defendants); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 14:6, at 570 (4th ed. 2002) (stating that *Boeing* settled the issue of whether the benchmark common fund amount for fee award purposes is made up of the amount claimed by class members or the amount potentially available to class members by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed).

on the amount of a settlement fund and a separate amount for attorney fees and expenses . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class ....").[8]

**B. Class Counsel Is Entitled to a Reasonable Fee**

The Supreme Court has held that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing at* 478; *see also Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007). The rationale is to compensate counsel fairly and adequately for their services and to prevent unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. The Connecticut Supreme Court has specifically affirmed this rationale. *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 511, 517-18, 970 A.2d 583, 588-89 (2009) (citing *Boeing* for the proposition that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."). In addition, courts have recognized that awards of fair attorneys' fees from a common fund should serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore to discourage future misconduct of a similar nature. *See Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the

[8] *See also Hubbard v. Donahoe*, No. 03 Civ. 1062 (RJL), 2013 WL 3943495, at *4, 8 (D.D.C. July 31, 2013) (collecting cases); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1072 (S.D. Tex. 2012); *Lopez v. Youngblood*, No. 07 Civ. 0474 (DLB), 2011 WL 10483569, at *12 (E.D. Cal. Sept. 2, 2011) (awarding 28.5% of the recovery where attorneys' fees were paid separate and apart from benefit to the class and citing with approval *Johnston* and *In re Vitamins Antitrust Litig.*, No. 99 Civ. 197 (TFH), 2001 WL 34312839, at *4 (D.D.C. July 16, 2001)); *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 121 (D.D.C. 2007).

public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted).

### C. This Court Should Use the Percentage Method to Evaluate the Reasonableness of Plaintiff's Attorneys' Fees Request

There was little precedent in Connecticut Courts relating to the best means for calculating attorneys' fees in a common fund case prior to a few years ago. Two common methods have been used by courts around the country. The percentage method awards counsel a percentage of the total award received by the class, while the lodestar approach multiplies the number of hours reasonably billed by the reasonable hourly rate (the "lodestar"). *See Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir. 1999). Under the latter method, a court may adjust the "lodestar," applying a multiplier after considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issues. *See In re Agent Orange Product Liab. Litig.,* 818 F.2d 226, 232 (2d Cir. 1987). The enhancement of lodestar amounts by a factor of 4-5 is common. *Towns of New Hartford & Barkhamsted v. Connecticut Res. Recovery Auth.,* No. CV040185580S(X02), 2007 WL 4634074, at *6, 10 (Conn. Super. Ct. Dec. 7, 2007).

In the *New Hartford* litigation, then-Judge Eveleigh carefully reviewed recent jurisprudence on the subject, and concluded that the fee award in a common fund case should generally be set as a percentage of the common fund, rather than through the older "lodestar" method. *Id* at *8 (citing federal cases from the Second Circuit and finding that this was also the approach of the First, Third, Sixth, Seventh, Ninth and Tenth Circuits). The court found that the percentage method was simpler and more efficient (avoiding "an otherwise 'gimlet-eyed review' of counsel's detailed lodestar"), allowed for consideration of the same factors used to determine

the appropriate multiplier in a lodestar case, and avoided "'an unanticipated disincentive to early settlements' created by the lodestar method." *Id.* (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000). On appeal, the Connecticut Supreme Court turned back defendant's challenge to the award of fees, while citing with approval the trial court's methodology, finding it to be a "comprehensive analysis:"

> [T]he [trial] court compared the percentage award of attorney's fees in the present case to other recent class actions. It then examined the six factors set forth by the United States Court of *Appeals* for the Second Circuit to determine the reasonableness of the fee in a common fund *class* action: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the result; and (6) public policy concerns. See *Goldberger v. Integrated Resources, Inc.*, supra, 209 F.3d at 50.

*Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 511, 515 & n.6, 970 A.2d 583, 587 (2009). Plaintiff respectfully submits that this Court should apply the *Goldberger* factors as approved by the Connecticut Supreme Court and award a fee in accordance with the percentage of the common fund method.

**D. The Requested Fees Are Reasonable**

An analysis of the facts in this case in light of the *Goldberger* factors demonstrates that the requested $1,500,000 award of attorneys' fees and expenses (or 25% of the Settlement cash value and 20% of the total Settlement value) is reasonable.

**1. Counsel's Time and Labor**

There is no question that Settlement Class Counsel expended significant time and effort to bring this litigation to a successful resolution. As detailed above, counsel have devoted substantial time and effort to this case for over four years, through significant discovery (including expert reports and depositions of Plaintiff and her experts) and lengthy motion

practice (including a motion for class certification (which the Court granted), a motion to decertify the class (which the Court denied), and multiple cross-motions for summary judgment (which the Court granted to Plaintiff in part and denied to Defendant)). Even when courts do not employ the lodestar method to determine fees, they often consider the lodestar calculation in evaluating a requested percentage fee, although "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, at 50. As discussed above, a review of counsel's contemporaneous records indicates that they collectively spent 1,345.25 hours of attorney time with an aggregate lodestar of $1,056,705.00. *See* Klein Final App. Aff. at ¶¶ 6-9.[9] Once Class Counsel's expenses of $112,920.74 (Klein Final App. Aff. at ¶ 10-11; *see also* Part III.E below) are deducted from the combined $1,500,000 fee and expense request, that leaves a fee request of $1,387,079.26, which constitutes a 1.31 multiple. Such a multiple is far less than the multipliers of three, four or even five routinely approved in other cases. *See, e.g., Towns of New Hartford*, 2007 WL 4634074, at *10 ("In cases where counsel have undertaken a difficult matter on a contingency basis and have secured a favorable result for the class, the normal multiplier is 4-5 times the lodestar.") (citing *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177, at *17 (S.D.N.Y. July 27, 2007)); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (finding a multiplier of 3.5 to be reasonable). As in *Town of New Hartford*, there can be no question of counsel obtaining a "windfall." *See* 291 Conn. 511,

[9] The hourly rates for Class Counsel are the same as the regular current rates charged for services in non-contingent matters and/or that have been accepted and approved in class action litigation in other courts throughout the country. Klein Final App. Aff. at ¶ 9.

515 & n.6 (approving the trial court's lodestar cross-check analysis and finding no windfall where the lodestar multiple was over 2).

**2. The Relationship of the Requested Fee to the Settlement**

The requested attorneys' fee is well below the standard range in this Court and in the Second Circuit. Once Plaintiffs' counsel's expenses of $112,920.74 (*see* Klein Final App. Aff. at ¶¶ 10-11) are deducted from the $1,500,000 fee-and-expense cap, that leaves $1,387,079.26 for attorneys' fees, which is only 18.5% of the total Settlement Value (including requested fees). This percentage is well below the typical fee award in Connecticut state and federal courts. For example, this Court (Moll, J.) approved a 32% fee award in *Gruber v. Starion Energy Inc.*, No. X03HHDCV176075408S, 2017 WL 6262409, at *1 (Conn. Super. Nov. 13, 2017). Indeed, a request of one-third – much higher than is being sought here – is "typical of awards in this Circuit." *Bozak v. FedEx Ground Package Sys., Inc.*, No. 3:11-CV-00738-RNC, 2014 WL 3778211, at * 7 (D. Conn. July 31, 2014); *Capsolas v. Pasta Resources Inc.*, No. 10 Civ. 5595, 2012 WL 4760910, at *8 (S.D.N.Y. Oct. 5, 2012) (fee request of one-third is "consistent with the norms of class litigation in this circuit") (internal quotation marks omitted); *Willix v. Healthfirst Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (same). Accordingly, the percentage fee in relation to the Settlement is reasonable, especially given the complexity and novelty of the case, the attendant litigation risks, and the effort Settlement Class Counsel expended to reach a Settlement, as discussed below.

**3. The Risks of Litigation**

The *Goldberger* court identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable award of attorneys' fees]." *Goldberger*, 209 F.3d at 54 (citation omitted). Courts have noted that the *Goldberger* risk analysis overlaps with risk

analysis performed in evaluating the fairness of a settlement. *See In re Priceline.com*, 2007 WL 2115592, at *3-5 (D. Conn. 2007) (noting that risk analysis concerning attorney fee award is similar to risk analysis with respect to settlement fairness).

Here, although Class Counsel believe that Plaintiff's claims are meritorious, Defendant has raised significant issues concerning Plaintiff's ability to prove legal liability and damages. Accordingly, there is a substantial risk that, absent the Settlement, Plaintiff could not achieve a better result for the Class through continued litigation. For example, Defendant has vigorously argued, and likely would continue to argue absent the Settlement, that, *inter alia*, Plaintiff cannot establish causation; Plaintiff cannot establish monetary damages and at most is entitled to injunctive relief; and Plaintiff and the Settlement Class failed to mitigate their damages. *See, e.g.*, [Dkt. No. 214.00]. The Court has expressly held that at least some of these issues, such as entitlement to and amount of damages, remain open. *See* [Dkt. No. 240.00] at 3-4 (damages "will depend on the facts" and "the court could find the class made it over the ascertainable loss threshold but was tripped up by its failure to prove a specific credible damages amount"). Although Plaintiff is confident that she can prove specific damages through her expert, there is a genuine risk that the Court or fact-finder at trial could disagree, in which case Settlement Class Members could receive nothing. Moreover, even if Plaintiff prevails at trial, Verde will undoubtedly appeal, raising the risk, again, that the Settlement Class could receive nothing.

Settlement Class Counsel have received no compensation during the course of this litigation despite having made a significant time commitment and incurred significant expenses to bring this action to a successful conclusion for the benefit of the Class. Any fee award or expense reimbursement to Settlement Class Counsel has always been contingent on the result achieved and on this Court's exercise of its discretion in making any award. "Settlement Class

Counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated." *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990). *See also City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in relevant part*, 495 F.2d 448 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success"). Settlement Class Counsel certainly faced – and accepted – substantial risks when they decided to bring this case. Accordingly, this factor argues strongly in favor of Plaintiff's requested attorneys' fee award.

**4. The Complexities and Magnitude of the Litigation**

This case is a class action lawsuit concerning variable rate pricing policies that have affected over 116,000 Class Members. The complexities involved in this litigation weigh in favor of awarding fees to counsel for a number of reasons, including the uncertainty of the legal claims, the difficulty of establishing damages and liability and the likelihood of long and difficult litigation. For example, in addition to the complexities and difficulties inherent in any class action, this litigation involves many substantial legal issues relating to consumer protection and contract law. The costs and risks associated with litigating this litigation to a verdict, not to mention through the inevitable appeals, would have been high, and the process would require many hours of the Court's time and resources. Further, even in the event that the Class could recover a larger judgment after a trial – which, as discussed above, is far from certain, both because of the inherent litigation risks ***and*** because the Settlement ***already*** provides Class Members with essentially complete (or more than complete) relief – the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for years,

further reducing its value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation…the passage of time would introduce yet more risks…and would, in light of the time value of money, make future recoveries less valuable than this current recovery")

**5. Quality of Class Counsel's Representation**

To evaluate the "quality of the representation," courts applying the Second Circuit's *Goldberger* factors have "review[ed] the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *See In re Merrill Lynch Tyco Research Sec. Litig*., 246 F.R.D. 156, 174 (S.D.N.Y. 2007) (citation omitted). In light of the risks involved in the litigation, a settlement worth $6 million in cash is a good result. Moreover, Settlement Class Counsel are experienced class action and consumer litigators. *See* Klein Prelim. App. Aff. at Ex. 2.

The quality of opposing counsel is also important in evaluating the quality of the services rendered by Settlement Class Counsel. *See In re Merrill Lynch Tyco Research Sec. Litig*., 246 F.R.D. at 174. Defendants were ably represented by Wiggin and Dana, an undeniably prominent firm with an excellent litigation reputation. Accordingly, this factor supports Plaintiff's fee request.

**6. Considerations of Public Policy**

Public policy considerations support the requested fee. Where individual class members suffer real damages, but the amount at issue is too small in comparison to the costs of litigation

to justify filing an individual suit, "the class action mechanism and its associate percentage-of-recovery fee award solve the collective action problem" and allow plaintiffs an opportunity to obtain redress. *Hicks,* 2005 WL 2757792, at * 9. As the *Hicks* court further observed, "[t]o make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Id.; see also Bozak v. FedEx Ground Package Sys., Inc.,* No. 3:11-CV-00738-RNC, 2014 WL 3778211, at *6-7 (D. Conn. July 31, 2014) ("Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill that role must be adequately compensated for their efforts"); *Maley v. Del Glob. Techs. Corp.,* 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (finding it is "imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks of pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts.").

**7. Reaction of the Class**

Although not a formal *Goldberger* factor, the reaction by members of the Class is entitled to great weight by the Court. *See In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 996 (D. Minn. 2005) (stating that number and quality of objections enables court to gauge reaction of class to request for award of attorneys' fees). "[N]umerous courts have [noted] that the lack of objection from members of the class is one of the most important . . ." factors in determining reasonableness of the requested fee. *In re Prudential Sec. Ltd. P'ships Litig.*, 985 F. Supp. 410, 416 (S.D.N.Y. 1997) (internal quotations omitted); *see also Town of New Hartford*, 291 Conn. 511, 515 (noting with approval that the trial court had found there were no objections to the proposed fee award).

Here, 116,681 individual Notices were sent out to Class Members. Affidavit of Scott Fenwick (Chief of Operations at Heffler) ("Heffler Aff.") at ¶ 4. The Notices clearly set forth that Settlement Class Counsel would apply for an award of fees and expenses of up to $1,500,000. *See* Heffler Aff. at ¶ 7 and Ex. A. Although objections and requests to opt out are not due until January 20, 2020, as of the date of this filing, ***no*** Class Member has filed an objection to the Settlement or to the provisions for an award to the Plaintiff or to counsel for fees and expenses, and ***no*** Class Member has opted out. *See* Court docket (lack of objections); Heffler Aff. at ¶¶ 13-14.

Likewise, although claims also are not due until January 20, 2020, Class Members have filed 4,376 claims (constituting over 3.75% of the Class) to date. *See* Heffler Aff. at ¶ 10. Plaintiff will update the Court by February 17, 2020 (the date set by the Court for Plaintiff to respond to any objections) as to the number of timely claims, objections and opt-outs received by the Claims Administrator or filed with the Court. However, to date, this factor appears to support the application for fees.

### E. The Expenses Settlement Class Counsel Incurred Were Reasonable and Necessary to the Effective Prosecution of this Action

"It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007). Settlement Class Counsel requests reimbursement for $112,920.74 in expenses they incurred while prosecuting this action, the vast majority of which ($99,728.75) were for expert expenses. *See* Klein Final App. Aff. at ¶¶ 10-11. Settlement Class Counsel have reviewed these expenses carefully and determined that these

expenses were reasonably incurred and were necessary to the successful prosecution of this action.

* * *

Plaintiff respectfully suggests that the proposed fee and expense award of $1,500,000 is supported by all of the *Goldberger* factors. Moreover, Plaintiff respectfully submits that Defendant's reservation of its right to challenge Plaintiff's fee and expense application further ensures the fairness and integrity of any fee and expense award.[10] Accordingly, Plaintiff respectfully requests that the Court award $1,500,000 ($1,387,079.26 in fees and $$112,920.74 in expenses) to Settlement Class Counsel.

### F. Lead Plaintiff Constance Jurich Should Receive a Case Contribution Award

Plaintiff and Settlement Class Counsel respectfully submit that Plaintiff Constance Jurich should receive a case contribution award of $5,000 in recognition of the substantial time and effort she contributed to the prosecution of this litigation. Pursuant to the Settlement Agreement, Verde has agreed to pay this award using its own resources, which means, as with Class Counsel's request for attorneys' fees and expenses, this payment will not reduce the benefits provided to Class Members. Moreover, as with the fee request, the service award request was subject to arm's length negotiations between parties and was adequately disclosed in advance to the Class. The Notice provides that Plaintiff will seek up to $5,000 (*see* Heffler Aff. at Ex. A), and no objection has been received to date.

[10] Plaintiff will, of course, respond to any objection to Plaintiff's fee request that Defendant may file no later than February 17, 2020 (seven days before the February 24, 2020 Fairness Hearing), in accord with the briefing schedule set by this Court for Plaintiff to respond to objections generally. *See* [Dkt. No. 262.00] at ¶ 7.

Providing named plaintiff contribution awards to consumers who come forward to represent a class is a necessary and important component of any class action settlement. *See Hall v. ProSource Technologies, LLC*, No. 14 Civ. 2502 (SIL), 2016 WL 1555128, at *9 (E.D.N.Y. Apr. 11, 2016) ("Courts regularly grant requests for service awards in class actions to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.") (internal quotations and citations omitted); *Viafara v. MCIZ Corp.*, No. 12 Civ. 7452 (RLE), 2014 WL 1777438, at *16 (S.D.N.Y. May 1, 2014); *Elliot v. Leatherstocking Corp.*, No. 10 Civ. 0934 (MAD) (DEP), 2012 WL 6024572, at *7 (N.D.N.Y. Dec. 4, 2012). Plaintiff voluntarily submitted herself to public scrutiny by bringing a class action claim.

Moreover, Plaintiff has been highly motivated and involved in prosecuting this litigation. *See* Klein Final App. Aff. at ¶ 12). Plaintiff responded to interrogatory and document production requests; sat for deposition against experienced and aggressive counsel; and consulted regularly with Class Counsel regarding the conduct of this case. *Id.* Awards of equal or greater amounts than $5,000 are routinely awarded by courts to compensate class plaintiffs for their efforts. *See, e.g., Taylor* Fee Order at ¶ 4 (awarding plaintiff $7,500); *Annelli v. Ford Motor Co.*, No. 044001345S, 2008 WL 2966981, at *4 (Conn. Super. Ct. July 8, 2008) (awarding plaintiff $7,500); *Gray v. Found. Health Sys., Inc.*, No. X06CV990158549S, 2004 WL 945137, at *4 (Conn. Super. Ct. Apr. 21, 2004) (approving awards of $23,333 for each plaintiff); *Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 354 (D. Conn. 2009) (awarding $20,000 to named plaintiff as "reasonable and equitable" for the time she spent "working with Settlement Class Counsel to prosecute and resolve this case").

Without Plaintiff's willingness to serve in this litigation and perform significant work on behalf of the Class, the favorable settlement for the entire class would not have been possible. Indeed, "public policy favors such an award. As already noted, were it not for this class action, many of the plaintiffs' claims likely would not be heard." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). Plaintiff's participation was substantial and indispensable. Accordingly, Plaintiff and Settlement Class Counsel respectfully request that this Court award Plaintiff a case contribution award of $5,000.

## IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court enter an order approving (1) an award of Attorneys' Fees and Expenses in the amount of $1,500,000 ($1,387,079.26 in fees and $112,920.74 in expenses), to be paid in accord with the terms of the Settlement Agreement; and (2) an incentive award of $5,000 to Plaintiff Constance Jurich.

Dated: January 3, 2020

THE PLAINTIFF

BY /s/ Seth R. Klein

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**CERTIFICATION**

I certify that on this 3rd day of January, 2020, a copy of the foregoing was sent by email to all counsel of record as follows:

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_/s/ Seth R. Klein_____
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