DOCKET NUMBER X07-HHDCV15-6060160-S

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MODIFICATION OF THE CERTIFIED CLASS DEFINITION AND MOTION FOR APPROVAL OF CLASS ACTION SETTLEMENT

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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 Modification of the Certified Class for purposes of defining the Settlement Class and Approval of Class Action Settlement.[1]

I. INTRODUCTION

Plaintiff's Fourth Amended Class Action Complaint in this action (which was filed on December 18, 2018 and is the operative complaint) brings claims on behalf of herself and other similarly-situated consumers against the defendant, Verde Energy USA, Inc. ("Verde" or "Defendant"), alleging that Verde agreed in its contracts with customers that its variable rate for electricity supply services would fluctuate to reflect changes in "market conditions" while in practice they failed to do so, and 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* Fourth Amended Complaint [Dkt. No. 234] (the "FAC") at ¶¶ 19-28, 41-67.[2]

Defendant denies any liability with respect to the claims in the FAC and maintains that it did nothing improper. However, given the uncertainties of litigation, the parties agreed to three days of mediation, the latter two of which were before the Honorable Antonio C. Robaina (Ret.). With Judge Robaina's assistance, the parties agreed to a settlement that will pay Claimants

[1] In conjunction with the present motion for approval of the Settlement and this memorandum of law in support thereof, Plaintiff is also filing a separate Motion for Award of Attorneys' Fees and Expenses and for Case Contribution Award and a separate memorandum of law in support of that motion. A copy of both Motions and Memoranda are being posted to the Settlement website upon filing.

2 All subsequent references to ¶__ and ¶¶__ herein are to the FAC unless otherwise specified.

$0.0095 per variable rate Kilowatt Hour they consumed through September 30, 2016. As detailed below, this constitutes at least 85% and potentially ***more than 100%*** of the damages suffered by each Class Member (depending on the damages methodology used). Plaintiff respectfully submits that this is an excellent result, especially considering the legal hurdles faced by Plaintiff to prevailing at (or even reaching) trial.[3] A copy of the full Settlement Agreement is attached as Exhibit 1 to the previously-filed Affidavit of Seth R. Klein in Support of Preliminary Approval [Dkt. No. 258.00] ("Klein Prelim. App. Aff.").

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 preliminary approval Order, Heffler sent Notice of the proposed Settlement to all Class Members on November 20, 2019. As of the date of this filing, ***no*** Class Members have objected or opted-out.

Plaintiff now requests that the Court modify, for purposes of the Settlement, the definition of the already-certified Class (as set forth in Part II below) and grant final approval of the proposed settlement. As explained in detail below, the Settlement is fair, reasonable and adequate. It successfully resolves a challenging case and allows thousands of class members to receive a very substantive recovery. Accordingly, Plaintiff moves the Court for entry of an order:

(1) modifying, for purposes of the Settlement, the definition of the certified Class (*see* [Dkt. No. 180.00]), to clarify the beginning and end dates for the Class Period;

[3] Injunctive relief is unnecessary here as Verde by law no longer offers new variable rate contracts.

(2) Confirming the appointment of Constance Jurich as Lead Plaintiff;

(3) Confirming the appointment of Seth Klein and Robert Izard of Izard Kindall & Raabe LLP as Class Counsel to the Settlement Class; and

(4) Approving the Settlement as set forth in the Settlement Agreement.

II. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Practice Book §§ 9-7 and 9-8. *See* Practice Book § 9-9 (directing the Court to apply factors in preceding sections when certifying and managing a class action). By order of December 6, 2017, this Court has ***already*** certified the following class:

> All individual residential and small business consumers who enrolled (either initially or through "rolling over" from a fixed rate plan) in a Verde Energy USA, Inc. variable rate electricity plan in connection with a property located within Connecticut at any time within the applicable statute of limitations preceding the filing of this action through and including the date of class certification, excluding persons whose only contract with Verde contained a "Governing Law and Arbitration" clause (as first introduced in or about October 2015).
>
> Specifically excluded from the Settlement Class are: the Defendant; the officers, directors, shareholders, and employees of Defendant; any entity in which Defendant has a controlling interest; any affiliate or legal representative of Defendant; the Judge to whom the Action is assigned, his staff and any member of their immediate family; and any heirs, assigns and/or successors of any such persons or entities in their capacity as such.

See [Dkt. No. 180.00] at 6. With Defendant's consent, Plaintiff, for Settlement purposes only, respectfully requests that the Court slightly modify its previous class definition to set specific dates for the start and end of the Class Period, as follows:

> All individual residential and small business consumers who enrolled (either initially or through "rolling over" from a fixed rate plan) in a Verde Energy USA, Inc. variable rate electricity plan, from December 1, 2009 through, and including, October 31, 2015, in connection with a property located within Connecticut,

> excluding persons whose only contract with Verde contained a "Governing Law and Arbitration" clause.
>
> Also excluded from the Settlement Class are: (a) the Defendant; (b) the officers, directors, shareholders, and employees of Defendant; (c) any entity in which Defendant has a controlling interest; (d) any affiliate or legal representative of Defendant; (e) the Judge to whom the Action is assigned, his staff and any member of their immediate family; and (f) any heirs, assigns and/or successors of any such persons or entities in their capacity as such.

See Settlement Agreement at ¶¶ 2.12 and 2.37 and Exhibits D and E thereto. This proposed "Settlement Class" definition clarifies the Class Period in only two ways:

- First, the Settlement Class definition specifies that the Class Period begins on December 1, 2009 (rather than "at any time within the applicable statute of limitations"). The December 1, 2009 date is within the longest (six year) statute of limitations available under Plaintiff's claims in the Fourth Amended Complaint and stretches back to Verde's earliest customer contracts in Connecticut.
- Second, the Settlement Class definition specifies that the Class Period ends with customers who enrolled in Verde through October 31, 2015. As this is the date by which Verde finished transitioning to contracts that included a "Governing Law and Arbitration" clause for new enrollees (as referenced in the class definition previously certified by the Court), this proposed modification of the class definition has no substantive effect.[4]

[4] Although the Settlement Class only includes customers who ***enrolled*** with Verde through October 31, 2015, those Settlement Class Members who enrolled by that date will receive payments for variable electricity purchases through September 30, 2016, to reflect the fact that Settlement Class Members who enrolled by October 31, 2015, continued to purchase electricity pursuant to their old contract. Plaintiff respectfully submits that cutting off compensation for electricity purchased after September 30, 2016, constitutes a reasonable compromise for Settlement purposes.

Beyond these minor technical changes, the Court's thorough analysis in its December 6, 2017, Order remains fully relevant, and the above definitional modifications do not impact that analysis in any way. As this Court held, certification was (and is) proper "because liability focuses on common questions of standard contract language and its conformity with the law." [Dkt. No. 180.00] at 1. Accordingly, Plaintiff respectfully submits that the Court should modify that Class definition as set forth above for purposes of Settlement and of defining the Settlement Class.

III. APPOINTMENT OF CLASS COUNSEL AND LEAD PLAINTIFF

Practice Book Section 9-9(d) provides that "a court that certifies a class must appoint class counsel." Plaintiff respectfully requests that the Court confirm its prior appointment of Seth Klein and Robert Izard of Izard Kindall & Raabe LLP ("IKR") as Class Counsel for the Settlement Class. *See* [Dkt. No. 180.00] at p. 7 (appointing Class Counsel). IKR and its attorneys clearly satisfy all requirements for appointment, as set out in Practice Book Section 9-9(d)(1). IKR identified and investigated the legal claims alleged in the Complaint prior to filing suit and have demonstrated over the course of the past four-and-a-half years of litigation their willingness to commit all resources necessary to the successful prosecution of the case. Moreover, IKR has a long and successful record of litigating class action cases both in Connecticut and around the country, including other similar cases against third party electricity suppliers. *See* Klein Prelim. App. Aff. at Ex. 2 (IKR Firm Resume).

The Court should also confirm its appointment of Constance Jurich as Lead Plaintiff. *See* [Dkt. No. 180.00] at p. 7. As set forth in her accompanying affidavit, Ms. Jurich has been exceptionally involved in prosecuting this litigation, including producing documents, responding to interrogatories, and sitting for deposition. 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) at ¶ 12. Jurich has also remained closely involved both in monitoring and supervising the conduct of the case. *Id.* Accordingly, Jurich has diligently discharged her responsibilities as a Lead Plaintiff and putative Class Representative.

IV. THE SETTLEMENT SHOULD BE APPROVED

Plaintiff and Class Counsel respectfully submit that the Settlement is fair and reasonable in light of the risks of continued litigation and should be approved by this Court.

A. The Standard for Approval

Public policy strongly favors the pretrial settlement of class action lawsuits. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003); *see also In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *1 (S.D.N.Y. Nov. 20, 2008) ("The settlement of complex class action litigation is favored by the Courts.") (citations omitted). Connecticut Practice Book § 9-9(c) requires judicial approval for any compromise of claims brought on a class basis, and approval of a proposed settlement is a matter within the discretion of the court. *See, e.g., Rabinowitz v. City of Hartford*, No. HHD-CV-075008403S, 2014 WL 3397831 (Conn. Super. Ct. June 3, 2014). As discussed above, because Connecticut jurisprudence governing class actions "is relatively undeveloped" (*Collins v. Anthem Health Plans, Inc.*, 266 Conn. 12, 32 (Sept. 30, 2003)), Connecticut courts have historically looked to federal case law for guidance in construing Connecticut's class action requirements. *Id.*

Courts traditionally consider nine factors in deciding whether to grant final approval of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted).

In addition, on December 1, 2018, amendments to Fed. R. Civ. P. 23 took effect. The new Rule directs courts to consider the following factors in determining whether a proposed settlement is "fair, reasonable and adequate:"

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Although it is not yet clear whether Connecticut courts will use the standards in the amended Rule 23(e), the amendment effectively codifies factors that courts around the country, including Connecticut, were already evaluating. Accordingly, it provides a useful framework for analyzing the fairness of a proposed settlement. A review of all of the above factors supports approval of the Settlement.

B. The Settlement Merits Approval

1. The Proposed Settlement Was the Product of Serious, Informed Non-Collusive Negotiations Including Substantial Discovery

Where a settlement is reached only after extensive arm's-length negotiations by competent counsel who had more than adequate information regarding the circumstances of the

action and the strengths and weaknesses of their respective positions, it is entitled to a "strong initial presumption of fairness." *In re PaineWebber Ltd., P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The opinion of experienced counsel supporting the settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). Courts generally presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion, absent evidence to the contrary. Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.28, at 11-59 (3d ed. 1992) (counsel are "not expected to prove the negative proposition of a noncollusive agreement").

Here, 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, and all parties firmly understand the strengths and weaknesses of the claims and defenses at issue. 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.[5]

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

[5] 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]).

Settlement Agreement. *See id.* at ¶ 6; *see generally* Settlement Agreement (Klein Prelim. App. Aff. at Ex. 1).

Given the foregoing litigation and settlement history, Plaintiff asserts that there is no question that the Settlement is the result of serious, non-collusive negotiations. The litigation was hard-fought, and settlement was reached only after extensive motion practice that fully developed the legal claims and defenses at issue, and, even then, only after arms'-length negotiations with the assistance of a Judge Robaina, who was directly involved in the discussions setting forth the essential terms of the Settlement and recommended the final substantive terms to both parties.

2. The Proposed Settlement Treats All Class Members Equitably Relative to Each Other

Reviewing courts consider whether the terms of a settlement "improperly grant preferential treatment" to "segments of the class." *Kemp-Delisser v. Saint Francis Hosp. and Medical Center*, No. 15-cv-1113 (VAB), 2016 WL 10033380, at *4 (D. Conn. July 12, 2016). Here, there are no such issues. The Settlement provides that ***all*** Claimants will receive the same $0.0095 per Variable Kilowatt Hour of electricity used from December 1, 2009 through September 30, 2016 (¶ 4.2). Notably, this constitutes at least 85% of the Settlement Class' claimed out-of-pocket damages, depending on the methodology used.[6] (Verde's total liability for Settlement payments to Claimants is capped at $6 million; should total calculated loss from

[6] 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* note 4 above.

Valid Claims exceed that amount, all payments will be proportionally reduced to meet the cap. *See* Settlement Agreement at ¶ 4.1.)

Plaintiff's experts have analyzed Plaintiff's claimed damages under two alternate damages theories.[7]

- 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 is $0.0075, meaning that the $0.0095 per kWh payment under the Settlement would

[7] 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.

constitute substantially more than full recovery of Settlement Class Member damages.

Thus, the Settlement provides that any Settlement Class Member who opts to file a Valid Claim will recover at least a significant portion of their claimed losses. Moreover, as every Class Member is entitled to the same $0.0095 per Kilowatt Hour of variable electricity used, no Settlement Class Member is receiving preferential treatment.

Accordingly, the Proposed Settlement treats all members of the Settlement Class equally and fairly.

3. Plaintiff Faced Substantial Risks With Regard to Establishing Liability and Damages

In assessing a proposed settlement, the Court should balance the benefits afforded the Settlement Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Here, Plaintiff's counsel believe that Plaintiff's claims are meritorious and are mindful that the Court has already granted partial summary judgment to Plaintiff. However, Defendant has raised significant issues concerning Plaintiff's ability to prove damages (and liability on Plaintiff's contract and quasi-contract theories). Accordingly, there is a substantial risk that, absent the Settlement, Plaintiff could not achieve a better result for the Settlement Class through continued litigation than the proposed recovery Plaintiff has already achieved through the proposed Settlement.

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.

4. The Settlement is Reasonable in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987). Moreover, the Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted).

Here, the Settlement constitutes an outstanding result, especially given the risk that the Settlement Class would get ***no*** recovery if the case proceeded through litigation. As discussed above, Settlement Class Members will receive at least substantial portion of (if not more than) their total out-of-pocket damages. This constitutes a significant amount of money that fairly compensates Settlement Class Members for the alleged harm they suffered, especially in light of

the foregoing risks of litigation.[8] Although Plaintiff recognizes that CUTPA also provides for punitive damages, Plaintiff believes that, in light of the attendant risks of litigation, the recovery obtained is fair and reasonable.

5. The Complexity, Expense and Likely Duration of the Litigation

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). In addition to the complexities and difficulties inherent in any class action, this litigation involves many substantial and complex 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 Settlement Class could recover a larger judgment after a trial – which, as discussed above, is far from certain – the additional delay through trial, post-trial motions, and the appellate process could deny the Settlement 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.");

[8] Moreover, not only are Class Members eligible to receive essentially their full damages on a per-kWh basis, but Class Members who used significant amounts of electricity are eligible to receive substantial payments in absolute terms as well. For example, of 116,681 Class Members, approximately 14,875 are eligible to receive between $50 and $99.99; a further approximate 23,346 are eligible for awards of $100 to $299.99; approximately 5,221 Class Members are eligible for awards of $300 to $499.99; and approximately 2,242 Class Members are eligible to receive over $500 (including 379 who are eligible to receive over $1,000). *See* Klein Final App. Aff. at ¶ 5.

Strougo, 258 F. Supp. 2d at 261 ("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"). The more time that passes since 2015, when Defendant changed its contracts, the harder it will be to reliably locate Class Members who may have moved.

6. The Reaction of the Settlement Class Supports the Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citation omitted)). There is a "strong indication of fairness" where the "vast majority of class members neither objected nor opted out." *Silverstein v. AllianceBernstein, L.P.*, No. 09 Civ. 05904 (LGS), 2013 WL 7122612, at *5 (S.D.N.Y. Dec. 20, 2013) (citation omitted).

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.

Here, 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. This lack of objection strongly supports the Settlement.

See, e.g., D'Amato v. Deutsche Bank, 236 F.3d 78, 86-87 (2d Cir. 2001) (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement).

Likewise, although claims also are not due until January 20, 2020, Class Members have filed 4,376 claims (constituting 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.

7. The Negotiated Fees and Incentive Awards are Reasonable

As set forth in greater detail in Plaintiff's accompanying Motion for Award of Attorneys' Fees and Expenses and Case Contribution Award, the negotiated fees and incentive awards are reasonable. Specifically, the Settlement Agreement provides that Plaintiff may seek an award of up to $1,500,000 for attorneys' fees and expenses and up to $5,000 for a Lead Plaintiff service award. *See* Settlement Agreement at ¶ 6.2. Notably, Verde has reserved the right to object to Class Counsel's fee and expense application. Plaintiff and her counsel negotiated these amounts under the oversight and with the assistance of Judge Robaina, and these negotiations occurred only ***after*** the substantive amounts to be paid to Class Members had been finalized. Klein Prelim. App. Aff. at ¶ 9. This $1,500,000 cap constitutes only a 1.42 multiple of the Class Counsel's 1,056,705.00 lodestar to date (not even including the $112,920.74 in expenses incurred by Class Counsel). *See* Klein Final App. Aff. at ¶¶ 7-11. Moreover, Class Counsel anticipate needing to spend additional time on this litigation responding to Class Member inquiries and "wrapping up" the Settlement, beyond the time already incorporated into the preset lodestar figure.

Nor are Class Members adversely affected by the fees that Class Counsel intend to seek. Pursuant to the Settlement Agreement (at ¶ 6.2.c), Verde has agreed to pay any awarded fees, expenses and lead plaintiff award using its own resources, which means that these payments will ***not*** reduce the benefits provided to Class Members. 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 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). This is especially true where, as here, Defendant has reserved the right to oppose the application.

Accordingly, Plaintiff respectfully submits that the $1,500,000 amount that Plaintiff seeks for fees and expenses, and the $5,000 that Plaintiff seeks as a lead plaintiff service award, are fair and reasonable.

V. CONCLUSION

WHEREFORE, based on foregoing, Plaintiff respectfully requests that the Court enter an Order:

(1) modifying, for purposes of the Settlement, the definition of the certified Class (*see* [Dkt. No. 180.00]), to clarify the beginning and end dates for the Class Period;

(2) Confirming the appointment of Constance Jurich as Lead Plaintiff;

(3) Confirming the appointment of Seth Klein and Robert Izard of Izard Kindall & Raabe LLP as Class Counsel to the Settlement Class; and

(4) Approving the Settlement as set forth in the Settlement Agreement.

Dated: January 3, 2020

THE PLAINTIFF

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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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