DOCKET NO. X03 HHD-CV-17-6075408-S

LYDIA GRUBER,	:	SUPERIOR COURT
on behalf of herself and all others	:	
similarly situated,	:	JUDICIAL DISTRICT OF HARTFORD
Plaintiff,	:	COMPLEX LITIGATION DOCKET
	:	
v.	:	
	:	
STARION ENERGY, INC.	:	
Defendant.	:	July 24, 2017

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

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Plaintiff Lydia Gruber ("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 and Case Contribution Awards.

I. INTRODUCTION

Plaintiff brought this class action lawsuit (the "Action"), alleging that Starion Energy, Inc. ("Starion" or "Defendant"), falsely claimed that its variable rate for electricity supply services would fluctuate to reflect changes in the wholesale power market, while in practice it failed to decrease its variable rate when wholesale market rates went down. *See* Complaint [Dkt. No. 1] at ¶¶1-7, 21-35. After over two years of litigation and lengthy settlement discussions, the Parties agreed to a settlement of $2,580,000 to resolve the case. The Court preliminarily approved the Settlement on May 24, 2017, and authorized Plaintiff to give notice to the Settlement Class. [Dkt. No. 112.86.] Plaintiff has filed a Motion for Final Approval simultaneously herewith, and asks the Court, in addition, to approve an award of attorneys' fees and expenses and case contribution awards.

II. FACTUAL BACKGROUND

Both Izard, Kindall & Raabe, LLP ("IKR") and Sanford Heisler Sharp LLP ("SHS") (together, "Settlement Class Counsel") have spent significant time, effort, and outlay of funds to investigate and successfully prosecute their clients' claims against Defendant.

GRUBER FEDERAL CASE

IKR began investigating Starion's pricing practices in late 2014. *See* Affidavit of Seth R. Klein in Support of Plaintiff's Motion for Certification of Settlement Class and Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees & Expenses and for Case

Contribution Awards ("Klein Aff.") at ¶ 3. This investigation included a detailed review of relevant dockets maintained by the Connecticut Public Utility Regulatory Authority ("PURA"), Starion's PURA filings, Starion's website, contracts and marketing materials, and a review of wholesale prices for power in the Connecticut market through the regional independent service operator, ISO-New England. *Id*. at ¶¶ 3-4. IKR also retained a consulting expert who had recently retired from a high-level position with ISO-New England to advise concerning the structure of the market for electric power in the New England region. *Id.* at ¶ 5. After reviewing these materials and consulting with the expert, IKR drafted a detailed complaint for Plaintiff's review and approval. *Id.* at ¶ 6.

On December 5, 2014, IKR filed a complaint against Defendant in the United States District Court for the District of Connecticut on behalf of Plaintiff, as well as all other similarly situated Connecticut and Massachusetts residents, captioned *Gruber v. Starion Energy, Inc.*, Docket No. 3:14-cv-01828. Klein Aff. at ¶ 7. Plaintiff filed an Amended Complaint in that docket on April 28, 2015 (the "Gruber Federal Complaint"), that added Louise Ferdinand as a named plaintiff.[1] Defendant moved to dismiss the Gruber Federal Complaint on June 22, 2015; Plaintiff opposed Defendant's motion on July 13, 2015; and the Court held oral argument and denied Defendant's motion on August 13, 2015. *Id*. at ¶¶ 8-9.

In connection with the Gruber Federal Complaint, the parties conducted extensive document and fact discovery, including production of approximately 5000 pages of documentation by Starion (including relevant financial and transactional spreadsheets), extensive

[1] Melissa Pennellatore, also a resident of Massachusetts, had retained Izard Kindall & Raabe subsequent to the filing of the *Gruber* Federal Complaint but prior to settlement of this action. Had the case not settled, the *Gruber* complaint would have been amended to add Ms. Pennellatore as a plaintiff. Klein Aff. at ¶ 10 n.1.

production from a service provider to Starion, and fact depositions of Plaintiff Gruber and Class Representatives Ferdinand and Pennellatore and of Thomas Stiner, Defendant's CFO and corporate designee. Klein Aff. at ¶¶ 10-11, 13. The parties also conducted extensive expert analyses and discovery in connection with the Gruber Federal Complaint, including service of an expert report; a damages analysis by Plaintiff's electric-industry expert; a financial review of Defendant's ability to pay by Plaintiff's accounting expert; and the deposition of one of Plaintiff's retained experts by Defendant. Klein Aff. at ¶ 12.

WINDLEY FEDERAL CASE

SHS began investigating Starion's pricing and marketing practices the latter half of 2014. Affidavit of Jeremy Heisler ("Heisler Aff. ") at ¶ 4. SHS conducted an extensive review of investigations and findings against Starion and/or individuals associated with Starion by the Maryland Public Service Commission, the District of Columbia Public Services Commission and the Connecticut Attorney General. *Id.* SHS also reviewed Starion's S.E.C. filings, Starion's website, Starion's terms of service, and press coverage of Starion and its founders. *Id.* Furthermore, SHS conducted extensive research into various causes of actions and surveyed the law of the ten jurisdictions in which Starion operates to assess the viability of a multistate class action. *Id.*

On or about November 13, 2014, SHS filed a complaint against Defendant in the United States District Court for the Southern District of New York on behalf of Diana Windley, a New York resident, captioned *Windley v. Starion Energy, et al*., Docket No. 1:14-cv-09053 ("Windley Action"). *Id.* at ¶ 5. Plaintiff filed amended complaints on or about February 26, 2015, August 24, 2015, and September 28, 2015, which, among other things, added New Jersey resident Douglas Siedenburg and Massachusetts resident Case Martin as plaintiffs. *Id.*

On or about November 2, 2015, Defendant moved to dismiss the Windley Action. Plaintiff opposed Defendant's motion on November 24, 2015, and the Court held oral argument on December 17, 2015. On January 8, 2016, the court dismissed Douglas Siedenburg's claims, but otherwise denied Defendant's motion. *Id.* at ¶ 6. On January 27, 2016, Douglas Siedenburg filed a Motion for Clarification of Order of Dismissal and requested that the court issue a Rule 54(b) certification permitting him to immediately appeal. On or about March 4, 2016, the court denied the motion, requiring Mr. Siedenburg to postpone his appeal. *Id*. at ¶ 7.

The parties in the Windley Action conducted extensive document and fact discovery, including production of approximately 3000 pages of documentation by Starion and fact depositions of Diana Windley and Case Martin. *Id.* at ¶ 8. Moreover, during the course of discovery, the Windley Plaintiffs issued several third party subpoenas to utilities and to a Starion affiliate. *Id*.

NEGOTIATIONS AND SETTLEMENT

The parties engaged in several negotiation sessions, both telephonically and in-person, concerning the allegations in the Gruber Federal Complaint and Windley Action, including two in-person mediation sessions on October 26, 2016, and November 7, 2016, before Judge Diane M. Welsh (Ret.), United States Magistrate Judge for the Eastern District of Pennsylvania. Klein Aff. at ¶ 16.

The parties reached a settlement in principle at the November 7, 2016, mediation session on behalf of a Class all Starion variable rate customers in all service territories in which Starion conducts business. Klein Aff. at ¶ 17. Reducing the agreement in principle to a written memorandum of understanding required lengthy negotiations, including several telephone

conferences and rounds of correspondence. *Id.* The parties ultimately signed a memorandum of understanding on December 29, 2016. *Id.* at ¶ 18.

For non-substantive reasons unrelated to the merits of Plaintiff's claim, and with the informed consent of United States District Court Judge Stefan R. Underhill (the presiding judge in the *Gruber* federal action),[2] Plaintiff Gruber agreed (with consent and agreement of Ms. Ferdinand, Ms. Pennellatore, and the plaintiffs in the New York action), *inter alia*, that she would withdraw the Gruber Federal Complaint and, in order to implement the parties' settlement, file a substantively identical complaint in Connecticut state court on behalf of the entire putative Class.[3] *Id.* at ¶ 19. Plaintiff initiated this Action on or about January 30, 2017, by filing the present State Complaint in the Superior Court for the Judicial District of Hartford. *Id.* at ¶ 20.

On December 22, 2016, the *Windley* Action was similarly stayed based upon the parties' settlement negotiations. By stipulated order, on March 31, 2017, the district court (Pauley, J) dismissed the *Windley* Action without prejudice pending the finalization and approval by this Court of the class settlement. Heisler Aff. at ¶ 10.

Negotiation of the final text of the Settlement Agreement, the Plan of Allocation and the draft notices to the Settlement Class took several months of additional work. Klein Aff. at ¶ 21.

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[2] The parties held an in-person status conference with Judge Underhill on December 9, 2016, to explain their settlement plans and obtain the Court's consent to that process. *See* [ECF No. 84] in the *Gruber* action.

[3] As Starion's counsel explained during the April 24, 2017 status conference with the Court (*see* Dkt. No. 107.00), Starion sought to effectuate the settlement in state court to minimize certain administrative burdens that, *inter alia*, would needlessly complicate effectuation of the settlement. Insofar as state court review affords equal substantive protection to Class Members, Plaintiff had no objection to this course of action, provided full disclosure was afforded to both the relevant federal and state judges overseeing the litigation (as has been done).

Settlement Class Counsel was responsible for preparing the initial drafts of all of the Settlement papers and notices that served as the basis for negotiations on the final texts. *Id.* The parties signed a final Settlement Agreement on May 9, 2017, and Plaintiff submitted her Motion for Preliminary Approval of Class Action Settlement on May 10, 2017 [Dkt. No. 108.00], which the Court granted on May 24, 2017 [Dkt. No. 112.86]. *Id.* at ¶ 22.

Pursuant to the Preliminary Approval Order, the Parties worked with KCC Class Action Services, LLC ("KCC") to provide the class with information about the case and the proposed settlement. Klein Aff. at ¶ 24. In accord with the Notice Plan approved by the Court, the Settlement Class was provided with basic notice of the Settlement by e-mail or first-class mail on July 7, 2017. *Id.* at ¶ 25. In accord with the Notice forms approved by the Court, the email and postcard Notices included basic information about the Settlement and provided both a website address (www.variableelectricsettlement.com) where the full Notice approved by the Court could be downloaded and toll-free telephone number that consumers could call with questions or to request paper copies of the relevant documents. *Id.*; Affidavit of Scott DiCarlo, Senior Project Manager ("DiCarlo Aff."), attached to the Klein Affidavit as Exhibit B, at ¶¶ 2-6. The Court-approved full Notice and Email Notice inform Class Members of all of the key details about the terms of the Settlement, including the fact that Plaintiff would request an award of attorneys' fees of up to 33⅓ percent plus expenses and case contribution awards, to be paid from the Settlement Fund, and the procedures for opting out of the Settlement and for objecting to any provisions of the Settlement Agreement or petition for attorneys' fees, expenses and case contribution awards. Klein Aff. at ¶ 25; DiCarlo Aff. at Exs. A, B.

The deadline for filing objections or opting out of the Settlement is October 23, 2017, and the deadline for filing a claim is October 31, 2017. These deadlines were intentionally set

several weeks after Plaintiff was required to file her motions in support of final approval and of the award of fees and expenses, so that Settlement Class Members could make their decision to participate in, object to, or opt out of the Settlement, informed by the materials Plaintiff submitted. Klein Aff. at ¶ 26. As of the date of this filing, neither counsel nor the Claims Administrator have received any objections or opt-outs. *See id.*; DiCarlo Aff. at ¶¶ 8-9.[4]

Over the course of the litigation, from investigation through the filing of Plaintiff's final approval papers, IKR expended 854 hours of time with a lodestar of $692,381.25, and SHS expended 1,540.50 hours of time with a lodestar of $780,132.50, for a total of 2,394.50 hours and $1,472,513.75 lodestar between both Settlement Class Counsel firms. *See* Klein Aff. at ¶ 35; Heisler Aff. at ¶ 21. Moreover, IKR incurred out-of-pocket expenses in the amount of $182,399.24, the vast majority of which ($159,644.11) was for the experts whose work was critical to both the case and the settlement. Klein Aff. at ¶¶ 38-39. SHS incurred out-of-pocket expenses in the amount of $8,319.76 (Heisler Aff. at ¶ 28), for total out-of-pocket expenses between both Settlement Class Counsel firms of $190,719.00. Settlement Class Counsel's work was performed entirely on a contingency basis, as were its payments of out-of-pocket expenses.

III. ARGUMENT

A. The Court Should Grant Plaintiff's Attorneys' Fee Request

1. Settlement Class Counsel Are Entitled to a Reasonable Fee

Plaintiff requests that the Court award a 32 percent attorneys' fee award from the Settlement Fund ($825,600). 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

[4] Should any objections be received by the deadline, Plaintiff will respond by November 6, 2017, as provided in the Preliminary Approval Order.

reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *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 public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted).

2. This Court Should Utilize the Percentage Method to Determine Attorneys' Fees

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.

3. The Requested Fees Are Reasonable

An analysis of the facts in this case in light of the *Goldberger* factors demonstrates that the requested 32 percent fee is reasonable.

a. 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 two years. 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 2,394,50 hours of attorney time with an aggregate lodestar of $1,472,513.75. *See* Klein Aff. at ¶ 35; Heisler Aff. at ¶ 21.[5] Settlement Class Counsel's fee request, thus, is only about ***56%*** percent of lodestar – a ***negative*** multiplier, and 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

[5] The hourly rates for Settlement Class Counsel's attorneys 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 Aff., at ¶ 37; *see* Heisler Aff. at ¶ 22.

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

b. The Relationship of the Requested Fee to the Settlement

An attorneys' fee award of 32% is well within the standard range in the Second Circuit. "The one-thrid amount that plaintiffs request 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). 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.

c. 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). The Court further instructed that the risk "must be measured as of when the case is filed," rather than with the benefit of hindsight. *Id.,* 55. 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).

As this Court is aware, over the course of the last two years, several cases have been filed against electricity suppliers challenging retail pricing policies for variable rate contracts that bear no relationship to the underlying wholesale price of electricity and relying on legal theories of liability similar to those set out in Plaintiff's complaint here.[6] The application of state consumer protection law and implied covenant theories to the facts of these cases was untested. When the Complaint in the present case was filed, no Court had yet ruled on the legal sufficiency of any of the legal theories advanced in these cases. There was, accordingly, a significant risk at the outset that the case would not survive a motion to strike or later motion for summary judgment.

Assuming that the Class was able to overcome dispositive motions, trial would pose its own challenges. Plaintiff's claims hinge upon the question of how a reasonable consumer would interpret Starion's contract, which provided that "[y]our variable price shall be calculated monthly ***and shall reflect the cost of electricity obtained from all sources*** (including energy,

[6] *See, e.g., Tully v. North American Power & Gas, LLC,* No. 3:15-cv-00469 (D. Conn. Mar. 31, 2014); *Fritz v. North American Power & Gas, LLC,* No. 3:14-cv-00634 (WWE) (D. Conn., May 6, 2014); *Edwards v. North American Power & Gas, LLC,* No. 3:14-cv-01714-VAB (D. Conn. Nov. 18, 2014); *Sanborn v. Viridian Energy, Inc.,* No. 3:14-cv-1731-SRU (D. Conn. Nov. 19, 2014); *Richards v. Direct Energy Services, LLC,* No. 3:14-cv-01724-JAM (D. Conn. Nov. 19, 2014); *Steketee v. Viridian Energy, Inc.,* No. 3:15-cv-00585-SRU (D. Conn. Mar. 22, 2015); *Roberts v. Verde Energy USA, Inc.,* No. HHD-cv-15-6060160S (Conn. Super. Jun. 12, 2015).

capacity, settlement, ancillaries), related transmission and distribution charges and other market-related factors, plus all applicable taxes, fees charges or other assessments and Starion's costs, expenses and margins." *See* Complaint [Dkt. No. 1] at ¶ 24 (emphasis added). Starion has raised, and undoubtedly would continue to raise, numerous arguments, including the proper understanding of the phrase "cost of electricity;" the significance of the word "reflect" and the impact of the inclusion of "margins" in the above-quoted language; and questions about Plaintiff's and the Class' reliance upon the contract. Moreover, the actual pricing models employed by Defendant are complex; establishing the difference between the price consumers paid and the price that they *should* have paid under the contracts requires substantial research and expert testimony. Thus, there was a risk that Plaintiff would not be able to obtain a significant judgment even if she established liability. *See Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992) (complex issue of establishing damages would require battle of the experts). Even if all other hurdles were overcome, there would be the possibility of appeal. *Id.* (possible appellate litigation would further increase costs and uncertainty).

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 Class Plaintiff's requested attorneys' fee award.

d. The Complexities and Magnitude of the Litigation

This case is a class action lawsuit concerning pricing policies that have affected over 414,000 households and small businesses. 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.

This litigation posed a number of complex issued from the start. Most obviously, the underlying claims required Settlement Class Counsel to become knowledgeable about the manner in which electricity is generated, transported, metered and billed, as well as the complex interplay of state and federal laws, regulations and institutions that govern the market for electric power. Settlement Class Counsel conducted independent research on these issues and analyzed how these issues would play out in the context of the available legal causes of action prior to filing the Complaint. Klein Aff. at ¶¶ 3-6; Heisler Aff. at ¶ 4.

As discussed above, while the legal theories advanced in the case are not new, their application to variable rate practices for electricity suppliers was untested and the outcome uncertain. Determining whether Defendant's costs had a positive correlation with its variable rates was equally complex and required additional work by experts in energy supply markets – a

fairly rarified discipline. Klein Aff. at ¶ 14. The case was, accordingly, large in scope and both factually and legally complex.

e. 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 and the Defendant's ability to pay anything larger, a settlement of $2.58 million is a good result. Moreover, Settlement Class Counsel are experienced class action litigators. *See* Klein Aff at Ex. B (IKR firm resume), Heisler Aff. at ¶¶ 13-20, 23-27.

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. 246 F.R.D. at 174. Defendants were ably represented by Eckert Seamans Cherin & Mellott LLC a prominent firm throughout the Northeast with an excellent litigation reputation. Accordingly, this factor supports Plaintiff's fee request.

f. Reaction of the Class

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).

As noted in the accompanying Motion for Final Approval, over 414,000 notices were sent out. The notices clearly set forth that Settlement Class Counsel would apply for an award of fees of up to 33⅓% of the Class Settlement Fund, plus reimbursement of all costs and expenses. Although objections and requests to opt out are not due until October 23, 2017, as of July 21, 2017, of the over 400,000 Settlement Class members who have received individual Notice, 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 nor have any class members sought to opt out of the Settlement. Klein Aff. at ¶ 26, DiCarlo Aff. at ¶¶ 9. Plaintiff will update these numbers before the Fairness Hearing. However, to date, this factor appears to support the application for fees.

g. 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.").

* * *

Plaintiff respectfully suggests that the proposed fee award of 32 percent of the Settlement is supported by all of the *Goldberger* factors, and requests that the Court award that amount to Settlement Class Counsel.

B. 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 $190,719.00 in expenses they incurred while prosecuting this action. *See* Klein Aff.. at ¶ 38 (IKR expenses), Heisler Aff. at ¶ 28 (SHS expenses). By far the largest component of these expenses involve payment of the cost of experts who spent innumerable hours reviewing documents from Defendant and third parties, such as Emera (an electricity intermediary retained by Starion), and creating models for determining injury and damages. Klein Aff. at ¶ 39. Settlement Class Counsel have reviewed the expense affidavits carefully and determined that the expenses were reasonably incurred and were necessary to the successful prosecution of this action.

C. Timetable for Payment of Attorneys' Fees and Expenses

Pursuant to ¶ 46 of the Settlement Agreement (Klein Decl. at Ex. A), Plaintiff respectfully requests that any award of attorneys' fees and expenses be paid from the Settlement Fund Escrow Account in its entirety within ten (10) days of any Order awarding such fees and expenses.

D. Lead Plaintiff and Class Representatives Should Receive Case Contribution Awards

Plaintiff and Settlement Class Counsel respectfully submit that Plaintiff Lydia Gruber and her fellow Class Representatives Louise Ferdinand, Melissa Pennellatore, Diana Windley, Case Martin, and Douglas Siedenburg should receive a modest incentive awards of $2,000 each in recognition of the substantial time and effort they contributed to the prosecution of this Action. Plaintiff and Class Representatives have been highly motivated and involved throughout this litigation. *See* Klein. Decl. at Exs. C (Gruber Affidavit), D (Ferdinand Affidavit), E (Pennellatore Affidavit); Heisler Decl. at Exs. A (Windley Affidavit), B (Martin Affidavit), C (Siedenburg Affidavit). As set forth in their respective affidavits, Plaintiff and Class Representatives cooperated with counsel in finalizing the Complaint, kept informed about the case as the litigation progressed, responded to Defendant's discovery requests and had their depositions taken. Plaintiff and Class Representatives also approved the final settlement terms and recommend that the Court approve it. Awards of greater amounts to compensate for their efforts are routinely awarded by courts. *See, e.g., 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"); *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).

Plaintiff and Class Representatives were willing to serve in this Action and performed significant work on behalf of the class to further this case, without which 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). For the foregoing reasons, Settlement Class Counsel respectfully requests that this Court award Plaintiff and each Class Representative a case contribution award of $2,000.

IV. CONCLUSION

For the reasons set forth above, Plaintiff and Settlement Class Counsel respectfully request that the Court enter an order approving (1) an award of Attorneys' Fees in the amount of $825,600.00, to be paid within ten days of the Court's Order awarding such fees; (2) an award of $190,719.00 in costs and expenses to Settlement Class Counsel, to be paid within ten days of the Court's order awarding such expenses; and (3) an incentive award of $2,000 each to Plaintiff Lydia Gruber and each of her fellow Class Representatives Louise Ferdinand, Melissa Pennellatore, Diana Windley, Case Martin, and Douglas Siedenburg; with all the foregoing amounts to be deducted from the $2,580,000 common Settlement Fund.

Dated: July 24, 2017

PLAINTIFF,

LYDIA GRUBER

By: /s/ Seth R. Klein

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CERTIFICATION

Pursuant to Practice Book § 10-14, I hereby certify that a copy of the above was mailed or electronically delivered on July 24, 2017 to all counsel and pro se parties of record.

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/s/ Seth R. Klein
Seth R. Klein