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 CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

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 Certification of Settlement Class and Approval of Class Action Settlement.

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 now seeks final approval of the Settlement.

The Settlement is in the best interests of the Class. The litigation was hard-fought with extensive discovery, and settlement was reached only after extensive arms'-length negotiations with the assistance of a retired United States Magistrate Judge. The $2,580,000 Settlement constitutes a significant monetary recovery for the class. In addition, the Settlement Agreement provides for substantial non-monetary relief, including that Starion's consumer contracts in each of its markets will be modified to include a prominently-displayed provision stating that savings under the contracts are not guaranteed, and include further explanation of the market conditions that may be factors in Starion's determination of electricity rates. *See* Settlement Agreement, attached as Exhibit A to the 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."), submitted herewith.

Moreover, there are risks in the litigation that could prevent the class from obtaining ***any*** recovery at all if the case went to trial. Whether Plaintiff ultimately succeeded at a trial of this matter would hinge on the factfinder's determination of how a reasonable consumer would understand Starion's contract language. Plaintiff firmly believes that a reasonable consumer would agree that Starion's contract represented that Starion's variable rates would fluctuate in a manner correlated with the underlying wholesale market rate for electricity. However, Defendant would undoubtedly continue to vigorously argue that a reasonable consumer would not so understand Starion's contract. If the ultimate factfinder agreed with Defendant, Plaintiff and the class would recover nothing.

Finally, litigating this matter to completion might exhaust whatever available resources Defendant has to pay towards a possible judgment and/or potentially place Defendant in violation of its financial covenants, thereby impacting its ability to continue as a going concern and placing collectability of the judgment at serious risk. Defendant has no insurance coverage for the loss, and Defendant relies on internally generated operating cash flow to fund operations. Accordingly, Plaintiff believes there is a substantial likelihood that, even if Plaintiff were to win more than $2,580,000 at trial, the Class would not actually collect any additional money (and, indeed, even the $2,580,000 presently available might be depleted by a lengthy litigation).

Accordingly, Plaintiff moves the Court for entry of an order:

(1) Certifying the Settlement Class;

(2) Appointing Lydia Gruber as Lead Plaintiff and Lydia Gruber, Louise Ferdinand, Melissa Pennellatore, Diana Windley, Case Martin, and Douglas Siedenburg as Class Representatives;

(3) Appointing Seth Klein and Robert Izard of Izard Kindall & Raabe LLP and Jeremy Heisler, Michael Palmer, Andrew Melzer and David Tracey of Sanford Heisler Sharp LLP as Settlement Class Counsel;

(4) Approving the Settlement; and

(5) Approving the Plan of Allocation.

II. FACTUAL BACKGROUND

The present Settlement is the culmination of two separate federal class actions.

GRUBER FEDERAL CASE

On or about December 5, 2014, Plaintiff Lydia Gruber, a Connecticut resident, commenced an action on behalf of herself and all other similarly situated Connecticut and Massachusetts residents in the United States District Court for the District of Connecticut 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, a Massachusetts resident, as an additional named plaintiff.[1] *Id.* at ¶ 8. 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 ¶ 9.

[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.

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 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

On or about November 13, 2014, Diana Windley, a New York resident, commenced an action captioned *Windley v. Starion Energy, et al*., Docket No. 1:14-cv-09053, in the United States District Court for the Southern District of New York ("*Windley* Action"). Affidavit of Jeremy Heisler ("Heisler Aff."), submitted herewith, 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.

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. *Id.* at ¶ 17. The parties thereafter signed a memorandum of understanding dated 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

[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.

implement the parties' settlement, file a substantively identical state complaint in Connecticut state court on behalf of the entire putative Class.[3] *Id.* at ¶ 19.

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.

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. Klein Aff. at ¶ 20. 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 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 a toll-free telephone number that consumers could call with questions or to

[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).

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]

III. THE PROPOSED CLASS SHOULD BE CERTIFIED

Plaintiff requests that the Court certify the following Class:

> All persons who were or are customers of Starion Energy, Inc.; Starion Energy PA, Inc.; or Starion Energy NY, Inc. in Connecticut, the District of Columbia, Delaware, Illinois, Maryland, Massachusetts, New Jersey, New York, Ohio, or Pennsylvania, and were enrolled in a Starion variable rate electric plan at any time within the applicable statutes of limitations preceding the filing of this action through and including the date upon which the Court issues the Preliminary Approval Order. (the "Class").

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

> Excluded from the Settlement Class are Starion Energy, Inc.; Starion Energy PA, Inc.; or Starion Energy NY, Inc.; any of their respective parents, subsidiaries, or affiliates; any entity controlled by any of them; any officer, director, employee, legal representative, predecessor, successor, or assignee of Starion Energy, Inc.; Starion Energy PA, Inc.; or Starion Energy NY, Inc.; and any current or former customer who previously received from Starion Energy, Inc.; Starion Energy PA, Inc.; or Starion Energy NY, Inc. any payment resolving a claim similar to those asserted in the Class Actions; any current or former customer who is party to a Starion variable rate electric plan contract that contains an arbitration clause (unless the customer expressly waives any and all arbitration rights that may exist under that arbitration clause); and the judicial officers assigned to this litigation; and members of their staffs and immediate families.

Certification of a class action is governed by 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). Section 9-7 sets forth four prerequisites to class certification referred to in the short-hand as: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. In addition, the class must meet one of the three requirements of § 9-8. Plaintiff here seeks to certify a class under Section 9-8(3), which authorizes class actions where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [] a class action is superior to other available methods for fair and efficient adjudication of the controversy."

Connecticut jurisprudence governing class actions "is relatively undeveloped, because most class actions are brought in federal court. Our class action requirements, however, are similar to those applied in the federal courts." *Collins v. Anthem Health Plans, Inc.,* 266 Conn. 12, 32 (2003) (quotation marks omitted). Accordingly, Connecticut courts "look to federal case law for guidance" in construing Connecticut's class action requirements. *Id.* Practice Book § 9-7 is substantively identical to Fed. R. Civ. P. 23(a), and Practice Book § 9-8 is substantively identical to Fed. R. Civ. P. 23(b). *Collins*, 266 Conn. at 32-33.

A. Numerosity, Commonality and Typicality

The Class meets the numerosity, commonality, and typicality standards of § 9-7(1)-(3). First, the number of putative Class Members is such that it is impractical to join all of the Class Members in one lawsuit. *See Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333 (MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (certifying where the number of persons in the class logically exceeded 100). Approximately 414,000 accountholders are included in the Class. Klein Aff. at ¶ 27; *see* DiCarlo Aff. at ¶ 2.

Second, there are substantial questions of law and fact common to all Class Members. Both of Plaintiff's causes of action (unfairness and deception under state consumer protection statutes and breach of the covenant of good faith and fair dealing) revolve around a core factual allegation: Defendant's form contracts promised that Starion's variable rates would fluctuate to "reflect the cost of electricity" (*i.e.*, changes in the wholesale power market), when in fact they did not. Accordingly, the fundamental question of how a reasonable consumer would interpret Starion's contract language is common to the entire Class. Also common to both claims – and to the Class as a whole – is the question of whether Starion's variable pricing actually did or did not "reflect the cost of electricity." Likewise, the question of whether Starion's alleged misconduct harmed the Class is common to all Class Members.

Finally, Plaintiff's claims are "typical" of other Class Members' claims because all Starion customers were subjected to a uniform set of policies and practices that Starion used for all variable rate customers. Plaintiff's (and all of the Class Representatives') claims arise from the same course of conduct as the other Settlement Class Members' claims. Starion's policies

and practices with regard to setting variable electric rates affected Plaintiff, Class Representatives, and all other Settlement Class Members in the exact same way. Additionally, Plaintiff's and all other Settlement Class Members' claims are premised on the same legal theories. Accordingly, the typicality requirement is satisfied. *See In re Host Am. Corp. Sec. Litig.*, Master File No. 05-CV-1250 (VLB), 2007 WL 3048865 (D. Conn. Oct. 18, 2007) (finding typicality where plaintiffs alleged defendants committed same acts, in same manner against all class members).

B. Adequacy of Representation

The adequacy requirement of § 9-7(4) requires Plaintiff to demonstrate that: (1) there is no conflict of interest between Plaintiff and the other Class Members; and (2) Proposed Class Counsel are qualified, experienced and capable of conducting the Action. *See In re AOL Time Warner ERISA Litigation*, No. 02-8853, 2006 WL 2789862, at *3 (S.D.N.Y. Sept. 27, 2006).

Neither Plaintiff nor the Class Representatives have any claims antagonistic to or in conflict with those of the other Settlement Class Members, as Plaintiff is pursuing the same legal theories as the rest of the Settlement Class relating to the same course of Starion's conduct. Additionally, Proposed Settlement Class Counsel have an extensive background in litigating complex litigation and consumer class actions, have been appointed class counsel in prior cases, and have the resources necessary to prosecute this action to its conclusion. *See* Klein Aff. at Ex. B (Firm Resume of Izard Kindall & Raabe LLP); Heisler Aff. at ¶¶ 13-20, 23-27.

C. Predominance of Common Issues and Superiority

Practice Book § 9-8(3) authorizes class actions to proceed where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [] a class action is superior to other available methods for fair and efficient

adjudication of the controversy." The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.* The "predominance" and "superiority" provisions were intended "to cover cases 'in which a class action would achieve the economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 92 (D. Mass. 2005) (citing *AmchemProds., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). Where, as here, a court is deciding on the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *Amchem*, 521 U.S. at 619. The remaining elements or Rule 23, however, continue to apply in settlement-only certification situations. *Id.* at 619.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Lupron*, 228 F.R.D. at 91 (*citing Amchem*, 521 U.S. at 623). Predominance "does not require that *all* questions of law or fact be common; it only requires that the common questions *predominate* over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981) (emphasis added). As demonstrated *supra* when addressing commonality, several issues of law and fact common to all Settlement Class Members are present in this matter. These common issues of law and fact predominate over any potential individual issues which may arise, as they could be resolved

through the presentment of proof common to all Settlement Class Members. Thus, the predominance requirement of § 9-8(3) is satisfied.

The superiority requirement of § 9-8(3) is also satisfied. Under this requirement, "maintaining the present action as a class action must be deemed by the court to be superior to other available methods of adjudication. A case will often meet this standard when 'common questions of law or fact permit the court to consolidate otherwise identical actions into a single efficient unit.'" *Bynum v. Dist. Of Columbia*, 217 F.R.D. 43, 49 (D.D.C. 2003) (citations omitted). *See also Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 12 (D.D.C. 2002) (class actions favored "where common questions of law or fact permit the court to 'consolidate otherwise identical actions into a single efficient unit.'").

A class action is not only the most desirable, efficient, and convenient mechanism to resolve the claims of the Settlement Class, but it is almost certainly the only fair and efficient means available to adjudicate such claims. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available"). Individual Settlement Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Starion given the comparatively small size of each individual Settlement Class Members' claims. Thus, it is desirable to adjudicate this matter as a class action.

In light of the foregoing, all of the requirements of §§ 9-7 and 9-8 are satisfied, and, thus, the Court should certify this Class for settlement purposes.

IV. APPOINTMENT OF CLASS COUNSEL AND LEAD PLAINTIFF, AND CLASS REPRESENTATIVES

Plaintiff respectfully requests that the Court appoint Robert Izard and Seth Klein of Izard, Kindall & Raabe, LLP ("IKR") and Jeremy Heisler, Michael Palmer, Andrew Melzer, and David Tracey of Sanford Heisler Sharp LLP ("SHS") as Settlement Class Counsel. Practice Book Section 9-9(d) provides that "a court that certifies a class must appoint class counsel." IKR and SHS and the respective attorneys at each firm clearly satisfy all requirements for appointment, as set out in Practice Book Section 9-9(d)(1). IKR and SHS independently identified and investigated the claims alleged in the Complaint for weeks prior to filing suit, and have demonstrated over the course of the past two years of litigating this case (and, in the case of IKR, several other cases alleging similar claims against other electricity suppliers)[5] the willingness to commit all resources necessary to the successful prosecution of the case. IKR and SHS each have a long and successful record of litigating class action cases both in Connecticut and around the country, as set forth in their respective Firm Resumes. *See* Klein Aff. at Ex B (IKR Firm Resume) and Heisler Aff. at ¶¶ 13-20, 23-27.

The Court should also confirm its preliminary appointment of Lydia Gruber as Lead Plaintiff and of Lydia Gruber, Louise Ferdinand, Melissa Pennellatore, Diana Windley, Case Martin, and Douglas Siedenburg as Class Representatives. Plaintiff and all Class Representatives have been actively involved in the prosecution of this case. They have reviewed court filings, provided documents and information in discovery, sat for depositions and consulted

[5] *Richards v. Direct Energy Services, LLC,* No. 3:14-cv-01724 (D. Conn.), *Edwards v. North American Power & Gas, LLC,* No. 3:14-cv-1714 (D. Conn.), *Gruber v. Starion Energy, Inc.*, No. 3:14-cv-01828 (D. Conn.), *Jurich v. Verde Energy, USA, Inc.,* No. HHD-cv-156060160 (Conn. Super. Ct.), *Sanborn v. Viridian Energy, Inc.,* No. 3:14-cv-01731 (D. Conn.), and *Steketee v. Viridian Energy, Inc.,* No. 3:15-cv-00585.

with counsel, including with respect to the proposed Settlement. *See* Klein Aff. at ¶ 33 and Affidavits of Lydia Gruber, Louise Ferdnand, and Melissa Pennellatore, attached to the Klein Aff. as Exs. C, D and E, respectively; Heisler Aff. at ¶ 12 and Affidavits of Diana Windley, Case Martin and Douglas Seidenberg, attached to the Heisler Aff. as Exs. A, B and C respectively.

V. THE SETTLEMENT SHOULD BE APPROVED

Settlement Class Counsel – all experienced class action litigators – respectfully submit that the Settlement is fair and reasonable in light of the risks of continued litigation and should be approved by this Court. Klein Aff. at ¶ 23; Heisler Aff. at ¶ 11.

A. The Standard for Approval

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 district court. *See, e.g.*, *Rabinowitz v. City of Hartford*, No. HHD-CV-075008403S, 2014 WL 3397831 (Conn. Super. Ct. June 3, 2014). 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). The Second Circuit has identified nine factors that courts should consider 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). A review of these factors demonstrates that the Settlement merits approval.

1. The Stage of the Proceedings and the Amount of Discovery Completed

In evaluating a settlement, "[t]here is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation." Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.45 (4th ed. 2002).

Before, during and following settlement discussions, Starion provided Settlement Class Counsel with detailed nonpublic information regarding a wide range of Starion's practices and policies with regard to pricing its variable rate electricity product, as well as its financial situation. By the time the Settlement was reached, Proposed Class Counsel were well informed of the strengths and weaknesses of their claims and Defendants' defenses through both extensive documentary and deposition evidence and through the work of Plaintiff's damages and accounting experts, which permitted them to fully consider and evaluate the fairness of the Settlement to the Class. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (citation omitted) (finding action had advanced to stage where parties "'have a clear view of the strengths and weaknesses of their cases.'"). "[A] prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice." *McKenzie Construction Inc. v. Maynard,* 758 F.2d 97, 101-2 (3d Cir.1985). In the context of a complex class action, early settlement has far reaching benefits in the judicial system. *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002).

2. The Risks of Establishing Liability and Damages

In assessing a proposed settlement, the Court should balance the benefits afforded the Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. While Settlement Class Counsel believe that Plaintiff's claims are meritorious, there were substantial risks to achieving a better result for the Class through continued litigation. 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, 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. Although Plaintiff believes that the plain meaning of Starion's contract is clear and that reliance (by Plaintiff or the Class) is not required under Plaintiff's theories, there is no guarantee that Plaintiff would prevail on these points. Accordingly, absent the Proposed Settlement, there is a genuine possibility that the Class would receive nothing at trial.

Further, although Plaintiff is confident that the Court would grant a contested motion for class certification, there is a risk that Defendant would successfully defeat Class Certification. Even if the Class was eventually certified by the Court, Defendants would have likely taken any opportunity to argue for decertification as the Action progressed. Further, there is no assurance

of maintaining certification of a class, as courts may exercise their discretion to re-evaluate the appropriateness of class certification at any time. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might not be certified is not illusory"); *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."). Thus, the Settlement avoids any uncertainty with respect to class decertification.

3. The Ability of Starion to Withstand Greater Judgment

Plaintiff has significant concerns that Defendant is unable to pay a larger judgment. *See* Klein Aff. at ¶ 15. Plaintiff retained an expert accountant to analyze Defendant's audited financial statements. Plaintiff's expert concluded that even if Plaintiff won higher damages at trial, there could be significant collectability issues. This conclusion was reinforced by information provided by Defendant during the discovery and mediation process concerning certain financial covenants which restrict Defendant's liquid cash. Given the covenants, Defendant lacks the ability to pay a substantially higher cash settlement, and forcing Defendant to pay a greater cash award (for example, through verdict after a trial) could jeopardize Defendant's ability to operate as an ongoing business concern. *See Henry v. Little Mint, Inc.*, No. 12 Civ. 3996 (CM), 2014 WL 2199427, at *9 (S.D.N.Y. May 23, 2014) (approving settlement in which "[t]he parties negotiated heavily over the settlement amount taking into account [d]efendant's ability to pay" and would "allow [d]efendants to remain in business").

4. 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 legal issues relating to consumer protection and contract law, including whether reliance is a necessary element of Plaintiff's claims. 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, 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*, 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").

5. The Range of Reasonableness of the Settlement Fund 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, as discussed above, the relief the Settlement Agreement

provides for Settlement Class Members is in line with Starion's ability to pay, and Plaintiff, Class Representatives and Settlement Class Counsel believe that the amount recovered is appropriate in light of the risks of litigation discussed above. The Court must consider this recovery in light of the risks of litigation and the value of Settlement Class Members receiving money now and not several years from now after trial and appeal, if ever. Moreover, as a "common fund" settlement, no monies will be returned to Starion.

6. Reaction of the Settlement Class

Although objections and requests to opt out are not due until February October 23, 2017, as of July 21, 2017, of the 414,000 Settlement Class members have received individual Notice, none have filed objections to the Settlement or to the provisions for an award to the Plaintiff or to counsel for fees and expenses, nor have any opted out of the Class. Klein Aff. at ¶ 26; DiCarlo Aff. at ¶¶ 8-9. Plaintiff will update these numbers before the Final Fairness Hearing. To date, however, this factor appears to support the fairness of the Settlement. *See, e.g., D'Amato,* 236 F.3d at 86-87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement).

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Courts approve Plans of Allocation when they are "rationally related to the relative strengths and weaknesses of the respective claims asserted." *Torres v. Gristede's Operating Corp.*, No. 04-3316, 2010 WL 2572937, at *2 (S.D.N.Y. Jun. 1, 2010) (quoting *Danieli v. IBM*, No. 08 Civ. 3688, 2009 WL 6583144 (S.D.N.Y. Nov.16, 2009). The proposed Plan of Allocation easily meets this standard.

Based on Starion's records, approximately 414,000 households and small business were subscribed to Starion's variable electric services at some time during the Class Period. These

customers constitute the proposed Settlement Class. However, not all members of the Proposed Settlement Class were necessarily injured by Starion's pricing practices. Specifically, the damages analysis prepared by Plaintiff's electricity market experts concludes that during a small number of months during the Class Period, wholesale prices had risen so high that Starion's variable rate customers saved (rather than lost) money during those months under Plaintiff's damages model. Accordingly, Plaintiff's proposed plan of allocation excludes those months altogether from the allocation formula. Specifically, Plaintiff proposes distributing the Settlement Fund to the Settlement Class pursuant to the following Plan of Allocation:

> Upon final approval, individual Starion customers who have filed a Claim Form ("claimants") will be eligible to receive a share of the Settlement Fund based upon the power used by each claimant in each "Eligible Month" multiplied by the amount of the over- or under- charge in each month (as determined by the parties with assistance from electricity industry experts) to determine an amount of damages for each class member each month. The "Eligible Months" shall be based upon a simple calculation of the months in which Starion's electricity sales exceeded its total costs plus margin based upon Starion's financial records. In the event that claims made exceed the value of the net Settlement Fund after deducting all Settlement Costs (including the costs of notice and administration of the settlement and attorneys' fees and costs incurred by Class Counsel and Service Awards as may be approved by the Court), each Claimant would receive a pro rata share of the net Settlement Fund based on his or her calculated loss. Because each potential claimant used a different amount of electricity and because we do not know the number of eligible claimants who will file valid claims, we cannot estimate the per-person recovery. However, claimants whose calculated loss totals less than $3 will not receive any payment.

As set forth above, because Class Members did not suffer a monetary loss during the months in which Starion's procurement cost (plus a reasonable margin) exceeded the variable price (as calculated by Plaintiff's experts), Class Members' electricity usage during those months is not counted towards the allocation of the Settlement Fund. Accordingly, Class Members who were enrolled in Starion's variable rate electric services *only* during those "high procurement cost" months did not suffer *any* loss under Plaintiff's model, and so will not receive an allocation from

the Settlement Fund. Class Members whose payment would be below $3 also will not receive an allocation, as the transaction costs of processing and mailing checks to such customers would be disproportionate to the harm suffered, and the increased likelihood that checks for lower dollar amounts would not be cashed would increase the portion of the settlement that might need to be distributed through *cy pres*.[6]

Plaintiff believes that this proposed Plan of Allocation is fair and reasonable. The Plan reasonably reflects the losses Class Members suffered based directly upon their actual electricity usage. Moreover, the Plan excludes usage in months in which Class Members did *not* suffer a loss, thereby preventing unfair windfalls. The proposed Plan is also simple to administer and based upon data available from Starion, thereby minimizing administration costs. Accordingly, Proposed Settlement Class Counsel believe that the proposed Plan of Allocation should be approved.

VII. CONCLUSION

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

(1) Certifying the Settlement Class;

(2) Appointing Lydia Gruber as Lead Plaintiff and Lydia Gruber, Louise Ferdinand, Melissa Pennellatore, Diana Windley, Case Martin, and Douglas Siedenburg as Class Representatives;

[6] Settlement Class Counsel anticipate that the net Settlement Fund (after deducting all Settlement Costs) will be fully depleted by Class Member claims. However, in the event that money remains in the Settlement Fund after the payment of all valid Claims, Proposed Settlement Class Counsel will submit a *cy pres* proposal to the Court for distribution of remaining funds.

(3) Appointing Seth Klein and Robert Izard of Izard Kindall & Raabe LLP and Jeremy Heisler, Michael Palmer, Andrew Melzer and David Tracey of Sanford Heisler Sharp LLP as Settlement Class Counsel;

(4) Approving the Settlement; and

(5) Approving the Plan of Allocation.

Dated: July 24, 2017

PLAINTIFF,

LYDIA GRUBER

By: /s/ Seth R. Klein

Robert A. Izard
Seth R. Klein
IZARD KINDALL & RAABE LLP
(Juris No. 410725)
29 South Main Street, Suite 305
West Hartford, CT 06107
(860) 493-6292

Jeremy Heisler*
Michael Palmer*
Andrew Melzer*
David Tracey*
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Fl.
New York, NY 10019
Tel: (646) 402-5650
**Admitted pro hac vice*

Attorneys for Plaintiff and Class Counsel for Plaintiff, Class Representatives and the Class

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.

Keith E. Smith ksmith@eckertseamans.com
Charles A. Zdebski czdebski@eckertseamans.com

/s/ Seth R. Klein
Seth R. Klein