UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PAUL T. EDWARDS, GERRY WENDROVSKY, SANDRA DESROSIERS and LINDA SOFFRON, on behalf of themselves and all others similarly situated, Plaintiffs, v. NORTH AMERICAN POWER & GAS, LLC, Defendant.	Case No: 3:14-cv-1714 (VAB)

MEMORANDUM OF LAW IN SUPPORT OF UNCONTESTED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF NOTICE PLAN AND SCHEDULING OF FINAL FAIRNESS HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Plaintiffs Paul Edwards, Gerry Wendrovsky, Sandra Desrosiers, Linda Soffron, John Arcaro, Michael Tully, David Fritz, and Peggy Zahn ("Plaintiffs" or "Representative Plaintiffs") hereby submit this Memorandum of Law in support of their motion for preliminary approval of a proposed class action settlement pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3).

INTRODUCTION

This motion pertains to five class actions[1] (collectively, the "Actions") against Defendant North American Power & Gas, LLC ("NAPG"). After hard-fought litigation, which included extensive motion practice and investigation, and after extensive settlement negotiations that took place over more than two years (with the assistance of three highly regarded JAMS mediators), Plaintiffs and Defendant have agreed to a global settlement that will resolve all of the Actions.

Plaintiffs allege that NAPG lured Class Members into switching from their energy provider to NAPG for electricity and/or gas services by promising that, after the teaser rate expires, customers will enjoy a "market based variable rate" that "reflects price changes in the wholesale power market." NAPG also represented that its rate "may increase or decrease to reflect price changes in the wholesale power market," and the customer agreements include a list

[1] The class actions are (1) *Edwards v. NAPG*, No. 3:14-cv-01714 (D. Conn.) and (2) *Arcaro v. North American Power & Gas, LLC*, No. 3:16-cv-01921 (D. Conn.) (collectively "*Edwards* Actions"); (3) *Fritz v. N. Am. Power & Gas, LLC*, No. 3:14-cv-634 (D. Conn.), (4) *Tully v. N. Am. Power & Gas, LLC*, No. 3:15-cv-469 (D. Conn.),4), and (5) *Zahn v. N. Am. Power & Gas, LLC*, No. 1:14-cv-8370 (N.D. IL) (collectively "*Fritz* Actions"). Although only *Edwards* presently is formally before this Court, all parties and counsel join in this motion for preliminary approval, and the plaintiffs and counsel in the non-*Edwards* actions are prepared to move to formally transfer their respective actions to this Court should the Court so direct. These five cases advance claims on behalf of consumers in Connecticut, Illinois, Maryland, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Georgia and Texas. A sixth related class action against NAPG pending in the Southern District of New York (*Claridge, et al. v. N. Am. Power & Gas, LLC*, No. 15-cv-1261 (S.D.N.Y.)) on behalf of New York consumers has also been settled on identical terms as the five cases before this Court (with corresponding overall liability caps in each Settlement based upon total energy usage by each of the respective classes). *Claridge* is scheduled to be submitted to Judge Castel for preliminary approval on February 2, 2018.

of specific market costs, such as transportation and storage costs. Plaintiffs further allege that NAPG's representations were false and resulted in Class Members being charged more than they would have if NAPG abided by its promises or if Class Members had purchased electricity or natural gas from their local utility. Defendant denies these allegations and contends that its rates were adequately disclosed and reasonably related to the relevant markets for electric and gas service. Defendant also contends that it has strong defenses and meritorious summary judgment arguments.

Discovery and motion practice was extensive in the Actions. This included four motions to dismiss, the production and review of hundreds of thousands of documents and extensive electronic databases, 17 fact and expert depositions, expert reports, three class certification motions, summary judgment pre-motion submissions and briefing, and significant appellate practice before the Seventh Circuit and the Illinois Supreme Court.

Following arm's length negotiations by the Parties over a period of years, including multiple mediations and countless additional negotiations, the Parties entered into the Settlement Agreement, attached as Exhibit 1 to the Declaration of Robert Izard ("Izard Dec."), which resolves all of the claims asserted in all of the Actions (as well as any claims that any NAPG customers in other states might have) and confers substantial benefits on the Class, defined as: "all Persons who were NAPG Variable Rate Customers during the Class Period [February 20, 2012 through and including June 5, 2017] in Connecticut, Illinois, Maryland, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Georgia or Texas." ("Settlement Class").[2]

[2] Settlement Agreement, ¶¶ 2.11, 2.13. "Excluded from the Settlement Class are: North American Power & Gas, LLC; any of its parents, subsidiaries, or affiliates; any entity controlled by either of them; any officer, director, employee, legal representative, predecessor, successor, or assignee of North American Power & Gas, LLC; any person enrolled in a NAPG affinity program; and any person who has previously released claims that will be released by this Settlement; federal, state, and local governments (including all agencies and subdivisions thereof, but excluding

Plaintiffs hereby respectfully apply for the entry of an order that will: (1) preliminarily approve the Class Action Settlement and the terms thereof; (2) preliminarily certify the proposed class described in the Settlement Agreement for purposes of the settlement; (3) preliminarily designate Plaintiffs as Representatives of the Settlement Class; (4) preliminarily appoint D. Greg Blankinship and Todd S. Garber of Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG"), Matthew R. Mendelsohn of Mazie Slater Katz & Freeman, LLC ("MSKF"), Matthew D. Schelkopf of McCune Wright Arevalo, LLP ("MWA") and Robert Izard, Craig Raabe and Seth Klein of Izard, Kindall & Raabe, LLP ("IKR") as Class Counsel for the Settlement Class; (5) direct that notice be disseminated pursuant to the terms of the proposed notice plan; (6) find that such notice constitutes the best notice practicable under the circumstances; (7) schedule dates by which the Parties and Settlement Class members are to comply with their requirements and obligations as more fully described in the proposed Order filed concurrently herewith; and (8) set a hearing date for the final approval of the proposed settlement and an award of attorneys' fees and costs.

The Court has good cause to grant preliminary approval of this settlement, which is the product of over two years of vigorous arm's-length negotiations by experienced counsel. The resulting settlement is a fair, reasonable and adequate resolution of all claims. All of the parties were fully aware of the relevant facts and legal claims at issue in the litigation.

Preliminary approval of the settlement and conditional certification of the Settlement Class will allow the Parties to notify putative Class members of the settlement and of their right to participate, object, or opt out. Preliminary approval does not require the Court to rule on the ultimate fairness of the settlement, but only to make a "preliminary determination" of the "fairness,

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employees thereof) and the judges to whom the Actions are assigned and any members of their immediate families." *Id.* at ¶ 2.13.

reasonableness, and adequacy" of the proposed settlement. *See* Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004).

I. BACKGROUND OF THE LITIGATION.

Before bringing the instant action, Plaintiffs' counsel exhaustively investigated Plaintiffs' claims and independently obtained copies of the relevant contractual terms and conditions, as well as samples of Defendant's marketing materials. Plaintiffs' counsel also identified and investigated the relevant energy markets. Izard Dec., ¶ 3; Declaration of D. Greg Blankinship ("Blankinship Dec.") at ¶ 3.

Plaintiff Paul Edwards filed a class action complaint against NAPG on November 18, 2014, styled as *Edwards v. NAPG*, No. 3:14-cv-01714 (the "Edwards Action"), in the United States District Court for the District of Connecticut. On August 4, 2015, this Court denied NAPG's motion to dismiss as to all of the Mr. Edwards' substantive claims except unjust enrichment (which was dismissed without prejudice). The court also held that Mr. Edwards did not have standing to represent consumers form states other than his home state of Connecticut. Accordingly, Mr. Edwards filed an amended complaint, adding plaintiffs Gerry Wendrovsky, Sandra Desrosiers, and Linda Soffron (the latter two of whom are residents of New Hampshire) on June 3, 2016, on behalf of Connecticut and New Hampshire consumers. The Parties then proceeded with discovery, including the production of hundreds of thousands of documents, service of expert reports, depositions of each of the named plaintiffs, and a 30(b)(6) corporate deposition of Defendant. The *Edwards* plaintiffs filed their motion for class certification on May 24, 2017 (ECF Nos. 82-87), which was fully briefed and awaiting oral argument at the time of settlement. NAPG also filed a motion for

summary judgment on November 11, 2017 (ECF No. 105); filing of the *Edwards* plaintiffs' opposition has been stayed pending settlement. *See generally* Izard Dec., ¶ 4.

Plaintiff John Arcaro filed a class action complaint against NAPG on October 31, 2016 styled as *Arcaro v. North American Power & Gas, LLC*, No. 3:16-cv-01921-WWE (the "Arcaro Action"), in this Court on behalf of Rhode Island consumers. Insofar as the preexisting *Fritz* and *Tully* action (discussed below), pending before Judge Eginton, already covered Rhode Island consumers, Arcaro and NAPG agreed that the *Arcaro* action should be transferred to Judge Eginton. Once before Judge Eginton, the Parties moved to stay *Arcaro* pending the outcome of the *Fritz* and *Tully* action, which the Court (Eginton, J.) granted. That stay remains in place. *See generally* Izard Dec., ¶ 5.

Fritz v. N. Am. Power & Gas, LLC, No. 3:14-cv-00634 (D. Conn.) and *Tully v. N. Am. Power & Gas, LLC*, No. 3:15-cv-00469 (D. Conn.) have been consolidated before Judge Warren W. Eginton in the District of Connecticut in *Fritz* and asserts causes of action on behalf of Rhode Island and New Jersey classes. *See* ECF Nos. 43, 58, 69. Plaintiff Fritz and Tully have been appointed Interim Lead Plaintiffs and the undersigned counsel have been appointed Interim Class Counsel. *See* ECF No. 58. NAPG moved to dismiss both Plaintiffs' complaints, motions which were denied with the exception of breach of the covenant of good faith and fair dealing. The Parties then proceeded with discovery, including the service of interrogatories, requests for admission, requests for production (that resulted in the production of hundreds of thousands of documents), discovery motions, party and fact depositions, and the service of expert reports. Plaintiffs have also filed motions for class certification, although the briefing has been stayed given the proposed settlement. *See Fritz*, No. 3:14-cv-00634 (D. Conn. Apr. 26, 2017), ECF Nos. 113, 114. *See generally* Blankinship Dec., ¶¶ 4-5.

Zahn v. N. Am. Power & Gas, LLC, No. 1:14-cv-8370 (N.D. IL) is pending in the Northern District of Illinois and asserts causes of action on behalf of Illinois consumers. NAPG moved to dismiss the Complaint, and on May 22, 2015, the Court granted the motion to dismiss on the basis that the Illinois Commerce Commission ("ICC") had exclusive jurisdiction over the dispute, and even if it did not, Plaintiff has not stated a cause of action. Plaintiff appealed this decision to the Seventh Circuit. After briefing and oral argument, on March 4, 2016, the Seventh Circuit certified the following question to the Illinois Supreme Court: Does the ICC have exclusive jurisdiction over a reparation claim, as defined by the Illinois Supreme Court in *Sheffler v. Commonwealth Edison Company*, 955 N.E.2d 1110 (Ill. 2011), brought by a residential consumer against an Alternative Retail Electric Supplier. On December 1, 2016, following briefing and oral argument, the Illinois Supreme Court answered the question: "Under Illinois law, the Illinois Commerce Commission does not have exclusive original jurisdiction over such claims. The claims may be pursued through the courts." NAPG then filed a Petition for Rehearing in the Illinois Supreme Court, which petition was denied on January 23, 2017. On February 8, 2017, the Seventh Circuit reversed the District Court's decision that it lacked jurisdiction to hear the case, vacated its decision regarding the merits, and remanded for further proceedings. The *Zahn* action is currently stayed pending approval of the Settlement. *See Zahn*, No. 1:14-cv-8370 (N.D. IL July 12, 2017), ECF No. 72. *See generally* Blankinship Dec., ¶¶ 6-11.

As part of their investigations, and in preparation for their class certification motions and for a trial on the merits, Plaintiffs also engaged the services of Dr. Frank Felder, who is the Director of the Center for Energy, Economic & Environmental Policy at the Rutgers University Edward J. Bloustein School of Planning and Public Policy, and Seabron Adamson, a Vice President and

electric-industry economist and specialist with the Energy practice at Charles River Associates. Dr. Felder and Mr. Adamson provided their expertise with respect to the manner in which NAPG determined its rates, and they assisted Plaintiffs in determining the extent to which NAPG's rates violated its contracts and in calculating potential damages. Izard Dec., ¶ 6; Blankinship Dec., ¶ 12.

In mid-2015, the Parties in the *Fritz* Actions began to discuss the possibility of settlement. Blankinship Dec., ¶ 13. On December 14, 2015, the Parties in the *Fritz* Actions participated in a mediation with Vivien B. Shelanski, Esq. of JAMS, but were unable to reach agreement on relief for the class. *Id.* On February 17, 2016, the Parties in the *Fritz* Actions engaged in another mediation with Ms. Shelanski, but again, remained far apart and were unable to reach a settlement. *Id.* Settlement discussions were then halted and the Parties continued extensive discovery and motion practice for the next eleven months. *Id.* After such discovery, and decisions by the Court in *Claridge* (*see* note 1 above) to grant class certification and the Illinois Supreme Court's ruling on the issue of jurisdiction, the Parties in the *Fritz* Actions agreed to reengage in settlement discussions. *Id.*

On January 27, 2017, the Parties in the *Fritz* Actions participated in a full-day mediation session with Peter H. Woodin, Esq. of JAMS. *Id*., ¶ 14. While no settlement was reached at that time, progress was made and the Parties in the *Fritz* Actions agreed to continue discussions. *Id*. On February 23, 2017, the Parties in the *Fritz* Actions participated in another full-day mediation session with Mr. Woodin where additional progress was made, but additional issues remained. *Id*. Over the following months, the Parties continued to discuss settlement both with the assistance of Mr. Woodin and independently. *Id.*

On March 20, 2017, the Parties in the *Edwards* action likewise conducted a full-day mediation session with Mr. Woodin. Izard Dec., ¶ 7. Although no settlement was reached, the Parties in *Edwards* continued to discuss settlement directly. *Id.*

Ultimately, on June 27, 2017, the Parties in the *Fritz* Actions and in *Claridge* (*see* note 1 above) reached a settlement in principle with NAPG. Blankinship Dec., ¶ 14; Izard Dec., ¶8. The Parties in the *Fritz* Actions and *Claridge* filed a motion for preliminary approval of the Settlement on August 4, 2017 before Judge Castel (where the *Claridge* case was and is is pending). Blankinship Dec., ¶ 15; Izard Dec., ¶8. Plaintiffs' counsel in the *Edwards* Actions opposed preliminary approval and wrote a letter seeking permission to move to intervene and raising certain concerns about the plan of allocation and, in addition, their belief that it was improper for the *Fritz* and *Claridge* Plaintiffs to include in their settlement the states at issue in the *Edwards* Actions. Judge Castel thereafter denied the *Fritz* and *Claridge* plaintiffs' motion for preliminary approval. Blankinship Dec., ¶ 15; Izard Decl., ¶ 8.

Thereafter, the Parties in the Actions agreed to submit to mediation jointly. On September 25, 2017, the Parties in the Actions participated in a full-day mediation session with Mr. Woodin. The Parties could not reach a settlement during that session. Nevertheless, the Parties agreed to participate in another full-day mediation session with Hon. Diane M. Welsh, U.S.M.J. (Ret.), which resulted in the Parties reaching a settlement in principle. The formal Settlement Agreement was entered into on January 16, 2018. Blankinship Dec., ¶ 16; Izard Dec., ¶ 9.

The Parties recognize and acknowledge the benefits of settling these cases. Plaintiffs believe that the claims asserted in this case have merit and that the evidence developed to date supports their claims. Despite the strengths of their cases, Plaintiffs are mindful of the challenges to proof under, and possible defenses to, the claims in these matters. Plaintiffs further recognize and acknowledge the expense and length of time it would take to prosecute this matter against NAPG through trial, post-trial proceedings, and appeals, and that NAPG's ability to pay class judgments in all of the

Actions is far from certain. Counsel for Plaintiffs have taken into account the uncertain outcome and risks of the litigation, including the difficulties and delays inherent in such litigation, and the likelihood of protracted appeals. Counsel for Plaintiffs have, therefore, determined that the Settlement set forth in this Agreement is fair, reasonable and adequate. The Settlement confers substantial benefits upon, and is in the best interests of the Plaintiffs and the Settlement Class.

NAPG maintains that it has a number of meritorious defenses to the claims asserted in these actions. Nevertheless, NAPG recognizes the risks and uncertainties inherent in litigation, the significant expense associated with defending class actions, the costs of any appeals, and the disruption to its business operations arising out of class action litigation. NAPG also recognizes the risk that a trial on class-wide claims might present. Accordingly, NAPG believes that the Settlement set forth in the Agreement is likewise in its best interests.

As a result of their fact and expert discovery efforts, both sides were able to enter into settlement negotiations with an informed view of the strengths and weaknesses of their prospective cases, and with a basis for determining what form of monetary relief would be reasonable and appropriate in the settlement context.

II. SUMMARY OF THE SETTLEMENT.

The gravamen of Plaintiffs' allegations is that NAPG's pricing for variable rate energy did not follow the pricing representations made in NAPG's contract. NAPG contends that its disclosures with regard to rates were accurate and not misleading, and that its rates were commensurate with rates charged in the relevant markets. Both parties have investigated the facts and analyzed the relevant legal issues. While Plaintiffs and their counsel believe that the claims asserted have merit, Defendant disputes the factual allegations made by Plaintiffs, denies liability with respect to any of the claims alleged by Plaintiffs, and has (and will continue to)

contest class certification should the case proceed. Plaintiffs have weighed the costs and benefits to be obtained under the Settlement Agreement as balanced against the costs, risks and delays associated with the continued prosecution of this complex and time-consuming litigation and the likely appeals of any rulings in favor of either the Settlement Class or the Defendant. As a result, Plaintiffs believe that the Settlement Agreement provides substantial benefits to the Settlement Class, and is fair, reasonable, adequate and in the best interests of Plaintiffs and the Settlement Class. Against this backdrop, and in the interest of avoiding protracted and costly litigation, the Parties have agreed to a proposed settlement as described below.

Under the Settlement Agreement, Defendant shall pay Class Members who timely submit completed claim forms:

1. NAPG Variable Rate Customers shall receive $0.00351 per kilowatt hour for electric supply service and $0.0195 per therm for natural gas supply service received from NAPG while on a variable rate plan during the Class Period. This averages to $2.87 per month of enrollment per Class Member, although actual individual awards will vary based upon actual usage. However, should the total Benefit calculated for a NAPG Variable Rate Customer who submits a Valid Claim be less than $2, that Customer shall be entitled to receive a $2 Benefit.[3]
2. In the event that the NAPG Variable Rate Customer has more than one Household, then the Class Member may file another Claim seeking a Benefit and receive another Individual Settlement Amount for that additional Household.

[3] The total Benefit amount payable by NAPG shall be subject to a $16,053,000 cap (the "Cap"). (Combined with the concurrent proposed settlement for New York consumers in the *Claridge* litigation, NAPG's total liability cap is $17,500,000.) In the event that the value of the Benefits claimed exceeds the Cap, the Benefit payable to each NAPG Variable Rate Customer will be reduced pro rata based on the individual's electric supply and/or natural gas supply use while on a variable rate plan.

Settlement Agreement, ¶ 5.1. Defendant shall also separately pay the cost of notice to the class and administration of the settlement. *Id.*, Section X. Finally, Defendant has agreed to separately pay and not to oppose plaintiffs' attorney fees and costs of up to $3,669,000, as well as a request for Representative Plaintiff enhancement awards of $5,000 each. *Id.*, ¶¶ 7.2, 7.5.

In return for making these settlement benefits available to all Settlement Class members, the Settlement Class members' claims against Defendant will be dismissed with prejudice and all Settlement Class members (other than those who opt-out of the Settlement Class) will release and be permanently barred from pursuing any claims in accordance with the provisions of the Settlement Agreement. Settlement Agreement, Section XII.

III. STANDARD FOR APPROVAL OF A CLASS ACTION SETTLEMENT.

Rule 23(e) governs the settlement of class actions. The Rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Compromise and settlement of class actions is favored. *See Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context") (quotation omitted); *see also* Herbert B. Newberg & Alba Conte, Newberg on Class Actions ("Newberg"), § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). Thus, at the preliminary approval stage, the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* Newberg § 11.25; Manual for Complex Litigation §21.632. The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a

full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.3d 631, 634 (2d Cir. 1980); Newberg § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and [it] appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members).[4]

Moreover, "[a] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)) (internal quotations marks omitted). Where a settlement is achieved through arm's-length negotiations by experienced counsel and there is no evidence of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007); *see also Macedonia Church v. Lancaster Hotel, LP*, No. 05-0153 (TLM), 2011 WL 2360138, at *11 (D. Conn. June 9, 2011) (stating "the Court gives weight to the Parties' judgment that the settlement is fair and reasonable"). "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (citation omitted).

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL TO THE SETTLEMENT AGREEMENT.

When evaluating the fairness and adequacy of a proposed class settlement, courts in this Circuit are guided by the factors enunciated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448

[4] *See also Danieli v. IBM*, No. 08-3688, 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted.").

(2d Cir. 1974) (abrogated on other grounds). Those factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (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 defendant 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.

Grinnell, 495 F.2d at 463. These factors heavily favor granting preliminary approval.

A. The Litigation Is Complex And Will Be Expensive And Lengthy.

The Settlement Agreement provides substantial monetary and injunctive benefits to the Settlement Class while avoiding the significant expenses and delays attendant to discovery and motion practice related to summary judgment and class certification. Indeed, "Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain." *Macedonia Church*, 2011 WL 2360138 at *9. The Settlement Class includes all persons who were variable rate customers of NAPG at any time during the Class Period.

Absent an approved settlement, the Parties in all of the Actions will be forced to continue litigation, which will burden the three different courts hearing these cases. The resulting fact-intensive trials will also result in significant expenses to all parties. Any judgment will likely be appealed, extending the costs and duration of the litigation. The Settlement Agreement, on the other hand, will result in prompt and equitable payments to the Settlement Class and important injunctive relief that protect current class members and future consumers of Defendants' products. Thus, this factor weighs in favor of settlement.

B. The Settlement Amounts Are Reasonable In Light Of The Best Possible Recovery And In Light Of All The Attendant Risks Of Litigation.

The adequacy of a settlement amount offered should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray*, No. 93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998). That the settlement amount is less than the maximum potential recovery is not a barrier to approval. *See Grinnell Corp.*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").[5] Indeed, judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken and Associates Sec. Lit.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).

Here, there is a broad range of potential recovery if the case were to be litigated to judgment after trial. For example, Plaintiffs' expert Mr. Adamson calculated maximum damages with respect to NAPG variable rate electricity customers. Assuming a jury fully accepted his analysis, the $0.0035 per kWh recovery for electricity customers constitutes 23.3% of his calculated damages, which Plaintiffs respectfully submit on its face constitutes an outstanding result. Moreover, NAPG strongly contests Mr. Adamson's analysis and has submitted substantial contrary expert evidence. There is no guarantee that the jury would accept any, much less all, of Mr. Adamson's analysis. Moreover, Defendant could prevail on its legal arguments to defeat liability ***entirely***, resulting in ***no*** recovery for class members. Given this broad range of possible damages, the Settlement Agreement provides a substantial recovery that falls well within the range that courts have traditionally found to be fair and adequate under the law.

[5] *See also Cagan v. Anchor Sav. Bank FSB*, No. 88-3024, 1990 WL 73423, at *12 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement where maximum potential recovery was approximately $121 million).

The fact that the Settlement Agreement provides for a prompt payment to claimants favors approval of the settlement. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *10 (D. Conn. Nov. 3, 2016) (stating "the guaranteed payment of the settlement amount and the SFH and Trinity 15-year guarantee 'increases the settlement's value in comparison to some speculative payment of a hypothetically larger amount years down the road,' had the parties proceeded with litigation") (citing *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004)).

Moreover, this Settlement compares favorably with other class settlements involving consumer claims against ESCOs relating to allegedly misleading variable market rate claims. The Settlement provides recovery to Class Members of up to $16,053,000. Settlement Agreement, ¶ 5.1. *Cf. Wise v. Energy Plus Holdings, LLC*, No. 11-7345 (S.D.N.Y.), ECF Nos. 52 & 74 (providing for a settlement valued between $12,478,451 and $14,314,142); *Chen v. Hiko Energy, LLC*, Nos. 12-1771 (S.D.N.Y.), ECF Nos. 83 & 93 (providing a settlement valued between $7,225,000 and $10,225,000); *Vitale v. U.S. Gas & Electric, Inc.*, 2:14:04464 (D.N.J.), ECF Nos. 53 & 63 (providing a $1,825,000 cash fund to be paid to class members, resulting in a $4.60 per-class member per-energy service cap). Therefore, these factors militate in favor of approving the Settlement Agreement.

C. The Reaction Of The Class Will Likely Be Positive.

While the reaction of absent class members cannot be conclusively gauged until notice has been sent, the fact that all of the Plaintiffs (including Messrs. Edwards and Wendrovsky who are themselves experienced trial attorneys) and their experienced counsel support the Settlement Agreement is a strong indication that members of the Settlement Class will also view it positively.

D. The Current Stage Of The Instant Litigation And The Discovery That Has Occurred Favors Preliminary Approval.

The Actions have been litigated for over three years. The legal issues in this Actions have been thoroughly vetted through extensive motion practice and both fact and expert discovery. In the mediation, as well, the Parties exchanged briefs and legal and factual research upon which they rely. Plaintiffs' counsel conducted a thorough investigation of Plaintiffs' claims. Defendants' counsel has done so as well; each side has a thorough understanding of the case. The Parties are not required to complete discovery in every case for the Court to preliminarily approve the settlement.[6] Class Counsel is well positioned to evaluate the merits of the Actions.

E. Plaintiffs Face Substantial Hurdles In Establishing Liability.

The Settlement Agreement should be preliminarily approved because Plaintiffs face substantial hurdles in establishing liability. Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997).

First, Defendant argues that its disclosures with regard to its rates, particularly those contained in the customer agreements that were provided to class members, adequately disclose the factors that cause its variable rates to vary. Second, Defendant argues that its customers who have been enrolled with NAPG for considerable time should not recover, because they have voluntarily paid the rates in question, of which they must be aware. Plaintiffs dispute the factual and legal bases of these arguments but, if Defendant can prove these defenses, Plaintiffs' ability to establish liability is not guaranteed. Indeed, this Court has already granted summary judgment to another third party

[6] *See O'Connor v. AR Resources, Inc.*, No. 08cv1703 (VLB), 2012 WL 12743 (D. Conn. Jan. 4, 2012) (observing "the Court 'need not find that the parties have engaged in extensive discovery ... Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to intelligently make an appraisal of the Settlement.'") (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 176 (S.D.N.Y. 2000) (internal quotations and citations omitted), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001)).

electric supplier in the similar *Richards v. Direct Energy* (3:14-CV-01724 (VAB)) litigation, on the basis that the relevant contract allowed the challenged rates. At the time that the Parties here reached the Settlement, NAPG had already moved for summary judgment in this case based in part on the Court's analysis in *Richards*. Plaintiffs here respectfully disagree with the Court's ruling in *Richards* (which decision is presently on appeal) as well as its applicability here, but the fact remains that Plaintiffs and the Class face the substantial risk of recovering ***nothing*** but for the Settlement.

Plaintiffs' counsel is confident in its ability to prove Plaintiffs' case. Nonetheless, the Settlement Agreement avoids the risks inherent in further litigation, and therefore this factor weighs in favor of preliminary approval.

F. Plaintiffs Face Substantial Hurdles In Proving Damages.

In order to prove damages, Plaintiffs must prove that Defendant's contracts and marketing materials included false statements concerning the manner in which NAPG sets its variables rates and/or that the disclosures made by Defendant in connection with its marketing and contracts were insufficient. This is an expensive and potentially challenging task. While Plaintiffs are confident that their expert can collect and collate pricing data in such a way that class and individual damages can be determined; that task is substantial. Thus, there are substantial obstacles Plaintiffs must overcome to prove damages in this case, a factor favoring approval of the Settlement Agreement.

G. Maintaining The Class Action Through Trial May Be Challenging.

Plaintiffs are confident in their ability to maintain this action as a class through trial. Nonetheless, they recognize that there are substantial hurdles in being able to do so. While the *Claridge* plaintiffs have successfully certified a class in the *Claridge* matter pending in the Southern District of New York, Plaintiffs in *Fritz*, *Tully*, *Zahn*, *Edwards*, and *Arcaro* have not yet obtained class certification in their Actions. While Plaintiffs believe certification in those actions is

appropriate, given that they involve the laws of states other than New York, there is no guarantee certification would be granted. Moreover, NAPG is likely to move to decertify the Classes and/or seek appellate review pursuant to Fed. R. Civ. P. 23(f).

H. The Defendant May Not Be Able To Withstand A Substantially Greater Judgment.

The ability of Defendant to withstand a substantially greater judgment is by no means assured. While Plaintiffs have no concern that NAPG has the ability to pay all claims made in the context of this Settlement Agreement, there is no certainty that NAPG could bear the enormously large statutory and compensatory damages award that could be assessed were the cases to proceed through trial. In any event, a "defendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9.

V. THE COURT SHOULD CONDITIONALLY CERTIFY THE CLASS.

"Under Federal Rule 23(c)(1), 'the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date.'" *Ayzelman v. Statewide Credit Services Corp.*, 238 F.R.D. 358, 362 (E.D.N.Y. 2006) (citation and quotation marks omitted); *see also Lessard v. Rent-A-Center East, Inc.*, 250 F.R.D. 103, 107 (D. Conn. 2008). "The Second Circuit has acknowledged the propriety of certifying a class solely for settlement purposes." *Global Crossing*, 225 F.R.D. at 451. Where a class is proposed in connection with a motion for preliminary approval, "a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Courts employ a "'liberal rather than restrictive construction' of Rule 23, 'adopt[ing] a standard of flexibility' in deciding . . . certification." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

Plaintiffs seek the conditional certification of the following Rule 23 class for purposes of effectuating the settlement:

> All persons who at any time from February 20, 2012 to June 5, 2017 were customers of NAPG and paid NAPG variable rates for electricity and/or natural gas in Connecticut, Illinois, Maryland, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Georgia or Texas.
>
> Excluded from the Settlement Class are: North American Power & Gas, LLC; any of its parents, subsidiaries, or affiliates; any entity controlled by either of them; any officer, director, employee, legal representative, predecessor, successor, or assignee of North American Power & Gas, LLC; any person enrolled in a NAPG affinity program; and any person who has previously released claims that will be released by this Settlement; federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof) and the judges to whom the Actions are assigned and any members of their immediate families.

Because all of the certification requirements for settlement purposes are met and Defendant consents to conditional certification of a class action for settlement purposes, Plaintiffs respectfully request that the Court conditionally certify the Settlement Class.

A. The Settlement Class Satisfies Rule 23(a).

There are five Rule 23(a) requirements (numerosity, commonality, typicality, adequacy and ascertainability), all of which the Settlement Class satisfies. Indeed, the *Claridge* Court has already held that certifying a class is appropriate even under the more stringent standards applied outside of this settlement context. *See* Memorandum and Order, *Claridge*, No. 15-cv-1261 (S.D.N.Y. Nov. 30, 2016), ECF No. 89 (granting motion for class certification).

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

As the Settlement Class includes current and former NAPG customers it is estimated to include tens of thousands of members, rendering joinder impracticable. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members.") (citation omitted).

2. There Are Questions Of Law Or Fact Common To The Class.

Rule 23(a)(2) provides that there must be "questions of law or fact common to the class" for a suit to be certified as a class action. Fed. R. Civ. P. 23(a)(2). "Commonality does not mandate that all class members make identical claims and arguments, only that common issues of fact or law affect all class members. Generally, courts have liberally construed the commonality requirement to mandate a minimum of one issue common to all class members." *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992) (citations omitted); *see also Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 90 (D. Conn. 2010) ("This is not a demanding standard, as it is established so long as the plaintiffs can identify some unifying thread among the [class] members' claims.") (internal quotation marks and citation omitted).

Here, there are many common issues of fact and law, including whether Defendant's representations regarding its rates are misleading and deceptive and whether its electricity and natural gas rates are commensurate with what Defendant promised.

3. The Plaintiffs' Claims Are Typical Of The Claims Of The Class.

Rule 23(a)(3) provides that the claims of the Plaintiffs must be "typical of the claims of . . . the class." Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3) is satisfied "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (citation omitted). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.'" *Menkes*, 270 F.R.D. at 92 (quoting *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir.1993)).

Here, the claims of the Plaintiffs and those of the members of the Settlement Class arise from the same conduct. Defendant represents that its rates will be a market based variable rate and take into account specified factors. Plaintiffs allege these representations are false and misleading and that these are material misrepresentations that caused them injury because they believed they would be charged less than they actually were, and that they were damaged thereby. This same conduct caused the same injury to members of the Settlement Class. Moreover, Defendant's alleged misrepresentations and omissions regarding its rates would be material to any reasonable consumer. *See Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) ("[A] material claim is one that involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.") (citation omitted). *See also Galvan v. KDI Distribution Inc.*, No. 08-0999, 2011 WL 5116585, at *10 (C.D. Cal. Oct. 25, 2011) ("[R]epresentations regarding price are material to a purchase"); *F.T.C. v. Windward Mktg., Inc.*, No. 96-615, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) ("[A]ny representations concerning the price of a product or service are presumptively material.").

4. Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class.

Rule 23(a)(4) requires that "the representative parties fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy is met when " (1) the proposed class representative's interests are to vigorously pursue the claims of the class and are not antagonistic to the interests of other class members; and (2) the proposed class counsel are qualified, experienced and able to conduct the litigation." *Menkes*, 270 F.R.D. at 92 (citations omitted). Here, there is no indication that Plaintiffs, who enrolled in NAPG's services just like members of the Settlement Class have any interests antagonistic to the Settlement Class.

To the contrary, Plaintiffs have been actively protecting the interests of the class. They have all engaged in the prosecution of this matter since its inception, having consistently conferred with their counsel, reviewed the various versions of the complaints, reviewed and signed their interrogatory responses, provided documents and consulted with their counsel regarding the propriety of the Settlement. Moreover, Plaintiffs' attorneys are qualified, experienced and able to conduct the litigation.

5. Class Members Are Readily Identifiable And Ascertainable.

Rule 23 also contains an "implicit requirement" that the class be precise and ascertainable. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 30, 44-45 (2d Cir. 2006). Here, Defendant has identifying information for all of the customers to whom it provided electricity or natural gas, including their names, addresses, and the number of bills they received from NAPG. The Settlement Class is thus precise and readily identifiable.

B. The Settlement Class Satisfies Rule 23(b)(3).

Rule 23(b)(3) provides that questions of law or fact common to class members must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In addition, Plaintiffs must demonstrate that "[a] class action is superior to other methods for fairly and efficiently adjudicating the controversy." *Id.*

1. Common Questions Predominate Over Individual Issues.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance thus requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney*

Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001) (abrogated on other grounds).

Here, Defendant's liability turns on whether its uniform representations regarding rates are deceptive and misleading and every class member's claim may be proven by the same set of facts. Moreover, determining whether Settlement Class members were injured will turn on common proof regarding the extent to which NAPG's rates are higher than the rates promised in NAPG's contracts. In any event, when common questions of law or fact predominate regarding liability, "differences in the amount and recoverability of individual damages do not necessarily make class actions unmanageable." *Menkes*, 270 F.R.D. at 94 (citing *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). In addition, the Settlement Class handily satisfies Rule 23(a)'s requirements, which "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (citation omitted).

2. A Class Action Is The Superior Method For Adjudicating This Controversy.

Rule 23(b)(3) also requires a determination as to whether a class action is the superior means to adjudicate the class' claims. The rule sets forth a list of relevant factors: class members' interest in bringing individual actions; the extent of existing litigation by class members; the desirability of concentrating the litigation in one forum; and potential issues with managing a class action. Fed. R. Civ. P. 23(b)(3)(A-D). It is well settled that a class action is the superior method of adjudication where, as here, "[t]he claims of each individual class member are likely too small to warrant the costs of litigating individually, and it is therefore in the interest of all class members to proceed as a class." *Menkes*, 270 F.R.D. at 100. Certification of the Settlement Class will allow for efficient adjudication of claims that would likely not be brought owing to prohibitive legal expenses, while at the same time preserving scarce judicial

resources. Therefore, a class action is a superior method of adjudicating this case.

VI. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL.

D. Greg Blankinship and Todd S. Garber of FBFG, Matthew R. Mendelsohn of MSKF, Matthew D. Schelkopf of MWA and Robert Izard, Craig Raabe and Seth Klein of IKR should be appointed as Class Counsel. Rule 23(g) enumerates four factors for evaluating the adequacy of proposed counsel:

> (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and types of claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(C)(i).[7] All of these factors militate in favor of appointing the above attorneys as Class Counsel. All counsel spent a significant amount of time identifying and investigating Plaintiffs' claims before filing the Actions. Izard Dec., ¶ 3; Blankinship Dec., ¶ 3. FBFG, MSKF, MWA and IKR have extensive experience in class actions, particularly those involving consumer fraud, as demonstrated by the numerous times the firms and their attorneys have been appointed Class Counsel. *See* Izard Dec., Ex. 2 (IKR firm resume); Blankinship Dec., Exs. 1, 2, 3(FBFG, MSKF and MWA firm resumes). Finally, FBFG, MSKF, MWA and IKR are established law firms that currently litigate dozens of cases in state and federal courts throughout the nation, and they have more than sufficient resources to represent the Class. *Id*.

VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE.

Rule 23(c)(2)(B) requires that class members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified

[7] *See also deMunecas v. Bold Food, LLC*, No. 09-00440, 2010 WL 2399345, at *3 (S.D.N.Y. Apr. 19, 2010) ("The work that [plaintiffs' counsel] has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.").

through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Rule also requires that any such notice clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(b)(2)(B).

Here, NAPG has class members' names and addresses, and Defendant has agreed to provide that information to the Settlement Administrator, who will send direct written notice (the "Short Form Notice") to each class member. *See* Settlement Agreement, Exhibit B. That notice "must be of such nature as reasonably to convey the required information [under Rule 23(b)(2)(B) . . . and it must afford a reasonable time for those interested to make their appearance." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) (quotation marks omitted). The Short Form Notice also directs class members to a website where they can find further information, including the "Long Form Notice." *See* Settlement Agreement, Exhibit C. The Short Form Notice also includes a phone number for class members who wish to request a copy of the Long Form Notice without using the internet. Similar notice programs have been approved in other class settlements involving claims against third-party electricity suppliers. *See, e.g.*, Order, *Chen v. Hiko Energy, LLC*, No. 7:14-cv-01771 (S.D.N.Y. Jan. 26, 2016), ECF No. 73 (granting preliminary approval of class settlement notice); Order, *Wise v. Energy Plus Holdings, LLC*, No. 11-7345 (S.D.N.Y. Mar. 26, 2013), ECF No. 42 (same). Therefore, Plaintiffs respectfully request that the Court approve the forms of notice attached as Exhibits 1-B and 1-C to the Izard Declaration. Plaintiffs also respectfully request that the Court appoint

Heffler Claims Group as Settlement Administrator. Heffler Claims Group is an experienced settlement administration firm with substantial experience in administering class action settlements.

VIII. CONCLUSION.

Plaintiffs respectfully request that the Court preliminarily approve the Settlement Agreement, conditionally certify the Settlement Class, appoint Plaintiffs' counsel as Class Counsel, approve the proposed notices of settlement, and enter the contemporaneously-filed Proposed Order.

Dated: January 16, 2018

Plainttiffs,

By: */s/ Robert A. Izard*
Robert A. Izard
Craig A. Raabe
Seth R. Klein
Izard Kindall & Raabe, LLP
29 South Main St., St. 305
West Hartford, CT 06107

D. Greg Blankinship
Todd S. Garber
Antonino B. Roman
Finkelstein, Blankinship, Frei-Pearson & Garber, LLP
445 Hamilton Avenue, Suite 605
White Plains, New York 10601

Matthew R. Mendelsohn
Mazie Slater Katz & Freeman, LLC
103 Eisenhower Parkway
Roseland, New Jersey 07068

Matthew D. Schelkopf
McCune Wright Arevalo LLP
555 Lancaster Avenue

Berwyn, PA 19312

CERTIFICATE OF SERVICE

I, Seth R. Klein, hereby certify that on this 16th day of January, 2018, the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this document though the court's CM/ECF system.

/s/ Seth R. Klein
Seth R. Klein