DOCKET NUMBER X07-HHDCV15-6060160-S

CONSTANCE JURICH, on behalf of herself and all others similarly situated, Plaintiffs, v. VERDE ENERGY USA, INC., Defendant.	SUPERIOR COURT COMPLEX LITIGATION DOCKET AT HARTFORD SEPTEMBER 18, 2019

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, MODIFICATION OF THE CERTIFIED CLASS DEFINITION, APPROVAL OF NOTICE PLAN AND SCHEDULING OF FAIRNESS HEARING

Plaintiff Constance Jurich ("Plaintiff"), individually and on behalf of the proposed Settlement Class (as defined in the Settlement Agreement),[1] respectfully submits this memorandum of law in support of her motion for preliminary approval of the proposed settlement, modification of the certified Class for purposes of defining the Settlement Class, approval of notice plan and setting of a final fairness hearing.

I. INTRODUCTION[2]

Plaintiff's Fourth Amended Class Action Complaint in this action (which was filed on December 18, 2018 and is the operative complaint) brings claims on behalf of herself and other

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Settlement Agreement, dated as of September 18, 2019 (the "Settlement" or "Settlement Agreement").

[2] Defendant consents, for settlement purposes only, to the relief requested herein, but not to the allegations in the Complaint, as amended, or Plaintiff's arguments regarding the merits of its claims as summarized herein.

similarly-situated consumers against the defendant, Verde Energy USA, Inc. ("Verde" or "Defendant"), alleging that Verde claimed in its contracts with customers that its variable rate for electricity supply services would fluctuate to reflect changes in "market conditions" while in practice they failed to do so, and that Verde failed to make the statutorily mandated "clear and conspicuous statement explaining the rates that [the] consumer will be paying" and "the circumstances under which the rates may change." *See* Fourth Amended Complaint [Dkt. No. 234] (the "FAC") at ¶¶ 19-28, 41-67.[3] Defendant denies any liability with respect to the claims in the FAC and maintains that it did nothing improper. To resolve the dispute and avoid the mutual costs and risks of ongoing litigation, the parties have agreed to a settlement that will pay Claimants $0.0095 per variable rate Kilowatt Hour they consumed through September 30, 2016. A copy of the Settlement Agreement is attached as Exhibit 1 to the accompanying Affidavit of Seth R. Klein ("Klein Aff.").

Plaintiff respectfully submits that this is an outstanding result taking into account the status and uncertainties of the litigation. It successfully resolves a challenging case and allows thousands of class members to receive a substantive recovery. Plaintiff now requests that the Court preliminarily approve the proposed Settlement, permitting the Settlement Class to be given notice of the terms of the Settlement so that they can make an informed decision as to its merits.

Accordingly, Plaintiff moves the Court for entry of an order that, *inter alia*:

(1) Preliminarily approves the Settlement as set forth in the Settlement Agreement;

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

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

(3) Approves the proposed Notice Plan;

(4) Appoints Heffler Claims Group as the Settlement Administrator; and

(5) Schedules a Final Fairness Hearing.

II. PRELIMINARY APPROVAL IS APPROPRIATE

A. The Standard for Preliminary 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). Connecticut jurisprudence governing class actions "is relatively undeveloped, because most class actions are brought in federal court." *Collins v. Anthem Health Plans, Inc.*, 266 Conn. 12, 32 (2003) (quotation marks omitted). However, because Connecticut's requirements for preliminary approval of a class action settlement under Practice Book §§ 9-8 and 9-9 were until recently the same as the federal standard under Fed. R. Civ. P. 23, Connecticut courts have historically looked to pre-amendment federal case law for "guidance" in construing Connecticut's class action requirements. *Id.*[4]

[4] On December 1, 2018, amendments to Fed. R. Civ. P. 23 took effect. The intent of these amendments was to limit grants of preliminary approval to proposed settlements that "will likely earn final approval." See 2018 Advisory Committee Note. Connecticut has not amended the Practice Book to implement corresponding changes to Connecticut's preliminary approval practice. Nonetheless, Plaintiff believes that the proposed Settlement would satisfy the standard of the amended Rule 23, if they were deemed applicable. See Part II.B.3 below (discussing that the Settlement satisfies all final approval requirements).

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). Once a proposed settlement is reached, "a court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make a 'preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (citations omitted); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled.").

A court is afforded wide discretion in determining the information that it wishes to consider at this preliminary stage, and this initial assessment can be made on the basis of information already known to the court. Manual for Complex Litigation (Fourth), at § 21.162 (2004). At the preliminary approval stage, the Court is not required to make a final determination of the merits of the proposed settlement. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("At this stage of the proceeding, the Court need only find that the proposed settlement fits within the range of possible approval.") (internal quotation marks and citation omitted). To grant preliminary approval, 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.2d 631, 634 (2d Cir. 1980).[5]

Preliminary approval of a proposed settlement is warranted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the reasonable range of possible approval." *See NASDAQ*, 176 F.R.D. at 102; *see also In re Gilat Satellite Networks, Ltd.*, No. 02 Civ. 1510, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007).

B. The Proposed Settlement Meets the Standard for Preliminary Approval

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

Where a settlement is reached only after extensive arm's-length negotiations by competent counsel who had more than adequate information regarding the circumstances of the action and the strengths and weaknesses of their respective positions, it is entitled to a "strong initial presumption of fairness." *In re PaineWebber Ltd., P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The opinion of experienced counsel supporting the settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). Courts generally presume that settlement

[5] "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *See NASDAQ*, 176 F.R.D. at 102.

negotiations were conducted in good faith and that the resulting agreement was reached without collusion, absent evidence to the contrary. Alba Conte & Herbert Newberg, Newberg on Class Actions § 11.28, at 11-59 (3d ed. 1992) (counsel are "not expected to prove the negative proposition of a noncollusive agreement"). Here, the parties have engaged in extensive adversarial litigation, including both motion practice and discovery, followed by several rounds of arms'-length negotiations utilizing mediators, before arriving at the Settlement, and all parties firmly understand the strengths and weaknesses of the claims and defenses at issue.

Plaintiff has obtained and analyzed substantial records concerning Verde's contract language during the Class Period and the electricity that Verde provided to Connecticut variable rate consumers during that time, including Verde's own costs. Klein Aff. at ¶ 3. Likewise, Defendant has deposed and obtained interrogatory responses and document discovery from Plaintiff and Plaintiff's husband. *Id.* The parties have exchanged initial expert reports, and Verde has deposed Plaintiff's experts. *Id.*

Moreover, the parties' extensive motion practice has allowed them to fully understand the legal and factual issues at play and to obtain guidance as to the Court's view of the strengths and weaknesses of the claims and defenses. Plaintiff filed a motion for class certification on January 27, 2017, including a report from Plaintiff's experts [Dkt. No. 159.00]; following a failed mediation (as discussed below), Defendant filed its opposition on October 17, 2017 [Dkt. No. 171.00] that included rebuttal experts reports and detailed factual affidavits from Verde's officers; Plaintiff filed her reply on November 8, 2017 [Dkt. No. 176.00]; and the Court issued its ruling certifying a class on December 6, 2017 [Dkt. No. 180.00].

The parties then filed cross-motions for summary judgment on March 16, 2018. *See* [Dkt. Nos. 182.00, 185.00]. The parties filed their respective oppositions on April 6, 2018 [Dkt.

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

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

While Plaintiff's motion to file the FAC was pending, Defendant on August 29, 2018, filed a renewed motion for summary judgment [Dkt. No. 213.00] and a motion to amend, alter, or decertify the class [Dkt. No. 215.00]. Plaintiff filed oppositions to Defendant's motions on September 24, 2018 [Dkt. Nos. 222.00, 223.00], and Defendant filed reply briefs on October 9, 2018 [Dkt. Nos. 227.00, 228.00]. Following oral argument on November 6, 2018, the Court on February 1, 2019, denied Defendant's motions. *See* [Dkt. No. 240.00]. The Court noted, however, that, even for a *per se* CUTPA violation, the class must show ascertainable loss.

However, the Court held that "ascertainable loss doesn't require individual reliance and individual calculations." *Id.* at 3.[6]

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

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

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

setting forth the essential terms of the Settlement and recommended the final substantive terms to both parties.

2. The Proposed Settlement Has No Obvious Deficiencies and Treats All Class Members Fairly

Because preliminary approval is simply the first step in the process of approving a settlement, courts have typically screened proposed settlements to determine if they have "obvious deficiencies." *See NASDAQ*, 176 F.R.D. at 102. Here, there are no such issues. The Settlement provides that Claimants will receive $0.0095 per Variable Kilowatt Hour of electricity used from December 1, 2009 through September 30, 2016 (¶ 4.2), which constitutes at least 85% of the Settlement Class' claimed out-of-pocket damages, depending on the methodology used.[7] (Verde's total liability for Settlement payments to Claimants is capped at $6 million; should total calculated loss from Valid Claims exceed that amount, all payments will be proportionally reduced to meet the cap. *See* Settlement Agreement at ¶ 4.1.)

Specifically, Plaintiff's experts have analyzed Plaintiff's claimed damages under two alternate damages theories.[8]

- Under the first methodology, damages are calculated by comparing the rates charged by Verde to the public utility rates. Here, Verde has provided data showing that Settlement Class Members used a total of 1,028,949,238 Variable Kilowatt Hours.

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

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

Klein Aff. at ¶ 7. Based on data also provided by Verde, Plaintiff's experts have calculated that Settlement Class Members overpaid approximately $11,535,920 pursuant to Verde's pricing over contemporaneous public utility rates. *Id.* Accordingly, the average damages allegedly suffered by Settlement Class Members per kWh is $0.0112, and the $0.0095 recovery provided under the Settlement is 85% of that per-kWh damages amount.

- Under the second methodology, damages are calculated by comparing the rates charged by Verde to Verde's actual costs plus a reasonable gross margin. Under this methodology, Plaintiff's expert calculated that Settlement Class Members suffered approximately $7,729,775 in damages. Klein Aff. at ¶ 8. Accordingly, the average damages suffered by Settlement Class Members under this methodology is $0.0075, meaning that the $0.0095 per kWh payment under the Settlement would constitute more than full recovery of Settlement Class Member damages.

Thus, the Settlement provides that any Settlement Class Member who opts to file a Valid Claim will recover a significant portion of their claimed losses. Plaintiff respectfully submits that not only is this not "obviously deficient," but indeed is an outstanding result considering the status and uncertainties of the litigation.

Reviewing courts also consider whether the terms of a settlement "improperly grant preferential treatment" to "segments of the class." *Kemp-Delisser v. Saint Francis Hosp. and Medical Center,* No. 15-cv-1113 (VAB), 2016 WL 10033380, at *4 (D. Conn. July 12, 2016). Here, every Settlement Class Member is entitled to the same $0.0095 per Kilowatt Hour of variable electricity used. Accordingly, no Settlement Class Member is receiving preferential treatment.

There also are no "obvious deficiencies" here with regard to "unduly preferential treatment of class representatives . . . or excessive compensation for attorneys." *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 1257586, at *2 (S.D.N.Y. Mar. 12, 2010). Plaintiff and her counsel negotiated the amount to be paid by Verde for fees and an incentive award under the oversight and with the assistance of Judge Robaina. Klein Aff. at ¶ 9; *see also* Part II.B.3.e below. These negotiations occurred only ***after*** the substantive amounts proposed to be paid to Settlement Class Members had been finalized. Klein Aff. at ¶ 9. Moreover, the Settlement is not contingent upon approval of attorneys' fees or any incentive award. Settlement Agreement (Klein Aff. at Ex. 1) at ¶ 6.2(d). Rather, the Court will separately and independently determine the appropriate amount of any fees, costs, and expenses to award to Class Counsel, and the appropriate amount of any awards to the Plaintiff and the Class Representatives, up to an agreed-upon cap. Indeed, Defendant is allowed under the terms of the Settlement to object to Plaintiff's attorneys' fee request, further demonstrating the unlikelihood that the attorneys will receive excessive or preferential compensation. *See* Settlement Agreement at ¶ 6.2(a).

Accordingly, the proposed Settlement treats all members of the Settlement Class equally and fairly, and there are no "obvious deficiencies" which would prevent preliminary approval.

3. The Settlement Easily Falls Within the Range of Possible Approval

Determining whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000) *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (internal citations omitted). Indeed, "even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM) , 2015 WL 10847814, at *11 (S.D.N.Y. Sept. 9, 2015).

Here, Plaintiff respectfully submits that the proposed Settlement not only falls within a "reasonable range" as required for preliminary approval, but also satisfies the additional "final approval" factors applied in this Court (and thus meets the more stringent analysis called for even under the amended Rule 23 analysis). Courts consider nine factors in deciding whether to grant final approval of a class action settlement:

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

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted). A review of these key factors supports preliminary (and ultimately final) approval of the Settlement.[7]

a. 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). Here, as discussed above, Verde provided detailed information concerning its costs and the variable rates it charged to consumers, as well as detailed expert reports and officer affidavits (and motion papers) detailing Defendant's legal

[7] These also are generally the same factors that federal courts are now expressly directed to consider as part of the preliminary approval process under the December 2018 amendments to Rule 23. *See* Fed. R. Civ. P. 23(e)(2).

and factual position. By the time the Settlement was reached, Plaintiff's counsel were well informed of the strengths and weaknesses of Plaintiff's claims and Defendant's defenses, which permitted them to fully consider and evaluate the fairness of the Settlement.

b. The Risks of Establishing Liability and Damages

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

For example, Defendant has vigorously argued, and likely would continue to argue absent the Settlement, that, *inter alia*, Plaintiff cannot establish causation; Plaintiff cannot establish monetary damages and at most is entitled to injunctive relief; and Plaintiff and the Settlement Class failed to mitigate their damages. *See, e.g.*, [Dkt. No. 214.00]. The Court has expressly held that at least some of these issues, such as entitlement to and amount of damages, remain open. *See* [Dkt. No. 240.00] at 3-4 (damages "will depend on the facts" and "the court could find the class made it over the ascertainable loss threshold but was tripped up by its failure to prove a specific credible damages amount"). Although Plaintiff is confident that she can prove specific damages through her expert, there is a genuine risk that the Court or factfinder at trial could disagree, in which case Settlement Class Members could receive nothing. Moreover, even

if Plaintiff prevails at trial, Verde will undoubtedly appeal, raising the risk, again, that the Settlement Class could receive nothing.

c. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation

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

Here, the Settlement constitutes an outstanding result, especially given the risk that the Settlement Class would get ***no*** recovery if the case proceeded through litigation. As discussed above, Settlement Class Members will receive a substantial portion of their total out-of-pocket damages. This constitutes a significant amount of money that fairly compensates Settlement Class Members for the alleged harm they suffered, especially in light of the risks of litigation. Although Plaintiff recognizes that CUTPA also provides for punitive damages, Plaintiff believes that, in light of the attendant risks of litigation, the recovery obtained is fair and reasonable.

As the proposed Settlement meets the requirements for final approval, it clearly is "within the range" of *possible* approval, and thus the Settlement Class should be notified and given the opportunity to evaluate the terms of the proposed Settlement.

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

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267

(E.D.N.Y. 1984). In addition to the complexities and difficulties inherent in any class action, this litigation involves many substantial and complex legal issues relating to consumer protection and contract law. The costs and risks associated with litigating this litigation to a verdict, not to mention through the inevitable appeals, would have been high, and the process would require many hours of the Court's time and resources. Further, even in the event that the Settlement Class could recover a larger judgment after a trial – which, as discussed above, is far from certain – the additional delay through trial, post-trial motions, and the appellate process could deny the Settlement Class any recovery for years, further reducing its value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation…the passage of time would introduce yet more risks…and would, in light of the time value of money, make future recoveries less valuable than this current recovery"). The more time that passes since 2015, when Defendant changed its contracts, the harder it will be to reliably locate Settlement Class Members who may have moved.

e. The Negotiated Fees and Incentive Awards are Reasonable

Although not traditionally considered under Connecticut state courts as part of the preliminary approval process, the December 2018 amendments to Fed. R. Civ. P. 23 direct federal courts to consider "the terms of any proposed award of attorney's fees" as part of the preliminary approval process. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). To the extent this Court also

wishes to do so, Plaintiff respectfully submits that that the requested attorney's fees in this case are fair and reasonable.

Specifically, as part of the Settlement, Verde has agreed to pay an award of up to $1,500,000 that includes all attorneys' fees and expenses. *See* Settlement Agreement at ¶ 6.2(a). Any actual award (up to that amount) will be determined by the Court. Notably, Defendant ***can*** object to Plaintiff's fee and expense request, further ensuring that any fees ultimately awarded are fair and reasonable. *Id.*

In addition, Plaintiff and her counsel negotiated this fee and expense amount under the oversight and with the assistance of Judge Robaina, and these negotiations occurred only ***after*** the substantive amounts proposed to be paid to Settlement Class Members had been finalized. Klein Aff. at ¶ 9. Because the $1.5 million cap includes expenses as well as fees, and Plaintiff has already incurred almost $100,000 in expenses, the requested fee will be approximately $1.4 million, which, after four years of hard-fought litigation, represents a modest 1.4 multiple over Plaintiff's counsel's current lodestar. *See* Klein Aff. at ¶ 10. Moreover, counsel anticipate needing to spend significant additional time on this litigation responding to Settlement Class Members' inquiries and seeking Final Approval for the Settlement, beyond the time already incorporated into the present lodestar estimate. *Id.*[9] Counsel also intend to seek a $5,000 lead plaintiff service award for Plaintiff Constance Jurich, in light of her extensive efforts in this litigation, including production of documents, responding to interrogatories, sitting for deposition, and general oversight of the litigation. Klein Aff. at ¶ 11.

[9] Counsel's current lodestar is $998,182.50 and current expenses are $97,186.39. Klein Aff. at ¶ 10. As with Counsel's fees, these expenses will only increase as this litigation moves through the final approval process.

Settlement Class Members will ***not*** be adversely affected by the fees that counsel intend to seek. Pursuant to the Settlement Agreement (at ¶ 6.2(c)), Verde has agreed to pay up to $1,500,000 in fees and expenses and $5000 in a lead plaintiff award using its own resources, which means that these payments will ***not*** reduce the benefits provided to Settlement Class Members. Where, as here, "the parties agree to a fee that is to be paid separately by the Defendant[] rather than one that comes from, and therefore reduces, the Settlement Fund available to the class, the Court's fiduciary role in overseeing the award is greatly reduced because the danger of conflicts of interest between attorneys and class members is diminished." *Kemp-DeLisser v. St. Francis Hospital and Medical Center Fin. Committee*, No. 15-cv-1113 (VAB), 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (internal quotation marks and citation omitted).

If the Court gives preliminary approval to the proposed Settlement, Plaintiff will file a motion for an award of attorneys' fees and expenses and a lead plaintiff award that will analyze in detail the legal precedents governing such a request. For purposes of preliminary approval, however, none of the provisions in the Settlement Agreement concerning these issues should give the Court any reason to doubt that the Settlement Agreement itself is fair, reasonable and adequate.

III. THE SETTLEMENT CLASS MEETS THE PREREQUISITES FOR CERTIFICATION UNDER PRACTICE BOOK §§ 9-7, 9-8 AND 9-9

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Practice Book §§ 9-7 and 9-8. *See* Practice Book § 9-9 (directing the Court to apply factors in preceding sections

when certifying and managing a class action). By order of December 6, 2017, this Court has ***already*** certified the following class:

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

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

> All individual residential and small business consumers who enrolled (either initially or through "rolling over" from a fixed rate plan) in a Verde Energy USA, Inc. variable rate electricity plan, from December 1, 2009 through, and including, October 31, 2015, in connection with a property located within Connecticut, excluding persons whose only contract with Verde contained a "Governing Law and Arbitration" clause.
>
> Also excluded from the Settlement Class are: (a) the Defendant; (b) the officers, directors, shareholders, and employees of Defendant; (c) any entity in which Defendant has a controlling interest; (d) any affiliate or legal representative of Defendant; (e) the Judge to whom the Action is assigned, his staff and any member of their immediate family; and (f) any heirs, assigns and/or successors of any such persons or entities in their capacity as such.

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

- First, the Settlement Class definition specifies that the Class Period begins on December 1, 2009 (rather than "at any time within the applicable statute of limitations"). The December 1, 2009 date is within the longest (six year) statute of limitations available under Plaintiff's claims in the Fourth Amended Complaint and stretches back to Verde's earliest customer contracts in Connecticut.
- Second, the Settlement Class definition specifies that the Class Period ends with customers who enrolled in Verde through October 31, 2015. As this is the date by which Verde finished transitioning to contracts that included a "Governing Law and Arbitration" clause for new enrollees (as referenced in the class definition previously certified by the Court), this proposed modification of the class definition has no substantive effect.[10]

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

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

IV. NOTICE

Practice Book § 9-9(a)(2)(B) requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, there are no "rigid rules" to apply when determining the adequacy of notice for a class action settlement; and "the standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). Further, it is clearly established that "notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (*citing Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988), *cert. denied*, 488 U.S. 1005(1989)).

A. Notice Procedures

Plaintiff proposes that Heffler Claims Group ("Heffler"), a professional claims administration firm, be appointed to act as the Settlement Administrator. Settlement Agreement at ¶ 2.36. Pursuant to the notice plan devised in conjunction with Heffler, ***individual*** notice will be sent to all Settlement Class Members (whether current or former Verde account holders). *Id.* at Part V and ¶ 5.4. Verde will provide to Heffler a list of all Settlement Class Members with available mail (and, where no mail address available, email) addresses. *Id.* at ¶ 3.3. Heffler will send a Postcard Notice by U.S. mail (or, if no postal address is available, email) in substantially the forms attached as Exhibit B to the Settlement Agreement). Settlement Agreement at ¶ 5.4.

Long Notices and Claim Forms will be available on the Settlement Website, maintained by Heffler, and upon request from Heffler. Settlement Agreement at ¶ 5.5. Heffler will also use customary search protocols to verify addresses and to obtain current addresses for Settlement Class Members whose notices are returned to sender. *Id.* at ¶ 5.4.

The Settlement Website will also contain documents and other information regarding the Settlement, including the Long Notice and important rulings and pleadings (including Plaintiff's motions for preliminary and final approval), that will be available for download. Settlement Agreement at ¶¶ 2.39, 5.3, 5.5, 5.12. The Settlement Website will also allow Settlement Class Members to print Claims Forms or to fill-out and submit Claim Forms electronically. *Id*. at ¶¶ 5.8 and 5.9. Heffler will also establish a toll-free telephone line. , and callers will be able to leave messages for a callback to address questions during regular business hours. *See id.* at ¶ 5.3.

Heffler will make available to Settlement Class Members contact information for proposed Class Counsel Izard Kindall & Raabe LLP in the Long Notice (Class Counsel's address) and on the Settlement Website and through phone support (Class Counsel's address and phone number), so that Settlement Class Members may inquire directly of Class Counsel concerning any questions they have. Klein Aff. at ¶ 12.

B. Contents of Notice

The proposed Postcard Notice, Long Notice and Claim Form are attached as Exhibits B, C and A respectively to the Settlement Agreement (which in turn is attached to the Klein Aff. at Ex. 1). The Postcard and Long Notices include fair summaries of Plaintiff's and Defendant's respective litigation positions; the general terms of the Settlement as set forth in the Settlement

Agreement; instructions for how to opt-out of or object to the Settlement; the process and instructions for making a claim; and the date, time, and place of the Final Fairness Hearing. *Id.*

The contents of the proposed Notices are more than sufficient because they "fairly apprise the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *See Maywalt v. Parker and Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2nd Cir. 1995) (internal quotations omitted). The Notices will provide Settlement Class Members with information on the Settlement Class, the award to which they are entitled upon the filing of a Valid Claim, the purpose and timing of the Fairness Hearing, and the deadline and process for filing Claim Forms. In addition, as discussed above, they will provide a telephone number and website that proposed Settlement Class Members may use to the extent they have any questions.

The Notices also clearly explain that any member of the Settlement Class who wishes to opt out of the Settlement Class must individually sign and timely submit a written request clearly manifesting his or her intent to be excluded from the Settlement Class. The Notices similarly clearly explain that any Settlement Class Member who wishes to object to the Settlement must timely file a written statement of objection with the Court. The Notices will set forth the date that such opt-outs or objections must be completed.

V. CONCLUSION

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

(1) Preliminarily approving, for settlement purposes only, the Settlement as set forth in the Settlement Agreement;

(2) Modifying the definition of the already-certified Class as set forth above for Settlement purposes only;

(3) For settlement purposes only, approving Plaintiff, Constance Jurich, as the representative of the Settlement Class;

(4) For settlement purposes only, appointing Robert Izard and Seth Klein of Izard Kindall & Raabe LLP as class counsel to the Settlement Class;

(5) Approving the proposed Notice Plan;

(6) Approving the proposed schedule set forth in the [Proposed] Order Approving Plaintiffs' Uncontested Motion for Preliminary Approval of Class Action Settlement;

(7) Appointing Heffler Claims Group as the Settlement Administrator;

(8) Approving the procedure for Opt-Outs and Objections as set forth in the Settlement Agreement;

(9) Scheduling a Final Fairness Hearing;

(10) Staying all proceedings in this Action other than those proceedings necessary to carry out or enforce the terms and conditions of the Settlement; and

(11) Prohibiting and enjoining any other person or counsel from representing or prosecuting any claims on behalf of the Settlement Class in any other court.

Dated: September 18, 2019

THE PLAINTIFF

BY /s/ Seth R. Klein

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CERTIFICATION

Pursuant to Practice Book §10-14, I hereby certify that a copy of the above was electronically delivered September 18, 2019, to all counsel and pro se parties of record:

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Joel L. Lennen jlennen@eckertseamans.com

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/s/ Seth R. Klein
Seth R. Klein