DOCKET NO.: X07-HHD-CV-18-6090558-S	:	SUPERIOR COURT
	:	
WILLIAM & LAURIE PAETZOLD	:	COMPLEX LITIGATION
	:	
v.	:	JUDICIAL DISTRICT
	:	HARTFORD
METROPOLITAN DISTRICT	:	
COMMISSION	:	AT HARTFORD
	:	
	:	July 29, 2020

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CONFIRMATION OF MODIFIED CLASS DEFINITION AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs William and Laurie Paetzold ("Plaintiffs"), individually and on behalf of the proposed Settlement Class (as defined in the Settlement Agreement),[1] respectfully submit this memorandum of law in support of their Motion for Modification of the Certified Class for purposes of defining the Settlement Class and Final Approval of Class Action Settlement.[2]

I. INTRODUCTION

Plaintiffs' Amended Complaint [Dkt. No. 116.00] brings claims on behalf of the Plaintiffs' themselves and other similarly-situated consumers against the defendant Metropolitan District Commission (the "MDC") alleging that the MDC wrongfully included unlawful Surcharges on bills for water service for properties in East Granby, Farmington, Glastonbury and South Windsor from March 6, 2012 through October 1, 2014. *See* Amended Complaint at ¶¶ 1-15; Order Granting Plaintiffs' Motion for Class Certification ("Class Cert. Order") [Dkt. No. 154.00] at 1-2.

Defendant denies any liability with respect to the claims in the Amended Complaint and maintains that it did nothing improper. However, to resolve the dispute and avoid the mutual costs and risks of ongoing litigation, the parties have agreed to a settlement that will provide Class Members with compensation of up to 100% to 103% of their alleged losses (subject to *pro rata* reduction for attorneys' fees, costs, and named plaintiff awards). Specifically, current MDC

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[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Settlement Agreement, signed by all parties as of February 12, 2020 (the "Settlement" or "Settlement Agreement").

[2] In conjunction with the present motion for approval of the Settlement and this memorandum of law in support thereof, Plaintiffs are also filing a separate Motion for Award of Attorneys' Fees, Costs and Expenses and for Settlement Class Representative Awards and a separate memorandum of law in support of that motion. A copy of both Motions and Memoranda are being posted to the Settlement website upon filing.

customers will each receive an automatic credit on their MDC bills of up to 103% of the Surcharges they paid, while former MDC customers each will receive a check of up to 100% of the amount they paid in Surcharges.[3] These benefits will be provided to all Class Members who do not opt-out, without the need for filing a claim form.[4] *See* Settlement Agreement at ¶¶ 37, 38.[5]

This Court granted preliminary approval to the Settlement on April 21, 2020 [Dkt. No. 177.86] and, *inter alia,* appointed JND Legal Administration ("JND") as Settlement Administrator. Pursuant to the preliminary approval Order, JND sent Notice of the proposed Settlement to Class Members on June 19, 2020.[6] As of the date of this filing, ***no*** Class Members have objected, and only three have opted out.

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

(1) modifying, for purposes of the Settlement, the definition of the certified Class (*see* [Dkt. No. 154.00]), to make minor changes that are reasonably necessary

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[3] These are gross amounts. They will be proportionally reduced to account for any awards of attorneys' fees, expenses and named plaintiff service awards.

[4] Checks will not be mailed to former MDC customers if the third-party settlement administrator cannot successfully locate them.

[5] A copy of the Settlement Agreement was previously filed as Exhibit 1 to [Dkt. No. 179.00].

[6] Pursuant to Paragraph 37.b of the Settlement Agreement, Class Members who are former MDC customers for whom the MDC does not have an email address on file and for whom the Settlement Administrator could not locate a current address using customary search protocols did not receive direct mail or email notice.

for clarity and settlement administration purposes, and bring the definition of the certified class into accord with the class definition set forth in the Settlement Agreement; and

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

II. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Practice Book §§ 9-7 and 9-8. *See* Practice Book § 9-9 (directing the Court to apply factors in preceding sections when certifying and managing a class action). By order of August 14, 2019, this Court has ***already*** certified the following class:

> All persons who were charged a non-member town surcharge by the Metropolitan District Commission from March 6, 2012, through October 1, 2014.
>
> Specifically excluded from the Settlement Class are: Defendant, including any parent, subsidiary, affiliate or person controlled by Defendant; Defendant's officers, directors, agents, or employees; the judicial officers assigned to this litigation and members of their staffs and immediate families; and any heirs, assigns, and successors of any of the above persons or organizations in their capacity as such.

See [Dkt. No. 154.00] at Order at pp. 1-2. With Defendant's consent, Plaintiffs, for Settlement purposes only, respectfully request that the Court approve the minor amendments to the Class definition that were set forth in the Settlement Agreement and the preliminary approval papers, as follows:

> All persons and entities who are or were the property owner and were charged a Surcharge by the Metropolitan District Commission from March 6, 2012, through October 1, 2014.
>
> Specifically excluded from the Settlement Class are: Defendant, including any parent, subsidiary, affiliate or person controlled by Defendant; Defendant's

> officers, directors, agents, or employees; the judicial officers assigned to this litigation and members of their staffs and immediate families; and any heirs, assigns, and successors of any of the above persons or organizations in their capacity as such.

See Settlement Agreement ([Dkt. No. 179.00] at Ex. 1) at ¶ 2. The proposed revised class definition adds to the Class "entities" who were charged the Surcharge (in addition to "persons"), so that "entities" that owned relevant properties can recover on the same basis as natural "persons." The revised class definition also clarifies that Class Members need to be the property owner, to avoid any confusion in the event that a tenant was asked or required by the property owner to pay water bills.[7] In addition, the proposed revised definition replaces the phrase "non-member town surcharge" with the defined term "Surcharge," which is defined in the Settlement Agreement and by definition was only charged to customers in non-member towns.

Nothing in these minor technical changes affects the Court's thorough analysis of the standards for certifying the Class in its August 14, 2019, Order. By its preliminary approval order [Dkt. No. 177.86], which adopted by reference the terms of the [Proposed] Preliminary Approval Order [Dkt. No 180.00] (and added one provision discussed below), the court preliminarily approved the modified class definition. Accordingly, Plaintiffs respectfully submit

[7] The MDC charges the property owners, who bear ultimate responsibility for payment of MDC bills, under threat of lien or lawsuit. *See* MDC Charter at § 5-2b (water charges "secured by lien on lots"); Conn. Gen. Stat. § 7-239(b) ("demand for [water] rates or charges may be made on the owner of the premises"); Conn. Gen. Stat. § 7-239(d) (unpaid bills may be collected "in a civil action … against such owners"). Accordingly, the MDC "charged" (and sent bills to) property owners, and such property owners comprise the Class. To the extent that some tenants may have paid a bill instead of the landlord (which cannot be determined from the MDC records, if at all, without extraordinary, time-consuming effort), the settlement credits/payments will go to the property owner, who has the ultimate responsibility for payment of the MDC bills. Any tenant or other person who has paid surcharges on behalf of the owner can seek a refund from the property owner, as explained in the Long Form Notice. *See* Declaration of Jennifer Keough (submitted herewith) at Ex. B, ¶ 5.

that the Court should now grant final approval of the Class definition as set forth above for purposes of Settlement and of defining the Settlement Class.

III. APPOINTMENT OF CLASS COUNSEL AND LEAD PLAINTIFFS

Practice Book Section 9-9(d) provides that "a court that certifies a class must appoint class counsel." Plaintiffs respectfully request that the Court confirm its prior appointment of Izard Kindall & Raabe LLP ("IKR") as Class Counsel for the Settlement Class. *See* [Dkt. No. 154.00] at p. 10 of 11. IKR and its attorneys clearly satisfy all requirements for appointment, as set out in Practice Book Section 9-9(d)(1). IKR identified and investigated the legal claims alleged in the Complaint prior to filing suit and have demonstrated over the course of the litigation their willingness to commit all resources necessary to the successful prosecution of the case. Moreover, IKR has a long and successful record of litigating class action cases both in Connecticut and around the country, including other similar cases against third party electricity suppliers. *See* Affidavit of Seth R. Klein submitted herewith ("Klein Aff.") at Ex. 1 (IKR Firm Resume).

The Court should also confirm its appointment of William and Laurie Paetzold as Settlement Class Representatives. *See* [Dkt. No. 154.00] at p. 10 of 11. William and Laurie Paetzold have been exceptionally involved in prosecuting this litigation, including producing documents, responding to interrogatories, and sitting for deposition. Klein Aff. at ¶ 11. William and Laurie Paetzold have also remained closely involved both in monitoring and supervising the conduct of the case. *Id.* Accordingly, William and Laurie Paetzold have diligently discharged their responsibilities as Settlement Class Representatives.

IV. THE SETTLEMENT SHOULD BE APPROVED

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

A. The Standard for Approval

Connecticut Practice Book § 9-9(c) requires judicial approval for any compromise of claims brought on a class basis, and approval of a proposed settlement is a matter within the discretion of the court. *See, e.g., Rabinowitz v. City of Hartford,* No. HHD-CV-075008403S, 2014 WL 3397831 (Conn. Super. Ct. June 3, 2014). As discussed above, because Connecticut jurisprudence governing class actions "is relatively undeveloped" (*Collins v. Anthem Health Plans, Inc.,* 266 Conn. 12, 32 (Sept. 30, 2003)), Connecticut courts have historically looked to federal case law for guidance in construing Connecticut's class action requirements. *Id.* 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).

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

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

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted). In addition, on December 1, 2018, amendments to Fed. R. Civ. P. 23 took effect. The amended Rule directs courts to consider the following factors in determining whether a proposed settlement is "fair, reasonable and adequate:"

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

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

B. The Settlement Merits Approval

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

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

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

Specifically, Plaintiffs analyzed a substantial volume of documents from the prior litigation between the MDC and the Town of Glastonbury as well as additional records concerning the MDC's Surcharges and associated communications with consumers, the MDC's communications with member and non-member towns about rates and Surcharge issues, and detailed and voluminous financial spreadsheets concerning, *inter alia,* the Surcharges and potential Class Member damages. Affidavit of Seth R. Klein in Support of Motion for Preliminary Approval dated March 26, 2020 [Dkt. No. 179.00] ("Klein Prelim. App. Aff.") at ¶ 3.[8] Likewise, Defendant deposed and obtained interrogatory responses and document discovery from Plaintiffs. *Id.* at ¶ 4.

Moreover, the MDC vigorously defended this case through substantial motion practice, which allowed the parties to fully understand the legal and factual issues at play and to obtain guidance as to the Court's views of the strengths and weaknesses of the claims and defenses. For example, Defendant filed a Motion to Strike [Dkt. No. 109.00], which Plaintiffs opposed [Dkt. No. 111.00]. The Court granted the motion in part and narrowed the claims. [Dkt. No. 115.00],

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[8] The Klein Affidavit filed with the present motion expressly reaffirms the accuracy of, and adopts the entirety of, Mr. Klein's earlier affidavit. Klein Aff at ¶ 3.

For the claim on which the Court allowed Plaintiffs to proceed, Defendant filed a motion to reargue [Dkt No. 117.00], which the Court denied [Dkt. No. 117.86]. The issues addressed in Defendant's first motion to strike included novel issues that likely would be the subject of an appeal that could be decided in favor of either side if this case were to proceed to final judgment.

After Plaintiffs filed a revised complaint and added a breach of good faith and fair dealing count, the MDC again moved to strike. [Dkt. No. 118.00]. The court granted the MDC's motion to strike the good faith and fair dealing claim and the case proceeded on a breach of implied contract theory. [Dkt. No. 125.00].

Plaintiffs then moved for class certification [Dkt. No. 127.00]. Defendant opposed Plaintiffs' motion [Dkt. No. 147.00], and Plaintiffs filed a reply in further support of class certification [Dkt. No. 148.00]. This Court thereafter certified the Class sought by Plaintiffs. [Dkt. No. 154.00]. Defendant sought leave from the Chief Justice of the Connecticut Supreme Court to file an immediate "public interest" appeal [Dkt. No. 156.00]. Plaintiffs opposed the petition [Dkt. No. 157.00], and the Chief Justice denied Defendant's request [Dkt. No. 158.00].

During the pendency of the class certification briefing, the parties also filed memoranda of law at the Court's request regarding Defendant's request to depose or solicit affidavits from absent putative Class Members. *See* [Dkt. Nos. 138, 139]. The Court denied Defendant's request to depose absent members of the Class but permitted Defendant to obtain affidavits from willing absent members of the Class. [Dkt. No. 141.00].

On September 5, 2019, Plaintiffs filed an "offer of compromise" pursuant to Conn. Gen. Stat. § 52-192a and Practice Book § 17-14 *et seq.* [Dkt. No. 155.00]. On an issue that appears to one of first impression in Connecticut, Defendant moved to strike the offer of compromise [Dkt.

162.00], Plaintiffs filed a memorandum in opposition [Dkt. No. 164.00], and the Court ultimately denied Defendant's motion [Dkt. No. 168.00].

The foregoing procedural history shows that, up until the time that the Settlement was negotiated and agreed to, the MDC vigorously defended the action at every juncture. The ultimate outcome of various issues at the appellate level, if this case were to proceed further, would be uncertain. The MDC also expressed an intent to argue that the claims of all Class Members were barred by a voluntary payment doctrine that has been adopted in some other jurisdictions and would largely be an issue of first impression in Connecticut. Although Plaintiffs believe that Defendants would not have prevailed with respect to this defense, either at summary judgment or trial, the novel issue further rendered the ultimate outcome of this litigation uncertain.

The parties participated in a full-day mediation session before Judge Robaina on January 2, 2020. Klein Prelim. App. Aff. at ¶ 5. At the session and with the assistance of Judge Robaina, the parties reached an agreement in principle and prepared a written Memorandum of Understanding, subject to the satisfaction of certain conditions, including approval by the MDC's Board of Commissioners. *Id.* The parties thereafter engaged in detailed negotiations of the Settlement Agreement, which was approved by the MDC Board of Commissioners on February 10, 2020 and signed by the parties on February 12, 2020. *See id.* at ¶ 6; *see generally* Settlement Agreement ([Dkt. No. 179.00] at Ex. 1).

Given the foregoing litigation and settlement history, 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 substantial discovery and motion practice that fully developed the legal claims and defenses at issue, and, even then, only after arms'-length

negotiations with the assistance of Judge Robaina, who was directly involved in the discussions concerning the essential terms of the Settlement.

2. The Proposed Settlement is Reasonable and Adequate and Treats All Class Members Equitably Relative to Each Other

The Settlement provides that, subject only to pro rata reductions for attorneys' fees, expenses, and class representative service awards, Class Members who are still customers of the MDC will receive bill credits worth ***103%*** of the Surcharges, while Class Members who have left the MDC service area (or cannot readily be identified as having relocated to another property that receives MDC water service) will receive checks reimbursing ***100%*** of the Surcharges.[9] Settlement Agreement ([Dkt. No. 179.00] at Ex. 1) at ¶ 38. Moreover, Class Members need ***not*** file claims forms to receive these benefits; rather, they will automatically be provided to any Class Member who does not opt-out (and, with respect to former MDC customers, can be successfully located by the Settlement Administrator using industry-standard methods). *Id.* at ¶ 37(f). Thus, the Settlement provides complete and automatic recovery to Class Members. Indeed, even if Plaintiffs prevailed at trial, the Class would be unlikely to recover more, as attorney's fees and most litigation costs would not be recoverable separately from any judgment for breach of contract. Plaintiffs respectfully submit that not only is the recovery they secured "reasonable" and "adequate," but indeed is ***outstanding***, especially considering the risks and uncertainties of this litigation. As noted above, this case presented several issues on which

[9] The total value of the credit and check awards is $7,680,000. Settlement Agreement ([Dkt. No. 179.00] at Ex. 1) at ¶ 39. The credits will be applied dollar for dollar against charges for current customers, thereby directly reducing those customers' bills. Former customers will receive a check for their Surcharges. *Id.* Any class representative service awards and / or attorneys' fees awarded by the Court will be paid out of this amount and deducted *pro rata* from Class Member payments.

Connecticut law was not clearly established, and on which either party ultimately might prevail on appeal.

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, the only difference between Class Member recoveries is that current MDC customers are receiving a 103% recovery in bill credit that will be applied automatically, thereby reducing any amounts the customer otherwise would pay, while former MDC customers are receiving a 100% recovery by check. Plaintiffs respectfully submit that this *de minimis* difference is warranted to account for the (small) difference in value between a credit that can be applied immediately but can be used only over one or more billing cycles (because the amount of the credit is larger than residential customers typically pay for their water in multiple billing cycles), and an immediate payment by check. The 3% difference is approximately equal to one year of interest at the interest rates in effect when the settlement was negotiated (which likely decreased as a result of the unanticipated COVID-19 pandemic). Accordingly, Plaintiffs respectfully submit that no Class Member is receiving preferential treatment.

Nor does the Settlement involve "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). In their accompanying Motion for Award of Attorneys' Fees, Costs and Expenses and for Settlement Class Representative Awards, Plaintiffs request (i) a $5,000 Settlement Class Representative award for each plaintiff, and (ii) a combined fee, costs and expense award for Class Counsel constituting 25% of the total Settlement value, both of which would be deducted *pro rata* from payments made to Class Members. *See* Part

IV.B.5 below. These requests are well within the ordinary award and fee requests in class actions, and, more importantly, will be scrutinized by the Court to ensure they are fair and reasonable. Moreover, the Settlement is not contingent upon approval of attorneys' fees or any Settlement Class Representative award. Settlement Agreement ([Dkt. No. 179.00] at Ex. 1) at ¶ 44(e).

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

3. Plaintiffs Faced Genuine Risks With Regard to Establishing Liability and Damages That Would Add to the Complexity, Expense and Likely Duration of the Litigation

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, expense and duration of continued litigation. *See Grinnell*, 495 F.2d at 463; *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984) ("The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement"). Here, Plaintiffs' counsel believe that they would have prevailed had this case reached trial. That being said, and especially after obtaining a complete recovery for Class Members through Settlement, Plaintiffs do not believe that there is any benefit to risking that total recovery by further litigation and near-certain appeals. Although the Supreme Court ruled that the Surcharges were illegal in *Town of Glastonbury v. Metropolitan District Commission*, 328 Conn. 326 (2018), the MDC vigorously contested Plaintiffs' and the Class' legal basis for recovery from the outset based on defenses unique to this case. In particular, the MDC challenged Plaintiffs' entire legal theory under a claim of municipal immunity and the *Fennell* doctrine, as well as by arguing that there is a presumption in Connecticut law against holding statutory rights

(such as those provided in the MDC Charter) to be privately enforceable in contract, under *Pineman v. Oechslin*, 195 Conn. 405, 410-11 (1985). Undoubtedly, the MDC would press these issues on any appeal, along with the voluntary payment doctrine (likely to be raised on summary judgment) and other defenses. Accordingly, "[f]urther 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." *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005); *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").

In addition, the MDC would undoubtedly challenge class certification on appeal. Although Plaintiffs believe there is no basis for overturning this Court's ruling, it is always possible that an appellate court would agree with at least one of the arguments against certification raised by the MDC. For example, the MDC has maintained that under Connecticut law, any implied contract between the MDC and its customers would require an individualized "meeting of the minds," thereby giving rise to issues regarding commonality, typicality and the calculation of damages. *See generally* [Dkt. No. 147.00].

Further, as discussed above, Plaintiffs' counsel had to expend significant time and resources litigating Defendants' various motions and defenses in this hotly-contested litigation. Indeed, this Court whittled the litigation down to a ***single*** breach of contract count based on Defendant's motion practice. Even if Plaintiffs won at trial on that single count, they risked reversal on appeal, as Plaintiffs' case hinged entirely on that one remaining claim. If the MDC

prevailed on ***any*** of the above appellate points, then the Class would receive ***nothing.*** And even if Plaintiffs ultimately prevailed in all appeals, the delay would be substantial, with appeals often taking at least an entire year to resolve (even assuming an appeal directly to the Supreme Court without proceeding through the Appellate Court first). The Settlement, in contrast, allows Class Members to recover *now*.

4. The Reaction of the Settlement Class Supports the Settlement

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

Pursuant to the Notice Plan approved by the Court, JND sent notice to each of the 8,884 Class Members, as well as establishing a Settlement Website and a toll-free phone line and email help address. Declaration of Jennifer M. Keough (JND's Chief Executive Officer), submitted herewith ("Keough Decl."), at ¶¶ 10-15. Although objections and requests to opt out need not be submitted until August 19, 2020, to date ***no*** Class Members have objected, and only three have opted out. *See* Court docket (lack of objections); Keough Decl. at ¶¶ 17-20. This lack of objection strongly supports the Settlement. *See, e.g., D'Amato v. Deutsche Bank,* 236 F.3d 78, 86-87 (2d Cir. 2001) (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement).[10]

[10] Pursuant to this Court's preliminary approval order, Plaintiffs will file a final update by August 27, 2020 (a week prior to the September 3, 2020 final approval hearing) as to the number

5. The Negotiated Fees and Incentive Awards are Reasonable

As set forth in greater detail in Plaintiff's accompanying Motion for Award of Attorneys' Fees and Expenses and Settlement Class Representative Awards, the negotiated fees and incentive awards are reasonable. Specifically, Plaintiffs seek 25% of the Settlement value for attorneys' fees, costs and expenses. Any class representative awards and / or attorneys' fees awarded by the Court will be paid out of this amount and deducted *pro rata* from Class Member payments. As explained in greater detail in Plaintiffs' separate fee memorandum, Plaintiffs respectfully submit that this is well-within the typical range of attorneys' fee awards in class action settlements, especially considering (1) the outstanding result achieved here, (2) the risks in this case, and (3) the substantial and vigorous defense mounted by Defendant, which increased the risk Plaintiffs' counsel faced and the work they needed to perform. Plaintiffs made a settlement overture immediately after filing this action, but the MDC expressed no interest in an early resolution. Even if the MDC had expressed an interest, experience shows that any such settlement would be for a modest amount so early in the case and that a recovery of 100 cents on the dollar does not typically occur early. By contrast, Plaintiffs and their counsel have obtained just such a full recovery here by aggressively litigating the case against a Defendant that vigorously defended its position. If the Court awards the requested fees and expenses, a 75% net compensation award to Class members is outstanding. Moreover, any actual award will be determined by the Court. The Settlement is not contingent upon the Court's award of attorneys' fees and expenses, or the named plaintiff service awards.

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of timely objections and opt-outs received by the Claims Administrator or filed with the Court, and also will respond to any objections at that time.

Counsel also seek a $5,000 Settlement Class Representative service award for each of Plaintiffs William Paetzold and Laurie Paetzold. This request is warranted in light of Plaintiffs'' extensive efforts in this litigation, including production of documents, responding to interrogatories, sitting for deposition, and general oversight of the litigation. *See* Klein Aff. at ¶ 11. This award would have an immaterial impact on the amounts received by Class Members.

V. VERIFICATION OF PAYMENT

In its Preliminary Approval Order [Dkt. No. 177.86], the Court directed that "At the final approval hearing the parties must be prepared to discuss a means of memorializing on the record the individual amounts to be sent, the identity of the recipients, and a procedure to verify that the agreed amounts have been sent or are being credited as agreed." Insofar as payments and credits are automatic to all Class Members who do not opt-out, without the need for filing a claim form, the parties respectfully propose the following:

1. From the work JND has already performed to identify the class members, JND has as complete information as can be reasonably ascertained from the MDC's records and publicly available records identifying who owned each property at any time during the Class Period and thus are Class Members. In addition, the Settlement Website and Long Form Notice invite members of the public who believe they are Class Members but did not receive notice to contact JND for review and assistance.
2. From the billing spreadsheets, JND has information about the amount of the Surcharge charged to each property.
3. Using the data discussed above, JND can calculate the Surcharge paid by each owner of each property. In the event that a property was transferred in the middle of the year, the charges will be allocated proportionally to each Class Member. The MDC

will make available to JND data regarding the timing of invoices to allow JND to do this calculation.

4. Based on the billing spreadsheets and property data, JND will determine which Class Members appear to be "current" customers and which appear to be "former" customers. The MDC will review this list to assess whether any "former" customers moved to a new address within the MDC service area and therefore remain current customers at a new address.

5. JND will calculate the payment or credit amount as appropriate for each Class Member, taking into account whether it is a 100% payment or a 103% credit, and taking into account any pro rata reduction for attorneys' fees, costs and expenses and lead plaintiff awards.

6. For current customer Class Members, JND will transmit to MDC the credit amounts due to each of those Class Members.

7. For former customer Class Members, JND will determine which former customers have current addresses available, taking into account the database and investigatory searches they performed as part of the Notice process and contacts from Class Members. The MDC will provide funds to JND to cover the award of cash payments, and JND will send checks to the former customers who have been located.

Out of sensitivity to individual privacy concerns, Plaintiffs propose providing aggregate statistics to the Court upon payment, rather than filing Class Member-by-Class Member data. Pursuant to the Court's direction, Plaintiffs will be prepared to further discuss this issue at the Final Approval Hearing on September 3, 2020.

VI. CONCLUSION

WHEREFORE, based on foregoing, Plaintiffs respectfully request that the Court enter an Order:

(1) modifying, for purposes of the Settlement, the definition of the certified Class (*see* [Dkt. No. 154.00]), to make minor changes to bring the definition of the certified class into accord with the class definition set forth in the Settlement Agreement; and

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

Dated: July 29, 2020

PLAINTIFFS

BY_/s/ Seth R. Klein_________

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CERTIFICATION

I certify that on this 29th day of July, 2020, a copy of the foregoing was sent by email to all counsel of record as follows:

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_/s/ Seth R. Klein_______________
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