DOCKET NO.: X07-HHD-CV-18-6090558-S	:	SUPERIOR COURT
	:	
WILLIAM & LAURIE PAETZOLD	:	COMPLEX LITIGATION
	:	
v.	:	JUDICIAL DISTRICT
	:	HARTFORD
METROPOLITAN DISTRICT	:	
COMMISSION	:	AT HARTFORD
	:	
	:	March 27, 2020

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, MODIFICATION OF THE CERTIFIED CLASS FOR SETTLEMENT PURPOSES, APPROVAL OF NOTICE PLAN AND SCHEDULING OF FINAL APPROVAL HEARING

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 preliminary approval of the proposed settlement, modification of the certified Class for purposes of defining the Settlement Class, approval of a notice plan and setting of a final approval hearing. Defendant consents, for settlement purposes only, to the relief requested herein, without admitting or conceding either the allegations in the Complaint or Plaintiffs' arguments regarding the merits of their claims as summarized herein.

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

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Settlement Agreement, signed by all parties as of February 12, 2019 (the "Settlement" or "Settlement Agreement").

Surcharges on bills 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 losses (subject to pro rata reduction for attorneys' fees, costs, and named plaintiff awards). Specifically, current MDC 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.[2] These benefits will be provided to all Class Members who do not opt-out, without the need for filing a claim form.[3] *See* Settlement Agreement at ¶¶ 37, 38. A copy of the Settlement Agreement is attached as Exhibit 1 to the accompanying Affidavit of Seth R. Klein ("Klein Aff.").

Plaintiffs respectfully submit that this recovery is an outstanding result, especially after taking into account the uncertainties inherent in this or any litigation. It successfully resolves a hotly contested case and allows thousands of class members to receive a very high-percentage recovery. Plaintiffs now request that the Court preliminarily approve the proposed Settlement,

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

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

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, Plaintiffs move the Court for entry of an order that, *inter alia*:

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

(2) Preliminarily modifies, for purposes of the Settlement, the definition of the certified Class (*see* [Dkt. No. 154.00]), to make minor, non-substantive language changes to bring the definition of the certified class into accord with the class definition set forth in the Settlement Agreement;

(3) Approves the proposed Notice Plan;

(4) Appoints JND Legal Administration as the Settlement Administrator; and

(5) Schedules a Final Approval 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 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 federal case law

prior to amendment of the federal rule for "guidance" in construing Connecticut's class action requirements. *Id.*[4]

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

[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, Plaintiffs believe that the proposed Settlement would satisfy the standard of the amended Rule 23, if it were applicable. See Part II.B.3 below.

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 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

[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.

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 amount of documents from the prior litigation between the MDC and the Town of Glastonbury and they have obtained and analyzed additional substantial 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. Klein Aff. at ¶ 3. 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], 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 on

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 on the good faith and fair dealing claim and the case proceeded on a breach of 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]. Plaintiff 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], Plaintiff filed a memorandum in opposition [Dkt. No. 164.00], and the Court ultimately denied Defendant's motion [Dkt. No. 168.00]. This 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 rely upon, at summary judgment, a voluntary payment doctrine that has been adopted in some other jurisdictions and if successful potentially could defeat the Class claims, further rendering the ultimate outcome of this litigation uncertain.

Following the Court's denial of the MDC's motion to strike the offer of compromise, the parties participated in a full-day mediation session before former-Judge Robaina on January 2, 2020. Klein 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 (Klein Aff. 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 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, subject only to attorneys' fees, expenses, and named plaintiff 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 will receive checks reimbursing ***100%*** of the Surcharges.[6] Settlement Agreement (Klein Aff., 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 (given that, even if Plaintiffs prevailed, 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 this not "obviously deficient," but indeed is an outstanding result, especially considering the risks and uncertainties of this litigation. As noted above, this case presented several issues on which Connecticut law was not clearly established, and on which either party ultimately might prevail on appeal.

[6] The total value of the credit and check awards is $7,680,000. 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. Settlement Agreement (Klein Aff. at Ex. 1) at ¶ 39. As discussed below, any lead plaintiff awards and / or attorneys' fees awarded by the Court will be paid out of this amount and deducted *pro rata* from Class Member payments.

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 applied immediately but that 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 current low interest rates. Accordingly, Plaintiffs respectfully submit that no 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). Plaintiffs expect in their final approval papers to request a $5,000 named plaintiff award for each plaintiff and a fee constituting not more than 25% of the total Settlement value which would be deducted *pro rata* from payments made to Class Members. *See* Part II.B.3.d 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 named plaintiff award. Settlement Agreement (Klein Aff. at Ex. 1) at ¶ 44(e).

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, Plaintiffs respectfully submit that the proposed Settlement awarding 100% to 103% of Class Member damages 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]

[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).

a. 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: Class Members are receiving reimbursement of 100% (or 103%) of the Surcharges. Full and complete recovery, without even the need for submitting a claim form, plainly meets (and exceeds) any "range of reasonableness," especially given the risks inherent in any litigation. As the proposed Settlement meets the requirements for final approval, it clearly is "within the range" of *possible* approval, and thus the Class should be notified and given the opportunity to evaluate the terms of the proposed Settlement.

b. 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, Plaintiffs conducted a substantial investigation of the prior litigation between the Town of Glastonbury and the MDC and the parties engaged in substantial discovery, including review and analysis of the

MDC's detailed records concerning the Surcharges and Class Member damages. The parties also extensively litigated the factual and legal issues in the case. Accordingly, by the time the complete-recovery Settlement was reached, all counsel and parties well informed of the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses.

c. The Risks of Establishing Liability and Damages and 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 of litigation. *See Grinnell*, 495 F.2d at 463. Here, Plaintiff's counsel firmly 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 Surcharges were illegal in *Town of Glastonbury v. Metropolitan District Commission*, 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.

In addition, the MDC would undoubtedly challenge class certification on appeal. Although Plaintiffs believe there is no basis for overturning this Court's ruling, the risk could not

be ignored that an appellate court would agree with at least one of the arguments against certification raised by the MDC.

Further, as discussed above, Plaintiffs' counsel had to expend significant time and resources litigating Defendants' various motions and defenses in this hotly-contested litigation, which whittled the litigation down to a single breach of contract count. 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.

Although Plaintiffs are confident that they would prevail at trial, Defendant would undoubtedly appeal, raising the risk, again, that the Settlement Class could receive nothing. And, even if Plaintiffs ultimately prevailed in all appeals, the delay would be substantial. The Settlement, in contrast, allows Class Members to recover *now.*

d. 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, Plaintiffs respectfully submit that that the requested attorney's fees in this case are fair and reasonable.

Specifically, Plaintiffs will not seek more than 25% of the Settlement value for attorneys' fees and expenses. As will be explained in greater detail in Plaintiffs' fee application, 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.[7] 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. Even if the Court awards the requested fees and expenses, a net recovery of over 75% is outstanding. Plaintiffs' counsel also anticipate needing to spend significant additional time on this litigation responding to Class Members' inquiries and seeking Final Approval for the Settlement, beyond the time already incorporated into the present lodestar estimate. 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.

Counsel also intend to seek a $5,000 named plaintiff service award for each of Plaintiffs William Paetzold and Laurie Paetzold, in light of their extensive efforts in this litigation, including production of documents, responding to interrogatories, sitting for deposition, and general oversight of the litigation. Klein Aff. at ¶ 7.

If the Court gives preliminary approval to the proposed Settlement, Plaintiffs 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,

[7] Plaintiffs' counsel are mindful of the Court's position that lodestar is not an appropriate factor in determining class action attorneys' fees. However, Plaintiffs' counsel's time records and lodestar are available should the Court wish to review them.

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 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 make minor and non-substantive amendments to the Class definition to bring it into accord with the definition included in the Settlement Agreement, 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 (Klein Aff. at Ex. 1) at ¶ 2. Accordingly, 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 individual "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.[8] In addition, the proposed revised definition replaces the phrase "non-member town surcharge" with the defined term "Surcharge," which 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. Accordingly, Plaintiffs respectfully submit that the Court should modify that Class definition as set forth above for purposes of Settlement and of defining the Settlement Class.

[8] 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 proposed long-form notice attached as Exhibit 3 to the Klein Affidavit.

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 JND Legal Administration ("JND"), a professional claims administration firm, be appointed to act as the Settlement Administrator. Settlement Agreement (Klein Aff. at Ex. 1) at ¶ 26. Pursuant to the notice plan devised in conjunction with JND, ***individual*** notice will be sent to all Class Members (whether current or former MDC customers). *Id.* at ¶ 37. The MDC will provide to JND lists of property owner Class Members who are current MDC customers in the four affected non-member towns, including the most recent mail and (where available) email addresses. *Id.* at ¶ 37(a). The MDC has also obtained property transfer records available from the non-member towns, which the Settlement Administrator will

use to identify former MDC customers during the relevant time period (and then use U.S. Postal Service change-of-address databases and other sources to identify current addresses).[9] JND will send an Email Notice, in substantially the form attached as Exhibit 3 to the Klein Affidavit, to all Class Members who are current or former MDC customers for whom an email address is available.[10] *Id.* at ¶ 37(b)(i) & (iii).[11] Where no email address is available, JND will send those Class Members Postcard Notice in substantially the form attached as Exhibit 2 to the Klein Affidavit. *Id.* at ¶ 37(b)(ii) & (iii). JND will use customary search protocols to verify addresses and will use property transfer records and customary search protocols to obtain current addresses for Settlement Class Members who are former MDC customers. *Id.* at ¶ 37(b)(iii). In addition, JND will provide supplemental Digital Notice through Google and Facebook targeting adults in the greater Hartford area. *Id.* at ¶ 37(c).

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[9] During most of the relevant time period, the MDC's practice was that, when ownership of a property changed, the account number would remain the same and the name of the new property owner/customer would be recorded in the MDC's database, overwriting the name of the former property owner. Accordingly, the Settlement Administrator will use property transfer records to identify the former property owners, as explained above.

[10] Exhibits 2 and 3 to the Klein Affidavit reflect minor edits to the forms of short and long (email) notice attached as Exhibits A and B respectively to the Settlement Agreement. The parties mutually agreed to these edits to further clarify these notice documents and mutually consent to the replacements thereof.

[11] In addition to property owners who will receive notice because they were charged for water, the MDC will also provide a list of approximately 1,800 email addresses to JND of people who paid MDC bills electronically during the Class Period in order to promote full notice to Class Members. Many, if not most, of these persons or entities are likely property-owner Class Members who should receive notice through the property-owner distribution lists discussed above, but JND will send the email notice to these addresses as well to further ensure all Class Members receive notice. However, certain people who paid electronically may *not* be owners (for example, they may have been renters) and so are *not* Class Members. The Email Notice explains that even if someone receives notice, only property owners are Class Members and will receive compensation, and that if payors (such as renters) believe they are entitled to some or all of the benefit provided to owners (such as under the terms of their leases), the payors must discuss that with the property owners directly.

JND will also establish a Settlement Website that will 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. *Id.* at ¶ 37(d).[12] Class Members who wish to exclude themselves from the Settlement may do so through the website or by letter. *Id.* at ¶ 37(g). In addition, JND will 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 ¶ 37(e).

JND will make available to Settlement Class Members contact information for proposed Class Counsel Izard Kindall & Raabe LLP in the Long Notice and on the Settlement Website and through phone support, so that Settlement Class Members may inquire directly of Class Counsel concerning any questions they have. Klein Aff. at ¶ 8.

B. Contents of Notice

The proposed Postcard Notice is attached as Exhibit 2 to the Klein Affidavit, and the proposed Long (and Email) Notice is attached as Exhibit 3 thereto. The Postcard and Long (Email) Notices include fair summaries of Plaintiffs' 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; and the date, time, and place of the Final Approval 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

[12] As Class Members who do not opt-out automatically will receive compensation, there will be no Claim Form available on the Website. If someone does not receive notice and believes they are a Class Member, they will need to contact the Settlement Administrator or Class Counsel. Indeed, several putative Class Members have already reached out to Class Counsel.

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 Class, the award to which they are entitled, the named plaintiff award and fees sought by Plaintiffs and Plaintiffs' counsel, and the purpose and timing of the Final Approval Hearing. In addition, as discussed above, they will provide a telephone number and website that Class Members may use to the extent they have any questions.

The Notices also clearly explain that any member of the Class who wishes to opt out must individually sign and timely submit a written or website request clearly manifesting his or her intent to be excluded. The Notices similarly clearly explain that any 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, Plaintiffs respectfully request that the Court enter an Order in substantially the form of the [Proposed] Order submitted herewith:

(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) Approving the proposed Notice Plan;

(4) Approving the proposed schedule set forth in the [Proposed] Order

(5) Approving Plaintiffs' uncontested Motion for Preliminary Approval of Class Action Settlement;

(6) Appointing JND Legal Administration as the Settlement Administrator;

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

(8) Scheduling a Final Approval Hearing; and

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

Dated: March 27, 2020

Respectfully submitted,

PLAINTIFFS

By *Seth R. Klein*

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CERTIFICATE OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or nonelectronically on March 27, 2020, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

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