DOCKET NO. X03 HHD-CV14-6055537-S	:	SUPERIOR COURT
HOLLY CHANDLER AND DEVON ANN CONOVER,	:	COMPLEX LITIGATION DOCKET
PLAINTIFFS,	:	AT HARTFORD
VS.	:	
DISCOUNT POWER, INC.	:	
DEFENDANT	:	FEBRUARY 1, 2017

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Plaintiffs Holly Chandler and Devon Ann Conover ("Plaintiffs"), individually and on behalf of the proposed Settlement Class (as defined in the Settlement Agreement), respectfully submit this memorandum of law in support of their Motion for Certification of Settlement Class and Approval of Class Action Settlement.

I. INTRODUCTION

Plaintiffs brought this class action lawsuit (the "Action"), alleging that Discount Power, Inc. ("DPI" or "Defendant"), falsely claimed that its variable rate for electricity supply services would fluctuate based on changes in the "wholesale power market," while in practice it failed to decrease its variable rate when wholesale market rates went down. *See* Complaint [Dkt. No. 100.31] at ¶¶3-6, 20-29. After two years of litigation and lengthy settlement discussions, the Parties agreed to an $850,000 settlement to resolve the case. The Court preliminarily approved the Settlement on November 21, 2016 and authorized Plaintiffs to give notice to the Settlement Class. Dkt. No. 135. Plaintiffs now seek final approval of the Settlement.

The Settlement is in the best interests of the Class. After conducting discovery concerning DPI's operations, Plaintiffs determined that sufficient data exists to establish Defendant's liability beginning in June of 2013. From June of 2013 through December, 2015, Plaintiffs' experts estimated maximum recoverable damages at approximately $6 million. Accordingly, the $850,000 settlement represents approximately 14% of the maximum possible recovery.[1] *See* Affidavit of Seth R. Klein in Support of Plaintiffs' Motion for Certification of

[1] The Class Period in this matter extends from June 1, 2013 through July 31, 2016. Although Plaintiffs' experts did not formally construct a damages model for the period January 1 through July 31, 2016, Plaintiffs believe that these damages are relatively low given both the historical decreasing trend in damages in 2015 as compared to 2014 and the fact that, due to a change in Connecticut state law, DPI did not offer variable rate contracts to new customers, or roll existing fixed rate customers into variable rate contracts, after September 2015.

Settlement Class and Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees & Expenses and for Case Contribution Awards ("Klein Aff."), ¶ 20. Although this figure itself is within the range of approved class action settlements, Plaintiffs' decision to accept the Settlement is based, in substantial measure, on concerns over Defendant's ability to pay a larger judgment. Plaintiffs retained an accounting expert to analyze Defendant's audited financial statements. Plaintiffs' expert concluded that Plaintiffs would have great difficulty actually collecting a larger judgment if they prevailed at trial.

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

Accordingly, Plaintiffs move the Court for entry of an order:

(1) Certifying the Settlement Class;

(2) Appointing Holly Chandler and Devon Ann Conover as Representative Plaintiffs;

(3) Appointing Izard Kindall & Raabe LLP as Settlement Class Counsel;

(4) Approving the Settlement; and

(5) Approving the Plan of Allocation.

II. FACTUAL BACKGROUND

Plaintiffs filed the Action on November 20, 2014. The Complaint alleged that DPI, which is licensed as an electricity supplier in the State of Connecticut, charged customers who had variable rate plan contracts extraordinarily high amounts that bore no relationship to the underlying wholesale price of power. Plaintiffs alleged that these pricing practices violated the covenant of good faith and fair dealing as well as the Connecticut Unfair Trade Practices Act ("CUTPA"), and resulted in unjust enrichment. *See* Klein Aff., ¶ 7. Defendants filed an Answer, including eleven special defenses, on April 29, 2015. Dkt. No. 101. Plaintiffs replied to the special defenses and filed a certificate of closed pleadings on April 29, 2015. Dkt. Nos. 106 and 108.

The Parties conducted significant discovery from February of 2015 through March of 2016. Klein Aff., ¶¶ 10-13. Plaintiffs obtained documents related to Defendant's business practices, as well as documents related to the calculation of damages, from both Defendant itself and from the entity that operates the regional wholesale power market, ISO (for "Independent Service Operator") – New England. *Id.* Defendant obtained Plaintiff's personal documents related to the case, as well as documents obtained by Plaintiffs' counsel over the course of their extensive investigation of DPI conducted prior to filing suit. *Id.* at ¶ 11. At the end of the fact discovery period, Defendant's counsel deposed both Plaintiffs, and Plaintiff conducted a "corporate representative" deposition of DPI's Chief Operating Officer. *Id.* at ¶ 13.

The Parties also discussed the possibility of settlement while discovery was ongoing. Plaintiffs obtained sufficient information from Defendant and ISO-New England to have an expert evaluate whether Defendant's variable prices for electricity were correlated to its costs for purchasing electricity on the wholesale market and, if not, how much Connecticut consumers in

the aggregate overpaid. *Id.*, ¶ 15. Plaintiffs' expert prepared a report, which Defendant had the opportunity to review and critique. *Id.* Thus, the Parties had sufficient information to assess the risks concerning both liability and damages.

The Parties were also able to assess the risk that Defendant would not be able to pay all, or some significant portion, of an adverse judgment. Defendant provided documents, including audited financial statements, that allowed Plaintiffs, with the assistance of an accounting expert, to evaluate what DPI could afford to pay. *Id.*, ¶ 16. Plaintiffs' expert concluded that there was a substantial risk that further litigation would exhaust the resources Defendant had which might be used to pay an adverse judgment. *Id.*

The Parties were able to reach an agreement in principle in August of 2016. *Id.* at ¶ 17. Negotiation of the final text of the settlement agreement, the Plan of Allocation and the draft notices to the Settlement Class took several months more. *Id.* The Settlement Agreement was finalized and submitted to the Court in November of 2016, and the Court granted the Motion for Preliminary Approval on November 21, 2016. *Id.*, ¶¶ 18-19; Dkt. No. 133.

In accordance with the Preliminary Approval Order, the Parties worked with KCC Class Action Services, LLC ("KCC") to provide the class with information about the case and the proposed settlement. *Id.*, ¶¶ 22-23. The Settlement Class was provided with detailed notice of the terms of the Settlement by e-mail or first-class mail on December 27, 2016, and Plaintiff established an informational website concerning the settlement at www.discountpowersettlement.com. *See* Affidavit of Scott DiCarlo, Senior Project Manager ("DiCarlo Aff."), attached to the Klein Affidavit as Exhibit E, at ¶¶ 2, 5. The Court-approved Notice informed Class Members of all of the key details about the terms of the Settlement, including procedures for objecting to, or opting out of, the Settlement. Klein Aff., ¶ 23.

The deadline for filing objections or opting out of the Settlement is February 27, 2017. The deadline was intentionally set several weeks after Plaintiffs were required to file their motions in support of final approval and of the award of fees and expenses, so that Settlement Class Members could make their decision to participate in, object to, or opt out of the Settlement, informed by the materials Plaintiffs submitted. *Id.*, ¶ 24. As of the date of this filing, neither counsel nor the Claims Administrator have received any objections or opt-outs. *See id.*, ¶ 24; DiCarlo Aff., ¶¶ 7-8.

III. THE PROPOSED CLASS SHOULD BE CERTIFIED

Plaintiffs request that the Court certify the following Class:

> All individual residential and small business consumers enrolled (either initially or through "rolling over" from a fixed rate plan) in a Discount Power variable rate electric plan in connection with a property located within Connecticut at any time from June 1, 2013, through and including July 31, 2016.
>
> Excluded from the Class are Discount Power, the officers, directors and employees of Discount Power; any entity in which Discount Power has a controlling interest; any affiliate or legal representative of Discount Power; the judge to whom this case is assigned and any member of the judge's immediate family; any heirs, assigns and successors of any of the above persons or organizations in their capacity as such; and anyone who timely submits a valid request to be excluded from the Settlement Class.

Certification of a class action is governed by Practice Book §§ 9-7 and 9-8. *See* Practice Book § 9-9 (directing the Court to apply factors in preceding sections when certifying and managing a class action). Section 9-7 sets forth four prerequisites to class certification referred to in the short-hand as: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. In addition, the class must meet one of the three requirements of § 9-8. Plaintiffs here seek to certify a class under Section 9-8(3), which authorizes class actions where "questions of law or fact common to the members of the class predominate over any questions affecting

only individual members, and [] a class action is superior to other available methods for fair and efficient adjudication of the controversy."

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

A. Numerosity, Commonality and Typicality

The Class meets the numerosity, commonality, and typicality standards of § 9-7(1)-(3). First, the number of putative Class Members is such that it is impractical to join all of the Class Members in one lawsuit. *See Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333 (MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (certifying where the number of persons in the class logically exceeded 100). Approximately 38,000 DPI accountholders are included in the Class. Klein Aff., ¶ 25.

Second, there are substantial questions of law and fact common to all Class Members. All three of Plaintiffs' causes of action (breach of the covenant of good faith and fair dealing, unfairness and deception under CUTPA, and unjust enrichment) revolve around a core factual allegation: Defendant's form contracts promised that DPI's variable rates would "fluctuate to reflect changes in the wholesale power market," when in fact they did not. Accordingly, the fundamental question of how a reasonable consumer would interpret DPI's contract language is common to the entire Class. Also common to all three claims – and to the Class as a whole – is

the question of whether DPI's variable pricing actually did or did not "fluctuate" based on "wholesale market conditions." Likewise, the question of whether DPI's alleged misconduct harmed the Class is common to all Class Members.

Finally, Plaintiffs' claims are "typical" of other Class Members' claims because they were subjected to a uniform set of policies and practices that DPI used for all variable rate customers. Plaintiffs' claims arise from the same course of conduct as the other Settlement Class Members' claims. DPI's policies and practices with regard to setting variable electric rates affected Plaintiffs and all other Settlement Class Members in the exact same way. Additionally, Plaintiffs' and all other Settlement Class Members' claims are premised on the same legal theories. Accordingly, the typicality requirement is satisfied. *See In re Host Am. Corp. Sec. Litig.*, Master File No. 05-CV-1250 (VLB), 2007 WL 3048865 (D. Conn. Oct. 18, 2007) (finding typicality where plaintiffs alleged defendants committed same acts, in same manner against all class members).

B. Adequacy of Representation

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

Plaintiffs do not have any claims antagonistic to or in conflict with those of the other Settlement Class Members, as Plaintiffs are pursuing the same legal theories as the rest of the Settlement Class relating to the same course of DPI's conduct. Additionally, Proposed Settlement Class Counsel have an extensive background in litigating complex litigation and consumer class actions, have been appointed class counsel in prior cases, and have the resources

necessary to prosecute this action to its conclusion. *See* Klein Aff., Exh. B (Firm Resume of Izard Kindall & Raabe LLP).

C. Predominance of Common Issues and Superiority

Practice Book § 9-8(3) authorizes class actions to proceed where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [] a class action is superior to other available methods for fair and efficient adjudication of the controversy." The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.* The "predominance" and "superiority" provisions were intended "to cover cases 'in which a class action would achieve the economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 92 (D. Mass. 2005) (citing *AmchemProds., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). Where, as here, a court is deciding on the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *Amchem*, 521 U.S. at 619. The remaining elements or Rule 23, however, continue to apply in settlement-only certification situations. *Id.* at 619.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Lupron*, 228 F.R.D. at 91 (*citing Amchem*, 521 U.S. at 623). Predominance "does not require that *all* questions of law or fact be common; it

only requires that the common questions *predominate* over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981) (emphasis added). As demonstrated *supra* when addressing commonality, several issues of law and fact common to all Settlement Class Members are present in this matter. These common issues of law and fact predominate over any potential individual issues which may arise, as they could be resolved through the presentment of proof common to all Settlement Class Members. Thus, the predominance requirement of § 9-8(3) is satisfied.

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

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

given the comparatively small size of each individual Settlement Class Members' claims. Thus, it is desirable to adjudicate this matter as a class action.

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

IV. APPOINTMENT OF CLASS COUNSEL AND REPRESENTATIVE PLAINTIFFS

Plaintiffs respectfully request that the Court appoint Izard, Kindall & Raabe, LLP ("IKR") as Settlement Class Counsel. Practice Book Section 9-9(d) provides that "a court that certifies a class must appoint class counsel." Izard, Kindall & Raabe, LLP clearly satisfy all requirements for appointment, as set out in Practice Book Section 9-9(d)(1). IKR identified and investigated the claims alleged in the Complaint for weeks prior to filing suit, and has demonstrated over the course of the past two years of litigating both this case, and several other cases alleging similar claims against other electricity suppliers,[2] the willingness to commit all resources necessary to the successful prosecution of the case. IKR has a long and successful record of litigating class action cases both in Connecticut and around the country, and has substantial experience with both the facts and the legal theories at issue in this case.[3] A copy of IKR's current firm resume is attached to the Klein Affidavit as Exhibit B.

---

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

[3] IKR has successfully litigated the legal sufficiency of allegations substantially similar to those made in this case numerous times. The rulings in the *Richards* and *Edwards* cases have been published electronically. *Richards v. Direct Energy Servs., LLC,* No. 3:14-CV-1724 (VAB), 2015 WL 7428529, at *1 (D. Conn. Nov. 20, 2015); *Edwards v. N. Am. Power & Gas, LLC,* 120 F. Supp. 3d 132 (D. Conn. 2015). IKR has also briefed a contested motion for class certification in *Richards.*

The Court should also confirm its preliminary appointment of Holly Chandler and Devon Ann Conover as Representative Plaintiffs. Both Plaintiffs have been actively involved in the case from the beginning. They have reviewed court filings, provided documents and information in discovery, sat for depositions and consulted with counsel, including with respect to the proposed Settlement. *See* Affidavits of Holly Chandler and Devon Ann Conover, attached to the Klein Aff. as Exhs. C and D; *see also* Klein Aff., ¶ 30.

V. THE SETTLEMENT SHOULD BE APPROVED

A. The Standard for Approval

Connecticut Practice Book § 9-9(c) requires judicial approval for any compromise of claims brought on a class basis, and approval of a proposed settlement is a matter within the discretion of the district court. *See, e.g., Rabinowitz v. City of Hartford*, No. HHD-CV-075008403S, 2014 WL 3397831 (Conn. Super. Ct. June 3, 2014).

Public policy strongly favors the pretrial settlement of class action lawsuits. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003); *see also In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *1 (S.D.N.Y. Nov. 20, 2008) ("The settlement of complex class action litigation is favored by the Courts.") (citations omitted).

The Second Circuit has identified nine factors that courts should consider in deciding whether to grant final approval of a class action settlement:

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

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted). A review of these factors demonstrate that the Settlement merits approval.

1. The Ability of DPI to Withstand Greater Judgment

Beyond their review and negotiation of the merits, Proposed Settlement Class Counsel concluded that the Settlement is in the best interests of the Class based on their analysis of DPI's financial situation. Plaintiffs retained an expert accountant to review certain financial documents provided by DPI. Klein Aff., ¶ 16. Upon review of their expert's analysis, Plaintiffs believe that litigating this matter to completion might exhaust whatever available resources Defendant has to pay towards a possible judgment (thus placing collectability of the judgment at serious risk). *Id.*, ¶¶ 16, 20. Defendant has no insurance coverage for the loss, and Defendant relies on internally generated operating cash flow to fund operations. *Id.* Accordingly, Plaintiffs believe there is a substantial likelihood that, even if Plaintiffs were to win more than $850,000 at trial, the Class would not actually collect any additional money (and, indeed, even the $850,000 presently available might be depleted by a lengthy litigation).

Based on Plaintiffs' analysis of DPI's financial statements, DPI's projected cash flows require that the Proposed Settlement be paid over two years. *Id.*, ¶ 16. Accordingly, the Settlement Agreement provides that DPI will fund the Settlement in three installments, ending no later than December 31, 2018, in order to permit DPI to have sufficient ongoing operating cashflow. The cumulative fund will be maintained in an interest-bearing escrow account, and will be distributed to Class Members upon being fully funded (with such intermediate payment of fees, costs and expenses as authorized by the Court). Such "installment" settlements are routinely approved where necessitated by a defendant's financial situation. *See, e.g., Febus v.*

Guardian First Funding Group, 90 F. Supp. 3d 240 (S.D.N.Y. 2015); *Fisher Bros. v. Cambridge-Lee Indus., Inc.,* 630 F. Supp. 482 (E.D. Pa. 1985).

DPI's inability to pay a greater judgment is a significant driving factor behind the Proposed Settlement. Klein Aff., ¶ 20. *See Henry v. Little Mint, Inc.,* No. 12 Civ. 3996 (CM), 2014 WL 2199427, at *9 (S.D.N.Y. May 23, 2014) (approving settlement in which "[t]he parties negotiated heavily over the settlement amount taking into account [d]efendant's ability to pay" and would "allow [d]efendants to remain in business"). Accordingly, this factor weighs in favor of approval.

2. 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).

Plaintiffs engaged in extensive discovery to understand the strengths and weaknesses of their claims. Proposed Settlement Class Counsel requested, obtained and analyzed hundreds of documents concerning DPI's consumer contracts and pricing methodology, and conducted a "corporate representative" deposition of DPI's COO to further investigate these issues. Klein Aff., ¶¶ 10-13. Class Counsel also retained industry experts to prepare a liability and damages analysis (which Defendant analyzed and critiqued). *Id.,* ¶ 15. Likewise, counsel for DPI conducted the depositions of both putative Representative Plaintiffs. *Id*., ¶ 13 Ultimately, the Proposed Settlement was reached only after months of direct negotiations between counsel for the parties covering issues critical to both liability and damages, including numerous rounds of

correspondence and phone discussions as well as an in-person negotiation on June 7, 2016, with senior DPI management. *Id.* at ¶¶ 14-17. As a result, counsel for both parties were able to assess the strengths and weaknesses of the case and determine with a reasonable degree of certainty the amount of damages the class might plausibly claim in the event that they were successful at trial. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (citation omitted) (finding action had advanced to stage where parties "'have a clear view of the strengths and weaknesses of their cases.'"). Accordingly, this factor favors approval.

3. The Risks of Establishing Liability and Damages

In assessing a proposed settlement, the Court should balance the benefits afforded the Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. While Proposed Settlement Class Counsel believe that Plaintiffs' claims are meritorious, there were substantial risks to achieving a better result for the Class through continued litigation. Plaintiffs' claims hinge upon the question of how a reasonable consumer would interpret DPI's contract, which provided that "[t]he variable rate may fluctuate to reflect changes in the wholesale power market." *See* Complaint [Dkt. No. 100.31] at ¶ 22. DPI has raised, and undoubtedly would continue to raise, numerous arguments, including the proper understanding of the phrase "wholesale power market" and the significance of the phrase "*may* fluctuate" (as opposed to, for example, "*will* fluctuate"), as well as questions about Plaintiffs' and the Class' reliance upon the contract. Although Plaintiffs believe that the plain meaning of DPI's contract is clear and that reliance (by Plaintiffs or the Class) is not required under Plaintiffs' theories, there is no guarantee Plaintiffs would prevail on these points.

Accordingly, absent the Proposed Settlement, there is a genuine possibility that the Class would receive nothing at trial.

Further, although Plaintiffs are confident that the Court would grant a contested motion for class certification, there is always a risk that Defendant would successfully block Class Certification and so this case would not even reach trial. Even if the Class was eventually certified by the Court, Defendants would have likely taken any opportunity to argue for decertification as the Action progressed. Further, there is no assurance of maintaining certification of a class, as courts may exercise their discretion to re-evaluate the appropriateness of class certification at any time. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might not be certified is not illusory"); *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."). Thus, the Settlement avoids any uncertainty with respect to class decertification.

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

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). In addition to the complexities and difficulties inherent in any class action, this litigation involves many substantial legal issues relating to CUTPA and contract law, including whether reliance is a necessary element of Plaintiffs' claims. The costs and risks associated with litigating this litigation to a verdict, not to mention through the inevitable appeals, would have been high, and the process would require many hours of the Court's time and resources. While fact discovery was largely complete, the Parties did not complete expert

discovery, which would be an expensive proposition on its own. At the end of that process, it is likely that the Parties would have filed dispositive motions and motions to exclude expert testimony pursuant to *State v. Porter*, 241 Conn. 57 (Conn. 1997), as well as a contested motion for class certification. If Plaintiffs succeeded in certifying the class and the Court denied summary judgment for either Party, there would have been competing motions in limine, a jury trial and – inevitably – appeals.

Even in the event that the Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for years, further reducing its value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks…and would, in light of the time value of money, make future recoveries less valuable than this current recovery"). Accordingly, this factor weighs in favor of Settlement approval.

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

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

F.R.D. at 130 (citation omitted). 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). Moreover, "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).

The Proposed Settlement represents a 14% recovery of the maximum damages obtainable at trial under Plaintiffs' experts' damages model. A 14% recovery is consistent with, and even exceeds, recoveries in other class action settlements. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (noting that "a 9 percent settlement … is still within the range of reasonableness" in a consumer class action); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (approving settlement representing 10% of maximum damages and noting that "[n]umerous courts have approved settlements with recoveries around (or below) this percentage"); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 483 (S.D.N.Y. 2009) (approving settlement with 2% recovery of maximum damages). Ultimately, the adequacy of the amount can only be judged in light of the risks involved in establishing liability, proving classwide damages and actually obtaining payment from Defendant. As discussed above, the likelihood that the Plaintiff class would not obtain greater relief through continued litigation fully justifies the settlement recovery amount.[4]

[4] DPI has not offered variable rate contracts to new customers, or rolled existing fixed rate customers into variable rate contracts, since September 2015. Moreover, all DPI customers who were enrolled in variable rate plans during the Class Period (including prior to September 2015) will receive Notice alerting them to Plaintiffs' allegations as part of the process of administration

6. Reaction of the Settlement Class

Although objections and requests to opt out are not due until February 27, 2017, as of January 30, 2017, of the over 37,000 Settlement Class members have received individual Notice, none have filed objections to the Settlement or to the provisions for an award to the Plaintiff or to counsel for fees and expenses, nor have any opted out of the Class. DiCarlo Aff., ¶¶ 2-3 and 7-8. Plaintiff will update these numbers at or before the Fairness Hearing. To date, however, this factor appears to support the fairness of the Settlement. *See, e.g., D'Amato,* 236 F.3d at 86-87 (holding that the district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement).

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

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

Based on DPI's records, approximately 38,000 households and small business were subscribed to DPI's variable electric services at some time during the Class Period. These customers constitute the proposed Settlement Class. While all members of the Settlement Class paid variable rates, they did not all have the same damages. Class members purchased electricity at set rates per kilowatt hour. Defendant's excessive rates, as alleged in the Complaint, had a greater impact on consumers who used more power. Klein Aff., ¶ 26. Moreover, the damages

---

of the Proposed Settlement. Accordingly, there is little risk of ongoing harm to Connecticut consumers.

analysis prepared by Plaintiffs' electricity market experts concludes that during a small number of months during the Class Period, wholesale prices had risen so high that DPI's variable rate customers saved (rather than lost) money during those months. *Id.*, ¶ 27.

Plaintiffs' proposed plan of allocation is designed to ensure that the net settlement fund is allocated fairly, with greater amounts going to class members who had greater damages as a result of the conduct alleged in the Complaint. Accordingly, Plaintiffs propose distributing the Settlement Fund to the Settlement Class pursuant to the following Plan of Allocation:

> Upon being fully funded, individual Discount Power customers who have filed a Claim Form ("claimants") will be eligible to receive a share of the Settlement Fund based upon the amount of variable rate electricity used by that claimant between June 1, 2013, and July 31, 2016 as a percentage of the total amount of variable rate electricity used by all claimants during that same period (excluding periods in which Discount Power's procurement cost for electricity exceeded the variable price at which it sold that electricity), as set forth in Discount Power's internal records. In the event that claims made exceed the value of the net Settlement Fund after deducting all Settlement Costs (including the costs of notice and administration of the settlement and attorneys' fees and costs incurred by Class Counsel and incentive awards for the Lead Plaintiffs as may be approved by the Court), each claimant would receive a *pro rata* share of the net Settlement Fund based on his or her calculated loss. Because each potential claimant used a different amount of electricity and because we do not know the number of eligible claimants who will file valid claims, we cannot estimate the per-person recovery. Claimants whose payment under this Plan of Allocation would fall below $3.00 will not receive any payment

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

Members whose payment would be below $3 also will not receive an allocation, as the transaction costs of processing and mailing checks to such customers would be disproportionate to the harm suffered, and the increased likelihood that checks for lower dollar amounts would not be cashed would increase the portion of the settlement that might need to be distributed through *cy pres*.[5]

Plaintiffs believe that this proposed Plan of Allocation is fair and reasonable. The Plan reasonably compensates Class Members for the harm they suffered based directly upon their actual electricity usage. Moreover, the Plan excludes usage in months in which Class Members did *not* suffer a loss, thereby preventing unfair windfalls. The proposed Plan is also simple to administer and based upon data already produced by DPI, thereby minimizing administration costs. Accordingly, Proposed Settlement Class Counsel believe that the proposed Plan of Allocation should be approved.

VII. CONCLUSION

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

(1) Certifying the Settlement Class;

(2) Appointing Holly Chandler and Devon Ann Conover as Representative Plaintiffs;

(3) Appointing as Settlement Class Counsel Izard Kindall & Raabe LLP;

(4) Approving the Settlement; and

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

(5) Approving the Plan of Allocation.

Dated: February 1, 2017

PLAINTIFFS,
HOLLY CHANDLER AND
DEVON ANN CONOVER

By: /s/ Seth R. Klein

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

CERTIFICATION

Pursuant to Practice Book § 10-14, I hereby certify that a copy of the above was mailed or electronically delivered on February 1, 2017 to all counsel and pro se parties of record.

James T. Shearin
David P. Atkins
Pullman & Comley, LLC
850 Main Street, P.O. Box 7006
Bridgeport, CT 06601-7006

/s/ Seth R. Klein
Seth R. Klein