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 AWARD OF ATTORNEYS' FEES & EXPENSES AND FOR CASE CONTRIBUTION AWARDS

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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 Award of Attorneys' Fees & Expenses and Case Contribution Awards.

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 have filed a Motion for Final Approval, and ask the Court, in addition, to approve an award of attorneys' fees and expenses and case contribution awards.

II. FACTUAL BACKGROUND

Izard, Kindall & Raabe, LLP ("Settlement Class Counsel") began investigating Discount Power's pricing practices in October of 2014. *See* Affidavit of Seth R. Klein in Support of Plaintiffs' Motion for Certification of Settlement Class and Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees & Expenses and for Case Contribution Awards ("Klein Aff."), ¶ 3. This investigation included a detailed review of relevant dockets maintained by the Connecticut Public Utility Regulatory Authority ("PURA"), DPI's PURA filings, DPI's website, contracts and marketing materials, and a review of wholesale prices for power in the Connecticut market through the regional independent service operator, ISO-New

England. *Id.*, ¶¶ 3-4. Settlement Class Counsel also retained a consulting expert who had recently retired from a high-level position with ISO-New England to advise concerning the structure of the market for electric power in the New England region. *Id.*, ¶ 5. After reviewing these materials and consulting with the expert, Settlement Class Counsel drafted a detailed complaint for Plaintiffs' review and approval. *Id.*, ¶ 6.

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. *Id.*, ¶ 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. Settlement Class Counsel obtained and reviewed documents related to Defendant's business practices, as well as documents related to the calculation of damages, from both Defendant itself and from ISO-New England. *Id.*, ¶¶ 11-12. 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.*, ¶ 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.*, ¶ 13.

The Parties discussed the possibility of settlement while discovery was ongoing. Plaintiffs obtained sufficient information from Defendant and ISO-New England to 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.,* ¶ 14. Plaintiffs' original expert had withdrawn after accepting the position of Chief Economist for the Independent Service Operator for the mid-Atlantic Region, and thus Settlement Class Counsel retained Seabron Adamson and Edo Macan of Charles River Associates, Inc., to prepare a report on injury and damages, which Defendant had the opportunity to review and critique. *Id.,* ¶ 15. Settlement Class Counsel also retained an accounting expert to evaluate the limits of DPI's ability to pay an adverse judgment. *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.*

Reaching an agreement in principle on the terms of the Settlement required lengthy negotiations, including several telephone conferences and rounds of correspondence, and an in-person negotiation on June 7, 2016, that included senior DPI management. *Id.*, ¶ 14. The Parties were able to reach an agreement in principle in August of 2016. *Id.,* ¶ 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 of additional work. *Id.* Settlement Class Counsel was responsible for preparing the initial drafts of all of the Settlement papers and notices that served as the basis for negotiations on the final texts. *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, ¶¶ 2 & 5. The Court-Approved Notice informed Class Members of all of the key details about the terms of the Settlement, including the fact that Plaintiffs would request an award of attorneys' fees of 25% plus expenses and case contribution awards, to be paid from the Settlement Fund. Klein Aff., ¶ 23. The Notice also informed class members of the procedures for opting out of the Settlement and for objecting to any provisions of the Settlement Agreement or petition for attorneys' fees, expenses and case contribution awards. *Id*.

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. Klein Aff., ¶ 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.

Over the course of the litigation, from investigation through the filing of Plaintiffs' final approval papers, Settlement Class Counsel expended 433.75 hours of time, with a lodestar of $294,521.25. Klein Aff., ¶ 32. Moreover, Settlement Class Counsel incurred out-of-pocket expenses in the amount of $100,550.41, virtually all of which was for the experts whose work

was critical to both the case and the settlement. *Id.*, ¶ 35. Settlement Class Counsel's work was performed entirely on a contingency basis, as were its payments of out-of-pocket expenses. *Id.*, ¶ 36.

III. ARGUMENT

A. The Court Should Grant Plaintiff's Attorneys' Fee Request

1. Plaintiffs' Counsel Are Entitled to a Reasonable Fee

Plaintiffs requests that the Court award a twenty-five percent attorneys' fee award from the Settlement Fund. The Supreme Court has held that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007). The rationale is to compensate counsel fairly and adequately for their services and to prevent unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. The Connecticut Supreme Court has specifically affirmed this rationale. *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 511, 517-18, 970 A.2d 583, 588-89 (2009) (citing *Boeing* for the proposition that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."). In addition, courts have recognized that awards of fair attorneys' fees from a common fund should serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore to discourage future misconduct of a similar nature. *See Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and

experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted).

2. This Court Should Utilize the Percentage Method to Determine Attorneys' Fees

There was little precedent in Connecticut Courts relating to the best means for calculating attorneys' fees in a common fund case prior to a few years ago. Two common methods have been used by courts around the country. The percentage method awards counsel a percentage of the total award received by the plaintiffs, while the lodestar approach multiplies the number of hours reasonably billed by the reasonable hourly rate (the "lodestar"). *See Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir. 1999). Under the latter method, a court may adjust the "lodestar," applying a multiplier after considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issues. *See In re Agent Orange Product Liab. Litig.,* 818 F.2d 226, 232 (2d Cir. 1987). The enhancement of lodestar amounts by a factor of 4-5 is common. *Towns of New Hartford & Barkhamsted v. Connecticut Res. Recovery Auth.,* No. CV040185580S(X02), 2007 WL 4634074, at *6, 10 (Conn. Super. Ct. Dec. 7, 2007).

In the *New Hartford* litigation, then-Judge Eveleigh carefully reviewed recent jurisprudence on the subject, and concluded that the fee award in a common fund case should generally be set as a percentage of the common fund, rather than through the older "lodestar" method. *Id* at *8 (citing federal cases from the Second Circuit and finding that this was also the approach of the First, Third, Sixth, Seventh, Ninth and Tenth Circuits). The court found that the percentage method was simpler and more efficient (avoiding "an otherwise 'gimlet-eyed review' of counsel's detailed lodestar"), allowed for consideration of the same factors used to determine

the appropriate multiplier in a lodestar case, and avoided "'an unanticipated disincentive to early settlements' created by the lodestar method." *Id.* (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000). On appeal, the Connecticut Supreme Court turned back defendant's challenge to the award of fees, while citing with approval the trial court's methodology, finding it to be a "comprehensive analysis:"

> [T]he [trial] court compared the percentage award of attorney's fees in the present case to other recent class actions. It then examined the six factors set forth by the United States Court of *Appeals* for the Second Circuit to determine the reasonableness of the fee in a common fund *class* action: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the result; and (6) public policy concerns. See *Goldberger v. Integrated Resources, Inc.*, supra, 209 F.3d at 50.

Town of New Hartford v. Connecticut Res. Recovery Auth., 291 Conn. 511, 515 & n.6, 970 A.2d 583, 587 (2009). Plaintiff respectfully submits that this Court should apply the *Goldberger* factors as approved by the Connecticut Supreme Court and award a fee in accordance with the percentage of the common fund method.

3. The Requested Fees Are Reasonable

An analysis of the facts in this case in light of the *Goldberger* factors demonstrates that the requested twenty-five percent fee is reasonable.

a. Counsel's Time and Labor

There is no question that Settlement Class Counsel expended significant time and effort to bring this litigation to a successful resolution. As detailed above, counsel have devoted substantial time and effort to this case for over two years. Even when courts do not employ the lodestar method to determine fees, they often consider the lodestar calculation in evaluating a requested percentage fee, although "where used as a mere cross-check, the hours documented by

counsel need not be exhaustively scrutinized by the district court." *Goldberger*, at 50. A review of counsel's contemporaneous records indicates that they collectively spent over 400 hours of attorney time with an aggregate lodestar of $294,521.25. *See* Klein Aff., ¶ 32.[1] Settlement Class Counsel's fee request, thus, is about 72 percent of lodestar – far less than what is routinely approved in other cases. *See, e.g., Town of New Hartford*, 2007 WL 4634074, at *10 ("In cases where counsel have undertaken a difficult matter on a contingency basis and have secured a favorable result for the class, the normal multiplier is 4-5 times the lodestar.") (citing *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177, at *17 (S.D.N.Y. July 27, 2007)); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (finding a multiplier of 3.5 to be reasonable). As in *Town of New Hartford*, there can be no question of counsel obtaining a "windfall." *See* 291 Conn. 511, 515 & n.6 (approving the trial court's lodestar cross-check analysis and finding no windfall where the lodestar multiple was over 2).

b. The Risks of Litigation

The *Goldberger* court identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable award of attorneys' fees]." *Goldberger*, 209 F.3d at 54 (citation omitted). The Court further instructed that the risk "must be measured as of when the case is filed," rather than with the benefit of hindsight. *Id.*, 55. Courts have noted that the *Goldberger* risk analysis overlaps with risk analysis performed in evaluating the fairness of a

[1] The hourly rates for Settlement Class Counsel's attorneys are the same as the regular current rates charged for services in non-contingent matters and/or that have been accepted and approved in class action litigation in other courts throughout the country. Klein Aff., at ¶ 34.

settlement. *See In re Priceline.com*, 2007 WL 2115592, at *3-5 (D. Conn. 2007) (noting that risk analysis concerning attorney fee award is similar to risk analysis with respect to settlement fairness).

Over the course of the last two years, several cases have been filed against electricity suppliers challenging retail pricing policies for variable rate contracts that bear no relationship to the underlying wholesale price of electricity and relying on legal theories of liability similar to those set out in Plaintiffs' complaint here.[2] The application of the breach of contract, implied covenant, unjust enrichment and CUTPA theories to the facts of these cases was untested. When the Complaint in the present case was filed, no Court had yet ruled on the legal sufficiency of any of the legal theories advanced in these cases. There was, accordingly, a significant risk at the outset that the case would not survive a motion to strike or later motion for summary judgment.

Assuming that the Class were able to overcome dispositive motions, trial would pose its own challenges. 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

[2] *See, e.g., Tully v. North American Power & Gas, LLC,* No. 3:15-cv-00469 (D. Conn. Mar. 31, 2014); *Fritz v. North American Power & Gas, LLC,* No. 3:14-cv-00634 (WWE) (D. Conn., May 6, 2014); *Edwards v. North American Power & Gas, LLC,* No. 3:14-cv-01714-VAB (D. Conn. Nov. 18, 2014); *Sanborn v. Viridian Energy, Inc.,* No. 3:14-cv-1731-SRU (D. Conn. Nov. 19, 2014); *Richards v. Direct Energy Services, LLC,* No. 3:14-cv-01724-JAM (D. Conn. Nov. 19, 2014); *Gruber v. Starion Energy, Inc.,* No. 3:14-cv-01828-SRU (D. Conn. Dec. 5, 2014); *Steketee v. Viridian Energy, Inc.,* No. 3:15-cv-00585-SRU (D. Conn. Mar. 22, 2015); *Roberts v. Verde Energy USA, Inc.,* No. HHD-cv-15-6060160S (Conn. Super. Jun. 12, 2015).

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. Moreover, the actual pricing models employed by Defendant are complex; establishing the difference between the price consumers paid and the price that they *should* have paid under the contracts requires substantial research and expert testimony. Thus, there was a risk that Plaintiffs would not be able to obtain a significant judgment even if they established liability. *See Chatelain v. Prudential-Bache Sec., Inc*., 805 F. Supp. 209, 213 (S.D.N.Y. 1992) (complex issue of establishing damages would require battle of the experts). Even if all other hurdles were overcome, there would be the possibility of appeal. *Id.* (possible appellate litigation would further increase costs and uncertainty).

Settlement Class Counsel have received no compensation during the course of this litigation despite having made a significant time commitment and incurred significant expenses to bring this action to a successful conclusion for the benefit of the Class. Any fee award or expense reimbursement to Settlement Class Counsel has always been contingent on the result achieved and on this Court's exercise of its discretion in making any award. "Settlement Class Counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated." *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990). *See also City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in relevant part,* 495 F.2d 448 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success"). Settlement Class Counsel certainly faced – and accepted – substantial risks when

they decided to bring this case. Accordingly, this factor argues strongly in favor of Class Plaintiffs' requested attorneys' fee award.

c. The Complexities and Magnitude of the Litigation

This case is a class action lawsuit concerning pricing policies that have affected approximately 38,000 households and small businesses. The complexities involved in this litigation weigh in favor of awarding fees to counsel for a number of reasons, including the uncertainty of the legal claims, the difficulty of establishing damages and liability and the likelihood of long and difficult litigation.

This litigation posed a number of complex issued from the start. Most obviously, the underlying claims required Settlement Class Counsel to become knowledgeable about the manner in which electricity is generated, transported, metered and billed, as well as the complex interplay of state and federal laws, regulations and institutions that govern the market for electric power. Settlement Class Counsel conducted many weeks of independent research on these issues and analyzed how these issues would play out in the context of the available legal causes of action prior to filing the Complaint. Klein Aff., ¶¶ 3-4. Prior to filing a complaint, Settlement Class Counsel retained an expert on the electricity supply market to assist in understanding the factual background of the case. *Id.,* ¶ 5.

As discussed above, while the legal theories advanced in the case are not new, their application to variable rate practices for electricity suppliers was untested and the outcome uncertain. Determining whether Defendant's costs had a positive correlation with its variable rates was equally complex and required additional work by experts in energy supply markets – a fairly rarified discipline. *Id.,* ¶ 15. The case was, accordingly, large in scope and both factually and legally complex.

d. Quality of Class Plaintiffs' Representation

To evaluate the "quality of the representation," courts applying the Second Circuit's *Goldberger* factors have "review[ed] the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *See In re Merrill Lynch Tyco Research Sec. Litig*., 246 F.R.D. 156, 174 (S.D.N.Y. 2007) (citation omitted). In light of the risks involved in the litigation and the Defendant's ability to pay anything larger, a settlement representing over 14 percent of class-wide damages is a good result. *Compare Id.* (settlement representing 3-7 percent of total claimed damages); *Cagan v. Anchor Sav. Bank FSB*, No. CV–88–3024, 1990 WL 73423 at *12-13 (E.D.N.Y. May 22, 1990) (approving $2.3 million settlement over objections that "best possible recovery would be approximately $121 million."); *In Re AmBase Corp.,* No. 90 Civ. 2011 (CSH), 1995 WL 619856, at * 2 (S.D.N.Y. Oct. 20, 1995) (approving a settlement where class members received from 3% to 20% of their losses, calculated as if all damage issues were resolved in the class members' favor).

Settlement Class Counsel are experienced class action litigators. *See* Klein Aff. Exh. B (Izard, Kindall & Raabe firm resume). The individual attorneys hail from top law schools, and many have worked at well-known and established national law firms prior to forming and joining their current firms. *Id.*

The quality of opposing counsel is also important in evaluating the quality of the services rendered by Settlement Class Counsel. *See In re Merrill Lynch Tyco Research Sec. Litig*., 246 F.R.D. 246 F.R.D. at 174. Defendants were ably represented by Pulman & Comley, LLC, a prominent firm throughout the Northeast with an excellent litigation reputation. Accordingly, this factor supports Plaintiff's fee request.

e. The Relationship of the Requested Fee to the Settlement

The *Town of New Hartford* court ruled that a fee award of between 25-30 percent in a complex class action is not unusual, and is both reasonable and "exceedingly fair to the plaintiffs." 2007 WL 4634074, at *9. The court's determination was bolstered by its review of recent caselaw:

> Established class action case law supports a percentage award of attorneys fees of 25% or more from recoveries producing a common fund for the benefit of the class members. *See, e.g. Manual of Complex Litigation Section 14.121* ("Attorneys fees awarded under the percentage method are often between 25% and 30% of the fund"). Recently, class action fee awards of 25% or more have been rendered in the following cases involving settlements in the range of (or substantially greater than) the judgment rendered in this action. *In re Priceline.com, Inc. Securities Litigation,* 2007 WL 2115592 (D. Conn. July 20, 2007) (Covello, J.) (awarding attorneys fee of 30% of $80 million class action settlement); *In re Bisys Securities Litigation,* 2007 WL 2049726 (S.D.N.Y. July 16, 2007) (Rakoff, J.) (fee award of 30% on $65.8 million settlement) and *Hoormann v. Smithkline Beecham Corp.,* Case No. 04-L-715 (Ill. Cir. Ct. Madison Co. May 17, 2007) (awarding attorneys fee of 26% of $63.8 million class action settlement).

Id., *5; *see also Bozak v. FedEx Ground Package Sys., Inc.,* No. 3:11-CV-00738-RNC, 2014 WL 3778211, at * 7 (D. Conn. July 31, 2014) (finding that fee request of one-third typical of awards in the Second Circuit). Thus, the 25 percent fee request here is at the low end of the range of fee requests granted in other complex class action cases and, as noted above, results in a negative lodestar multiplier.

The percentage fee in relation to the Settlement is reasonable, especially given the complexity and novelty of the case, the attendant litigation risks, and the effort Settlement Class Counsel expended to reach a Settlement. *See Priceline.com*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (holding that 30% fee award was reasonable where counsel expended significant effort to prosecute action and lodestar cross-check yielded a multiplier of 1.98).

f. Reaction of the Class

The reaction by members of the Class is entitled to great weight by the Court. *See In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig*., 364 F. Supp. 2d 980, 996 (D. Minn. 2005) (stating that number and quality of objections enables court to gauge reaction of class to request for award of attorneys' fees). "[N]umerous courts have [noted] that the lack of objection from members of the class is one of the most important . . ." factors in determining reasonableness of the requested fee. *In re Prudential Sec. Ltd. P'ships Litig.*, 985 F. Supp. 410, 416 (S.D.N.Y. 1997) (internal quotations omitted); *see also Town of New Hartford,* 291 Conn. 511, 515 (noting with approval that the trial court had found there were no objections to the proposed fee award).

As noted in the accompanying Motion for Final Approval, over 38,000 notices were sent out. The notices clearly set forth that Plaintiffs' Settlement Class Counsel would apply for an award of fees of up to 25% of the Class Settlement Fund, plus reimbursement of all costs and expenses. Although objections and requests to opt out are not due until February 27, 2017, as of January 30, 2017, of the over 38,000 Settlement Class members have received individual Notice, no Class Member has filed an objection to the Settlement or to the provisions for an award to the Plaintiff or to counsel for fees and expenses nor have any class members sought to opt out of the Settlement. Klein Aff., ¶ 24, DiCarlo Aff., ¶¶ 7-8. Plaintiff will update these numbers at or before the Fairness Hearing. To date, this factor appears to support the application for fees.

g. Considerations of Public Policy

Public policy considerations support the requested fee. Where individual class members suffer real damages, but the amount at issue is too small in comparison to the costs of litigation to justify filing an individual suit, "the class action mechanism and its associate percentage-of-recovery fee award solve the collective action problem" and allow plaintiffs an opportunity to

obtain redress. *Hicks*, 2005 WL 2757792, at * 9. As the *Hicks* court further observed, "[t]o make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Id.; see also Bozak v. FedEx Ground Package Sys., Inc.*, No. 3:11-CV-00738-RNC, 2014 WL 3778211, at *6-7 (D. Conn. July 31, 2014) ("Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill that role must be adequately compensated for their efforts"); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (finding it is "imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks of pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts.").

Plaintiff respectfully suggests that the proposed fee award of 25 percent of the Settlement, or $212,500, is supported by all of the *Goldberger* factors, and requests that the Court award that amount to Settlement Class Counsel.

B. The Expenses Settlement Class Counsel Incurred Were Reasonable and Necessary to the Effective Prosecution of this Action

"It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007). Settlement Class Counsel requests reimbursement for $100,550.41 in expenses they incurred while prosecuting this action. *See* Klein Aff., ¶ 35. Virtually all of the expenses involve payment of the cost of experts who spent innumerable hours reviewing documents from Defendant and third parties, such as ISO-New England, and creating models for determining injury and damages. *Id.* Additional expenses

relate to travel costs incurred during mediation and court appearances, as well as costs of service and filing. *Id.* Settlement Class Counsel have reviewed the expense affidavits carefully and determined that the expenses were reasonably incurred and were necessary to the successful prosecution of this action.

C. Timetable for Payment of Attorneys' Fees and Expenses

Plaintiff retained an accounting expert to review Defendant's audited financial records for purposes of assessing the size of a judgment Defendant could afford to pay. Klein Aff., ¶ 16. Based on this review, Plaintiffs agreed to the total settlement amount of $850,000, and also agreed that the total amount should be paid in three installments. The first installment of $250,000 has already been paid into the escrow account established under the Settlement Agreement; the second installment is due by no later than December 31 of this year, and the third installment is due by no later than December 31 of next year. Settlement Agreement, ¶ 14. The second and third installments are each $300,000. *Id.*

The Settlement Agreement provides that payment of the Attorneys' Fees and Expenses awarded by the Court should be made in installments proportional to the installments Defendant makes to the Settlement Fund. Thus, the Settlement Agreement provides that counsel may be paid 30 percent of the total amount awarded for attorneys' fees and expenses within ten days of the effective date of the Settlement Agreement or the Court's award of fees and expenses (whichever is later), and may be paid an additional 35 percent of the total amount awarded for attorneys' fees and expenses within ten days of both the second and the final payment by

Defendants into the Settlement Fund. Settlement Agreement, ¶ 40.[3] While Plaintiffs are confident that Defendant can and will be able to make all of the payments provided under the Settlement Agreement, this provision ensures that Plaintiffs' counsel bear the same risk of default as the Settlement Class.

D. Lead Plaintiffs Holly Chandler and Devon Ann Conover Should Receive Case Contribution Awards

Plaintiff and Settlement Class Counsel respectfully submit that Plaintiffs Holly Chandler and Devon Ann Conover should receive a modest incentive awards of $2,000 each in recognition of the substantial time and effort they contributed to the prosecution of this Action. Plaintiffs Chandler and Conover have been highly motivated and involved Class Representatives. Indeed, well before the litigation was filed, Plaintiff Devon Conover sent an initial complaint to PURA in February of 2014, and Plaintiff Holly Chandler complained to the Connecticut Attorney General in January of 2014. Plaintiffs cooperated with counsel in finalizing the Complaint, kept informed about the case as the litigation progressed, responded to Defendant's discovery requests and had their depositions taken. Both Plaintiffs approved the final settlement terms and recommend that the Court approve it. *See* Klein Aff., ¶ 30; Affidavit Holly Chandler, attached as Exhibit C to the Klein Affidavit, at ¶ 9; Affidavit of Devon Ann Conover, attached as Exhibt D to the Klein Affidavit, at ¶ 6. Awards of greater amounts to compensate for their efforts are routinely awarded by courts. *See, e.g., Norflet v. John Hancock Life Ins. Co.,* 658 F. Supp. 2d 350, 354 (D. Conn. 2009) (awarding $20,000 to named plaintiff as "reasonable and equitable" for the time she spent "working with Settlement Class Counsel to prosecute and resolve this

[3] The Settlement Agreement provides that counsel may elect, at their discretion, to defer all payments of attorneys' fees and expenses until after Defendant makes its final payment into the Settlement Fund. *Id.*

case"); *Annelli v. Ford Motor Co.*, No. 044001345S, 2008 WL 2966981, at *4 (Conn. Super. Ct. July 8, 2008) (awarding plaintiff $7,500); *Gray v. Found. Health Sys., Inc.*, No. X06CV990158549S, 2004 WL 945137, at *4 (Conn. Super. Ct. Apr. 21, 2004) (approving awards of $23,333 for each plaintiff).

Plaintiffs were willing to serve as the named Plaintiff in this Action and performed significant work on behalf of the class to further this case, without which the favorable settlement for the entire class would not have been possible. Indeed, "public policy favors such an award. As already noted, were it not for this class action, many of the plaintiffs' claims likely would not be heard." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). For the foregoing reasons, Settlement Class Counsel respectfully requests that this Court award each Plaintiff a case contribution award of $2,000.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs Holly Chandler and Devon Ann Conover and Settlement Class Counsel respectfully request that the Court enter an order approving (1) an award of Attorneys' Fees in the amount of $212,500 to be paid in accordance with a schedule that tracks Defendant's payments to the Settlement Fund; (2) an award of $ 99,199.13 in costs and expenses to Settlement Class Counsel to be paid in accordance with a schedule that tracks Defendant's payments to the Settlement Fund; and (3) an incentive award of $2,000 each to Lead Plaintiffs Holly Chandler and Devon Ann Conover, with all these amounts to be deducted from the $850,000 common Settlement Fund.

Dated: February 1, 2017

PLAINTIFFS,
HOLLY CHANDLER AND
DEVON ANN CONOVER

By: /s/ Seth R. Klein

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CERTIFICATION

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

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