UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JULIANNE HEIGL, individually and on behalf of all others similarly situated, Plaintiff, v. WASTE MANAGEMENT OF NEW YORK, LLC, Defendant.	Civil Action No. 1:19-cv-05487-WFK-ST

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Dated: December 21, 2020

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INTRODUCTION

On August 27, 2020, this Court preliminarily approved the Class Action Settlement between Plaintiff Julianne Heigl ("Plaintiff") and Defendant Waste Management of New York, LLC ("Defendant" or "Waste Management") and directed that notice be sent to the Settlement Class. ECF No. 27. The settlement administrator, Heffler Claims Group ("Heffler") has implemented the Court-approved notice plan and direct notice has reached more than 99.25% of the certified Settlement Class. The reaction from the Class has been overwhelmingly positive. Specifically, of the approximately 89,310[1] Settlement Class Members, zero objected, and only 1 requested to be excluded.[2]

The Settlement was reached after months of arms'-length settlement negotiations. At the time of settlement, Defendant had collected approximately $3,226,903.61 in the challenged fees, and this Settlement creates a $2,700,000 non-reversionary settlement fund, which will be used to pay all approved claims by class members, notice and administration expenses, a Court-approved incentive award to Plaintiff, and attorneys' fees to Class Counsel to the extent awarded by the Court. Pursuant to the terms of the Settlement, Settlement Class Members who have active Waste Management Accounts ("WMA") with Defendant (approximately 75% of the total fees collected) will automatically receive a *pro rata* payment as a percentage of the total amount of fees he or she paid via the WMA, unless he or she excludes him or herself from the Settlement. Thus, these Settlement Class Members were not required to file claims. Settlement Class Members who have closed WMAs with Defendant are eligible to submit a claim form to receive a *pro rata* cash award based on their total amount of fees paid through the WMA. As of December 16, 2020, 5,745 class members (or approximately 21% of Settlement Class Members

[1] The number of class members was initially estimated as 89,720 persons. Defendant provided Heffler with a list of 89,720 persons that resulted in a list containing 89,310 members of the Settlement Class after duplicates were removed. *See* Declaration of Settlement Administrator ("Settlement Admin. Decl.") ¶ 8.

[2] The deadline to object or opt-out of the Settlement was November 6, 2020. *See* ECF No. 27 ¶¶ 17, 22.

with Closed WMAs) filed claims, and that number will continue to grow as Settlement Class Members have until February 20, 2021 to file claims. Thus, the Court should have no hesitation in granting final approval to the unopposed Settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. New York General Business Law § 399-zzz

Effective April 18, 2011, the New York Legislature enacted General Business Law ("GBL") § 399-zzz. The New York Legislature found "paper billing and payment fees unfairly impact consumers that do not have Internet access in their homes, as well as those that are uncomfortable using the Internet, including many senior citizens and those concerned about personal privacy." *See* Complaint (ECF No. 1) ("Compl.") Ex. A (ECF No. 6). Further, "[p]aper billing and payment fees disproportionately affect low-income consumers, who are less likely to have access to the Internet." *Id*. As such, GBL § 399-zzz provides that:

> Subject to federal law and regulation, no person, partnership, corporation, association or other business entity shall charge a consumer an additional rate or fee or a differential in the rate or fee associated with payment on an account when the consumer chooses to pay by United States mail or receive a paper billing statement.

GBL § 399-zzz(1).

"Every violation of [GBL § 399-zzz] shall be deemed a deceptive act and practice subject to enforcement under article twenty-two-A of this chapter," i.e., GBL § 349. GBL § 399-zzz(2). GBL § 349 entitles "any person who has been injured by reason of any violation of this section . . . to recover his actual damages or fifty dollars, whichever is greater." GBL § 349(h).

B. Plaintiff's Allegations

Defendant provides residential waste management services, including garbage collection and disposal in New York. Plaintiff alleges that Defendant charges a $6.50 fee in order for its customers to receive a paper billing statement and/or pay by United States mail. Compl. ¶ 1.

Plaintiff alleges that this conduct violates GBL § 399-zzz. *Id.* ¶ 4. Plaintiff furthers allege that because every violation of GBL § 399-zzz is a "deceptive act and practice" under GBL § 349, Defendant has violated GBL § 349 as well. *Id.* ¶ 11. Plaintiff accordingly sought "to enjoin the unlawful acts and practices described . . . to recover [her] actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees." *Id.* ¶ 27.

C. The Litigation History And Settlement Discussions

On August 30, 2019, Plaintiff, through counsel, sent a letter to Defendant alleging that it violated GBL § 399-zzz by charging her a $6.50 Administrative Charge in order for her to receive a paper billing statement and/or pay by United States mail. Declaration of Philip L. Fraietta In Support of Plaintiff's Motion for Final Approval ("Fraietta Decl.") ¶ 4. On September 17, 2019, Defendant responded to Plaintiff's letter by denying that it violated GBL § 399-zzz, but agreeing to suspend collection of the Administrative Charge from Ms. Heigl and similarly situated residential customers in New York pending further review. *Id.* ¶ 5.

On September 27, 2019, Plaintiff filed her Class Action Complaint in the United States District Court for the Eastern District of New York. *Id.* ¶ 6. On December 4, 2019, Defendant filed an Answer to Plaintiff's Complaint denying the allegations generally and asserting 18 affirmative defenses. *Id.* ¶ 7. Thereafter, the Court held an initial scheduling conference pursuant to Fed. R. Civ. P. 16 and the Parties engaged in substantial written and document discovery on the merits of the case, which included the production and review of hundreds of pages of documents, the provision of key information through interrogatories, and several meet-and-confer teleconferences. *Id.* ¶ 8. Additionally, on April 28, 2020, Defendant filed an Amended Answer which added two additional affirmative defenses, including that GBL § 399-zzz is an unconstitutional violation on commercial speech, in violation of the First Amendment. *Id.* ¶ 9.

From the outset of the case, the Parties engaged in direct communications, and as part of their obligations under Fed. R. Civ. P. 26, discussed the prospect of resolution. *Id.* ¶ 10. To that end, on February 4, 2020, Plaintiff made a written settlement demand on Defendant. *Id.* The Parties then engaged in months of arms'-length settlement negotiations and, on July 16, 2020, reached an agreement and executed a term sheet. *Id.* ¶ 11.

After finalizing and executing the Class Action Settlement Agreement, Plaintiff moved for preliminary approval and the Court granted that motion on August 27, 2020. *Id.* ¶ 22 (citing ECF No. 27).

TERMS OF THE SETTLEMENT

The key terms of the Settlement Agreement ("Agreement" or "Settlement"), attached to the Fraietta Declaration as Exhibit A, are briefly summarized as follows:

A. Class Definition

As part of preliminary approval, the Court provisionally certified a class for settlement purposes of: "all Waste Management residential subscription customers (*i.e.*, individual consumers who subscriber to Waste Management's residential services, but not including individuals whose residential waste collection services is/was provided by Waste Management pursuant to a contract awarded following a competitive bidding process) with a New York mailing address who from September 27, 2016 to and through the date of this Order [August 27, 2020] were charged and paid Defendant's Administrative Charge." ECF No. 27 ¶ 9; Agreement ¶ 1.33.[3]

[3] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) the Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

B. Monetary and Prospective Relief

Waste Management will cause to be established a $2,700,000 non-reversionary Settlement Fund, from which each class member with an Active WMA will automatically receive a *pro rata* payment as a percentage of the total amount of service charges he or she paid via the WMA, unless he or she excludes him or herself from the Settlement. Payments to those Settlement Class Members with Active WMAs will occur through a credit to the WMA. Settlement ¶ 2.1(a). Active WMAs account for approximately 75% of the total fees collected. Fraietta Decl. ¶ 13. If a Settlement Class Member with an Active WMA closed his or her WMA after the date the Settlement is preliminarily approved, then that Settlement Class Member will receive a *pro rata* share of the Settlement Fund in the form of a check, rather than via a credit to the WMA. Settlement ¶ 2.1(a).

Settlement Class Members with Closed WMAs have until February 20, 2021 to submit an Approved Claim. Each Settlement Class Member with a Closed WMA who submits an Approved Claim will receive a *pro rata* payment from the Settlement Fund in the form of a check, issued by the Settlement Administrator. Settlement ¶ 2.1(b).

Additionally, Waste Management has agreed not to reinstate the Administrative Charge unless GBL § 399-zzz is amended, repealed, ruled unconstitutional, or otherwise invalidated. Agreement ¶ 2.2(a). Class Counsel estimates that this prospective relief will save Settlement Class Members a total of approximately $1,621,282 in Administrative Charges per year. Fraietta Decl. ¶ 15.

C. Release

In exchange for the relief described above, Waste Management and each of its related and affiliated entities as well as all "Released Parties" as defined in ¶ 1.29 of the Settlement will receive a full release of all claims arising out of or related to the paper billing fees under

GBL § 399-zzz, GBL § 349, or any other statute or regulation. *See* Settlement ¶¶ 1.29, 3.1-3.2 for full release language.

D. Notice And Administration Expenses

Waste Management has caused to be paid, and will continue to cause to be paid, all notice and administration expenses out of the Settlement Fund. *Id.* ¶ 1.35.

E. Incentive Award And Attorneys' Fees And Expenses

In recognition for her efforts on behalf of the Settlement Class, Waste Management has agreed that Plaintiff may receive, subject to Court approval, an incentive award of $5,000 from the Settlement Fund, as appropriate compensation for her time and effort serving as Class Representative and as a party to the Action. *Id.* ¶ 8.3. Waste Management has also agreed that the Settlement Fund may also be used to pay Class Counsel reasonable attorneys' fees, costs, and expenses in this Action, in an amount to be approved by the Court. *Id.* ¶ 8.1. Class Counsel has agreed to petition the Court for no more than one-third of the Settlement Fund. *Id*. Payment of attorneys' fees, costs, and expenses is due within 10 business days after entry of Final Judgment. *Id.* ¶ 8.2. These awards are subject to this Court's approval, which Plaintiff has moved for separately. *See* ECF No. 29. That motion is unopposed.

ARGUMENT

I. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

The Court's Preliminary Approval Order provisionally certified a class for settlement purposes of: "all Waste Management residential subscription customers … with a New York mailing address who from September 27, 2016 to and through the date of this Order [August 27, 2020] were charged and paid Defendant's Administrative Charge." ECF No. 27 ¶ 9; Agreement ¶ 1.33 (the "Settlement Class").

Under Federal Rule of Civil Procedure 23, a class action may be maintained if all of the

prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the Court to find that:

> questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal citation omitted).

The Court should now grant final certification because the Settlement Class meets all of the requirements of Rule 23(a) and Rule 23(b)(3).

A. Numerosity

Numerosity is satisfied when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the Settlement Class easily satisfies Rule 23's numerosity requirement. According to Defendant's records, the Settlement Class is comprised of approximately 89,310 Waste Management residential subscription customers with a New York mailing address who from September 27, 2016 to and through August 27, 2020 were charged and paid Defendant's Administrative Charge. Fraietta Decl. ¶ 12. There is no question that joinder of all members of the Settlement Class would be impractical and numerosity is, therefore, satisfied.

B. Commonality

Rule 23(a)(2) requires that a plaintiff establish that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This commonality requirement is met "if plaintiffs' grievances share a common question of law or of fact." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). The disputed issue of law or fact must "occupy essentially the same degree of centrality to the named plaintiffs' claim as to that of other members of the proposed class." *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 442 (S.D.N.Y. 1995) (internal quotations omitted). "[A] single common issue of law will satisfy the commonality requirement." *Michalow v. E. Coast Restoration & Consulting Corp.*, 2011 WL 6942023, at *3 (E.D.N.Y. Nov. 17, 2011); *Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999). A common issue of law will be found if plaintiffs "identify some unifying thread among the members' claims." *Monaco*, 187 F.R.D. at 61.

Here, there are common questions of law and fact that will generate common answers in the litigation. Specifically, Plaintiff alleges that Defendant charged a fee to receive a paper billing statement and/or to make payments by United States mail in violation of GBL § 399-zzz. Compl. ¶¶ 1-2. Resolution of this common question requires evaluation of the scope of a single statute: GBL § 399-zzz. If Defendant violated the statute, then every Settlement Class Members' rights under the statute have been violated in the exact same manner, and both actual and statutory damages can be precisely calculated for each Settlement Class Member. *Id.* ¶ 17; Fraietta Decl. Ex. C, 10/6/20 *Russett* Final Approval Hearing Transcript ("*Russett* Tr.") at 7:4-8 ("[Commonality] is met here, as the combination of all claims is whether there was an unlawful charge of fees for payments made by plaintiffs through the mail."); *see also Pichardo v. Carmine's Broadway Feast Inc.*, 2016 WL 5338551, at *3 (S.D.N.Y. Sept. 26, 2016) ("Courts considering similar claims of unlawful payment policies routinely certify classes based on

evidence of a common policy."). Thus, the commonality requirement is satisfied.

C. Typicality

Rule 23(a)(3) requires that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Typicality is satisfied "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux*, 987 F.2d at 936. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Id.* at 936-37.

Here, Plaintiffs allege that Defendant charged a fee for payments made by paper check in violation of GBL § 399-zzz. Compl. ¶¶ 1-2. "[T]ypicality is [therefore] satisfied given that it is plaintiff's contention that the paper billing fee is done in the exact same manner and was directed at, or affected, both Plaintiff and Class Members in the same exact way." *Russett* Tr. at 7:18-21.

D. Adequacy

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

In this case, Plaintiff – like each and every one of the Settlement Class Members – is or was an account holder with Waste Management who was charged an Administrative Charge to receive a paper billing statement and/or pay by United States mail. Compl. ¶ 7. Thus, Plaintiff and the Settlement Class Members have the exact same interest in recovering the damages to

which they are entitled. *Id.* ¶ 19. As such, Plaintiff does not have any interest antagonistic to those of the proposed Settlement Class and her pursuit of this litigation should be clear evidence of that. *Id.* Moreover, Plaintiff was extensively involved in the litigation and settlement of this case. *See* Declaration of Julianne Heigl, ECF No. 29-14 ¶¶ 3-10.

Likewise, Class Counsel – Bursor & Fisher, P.A. – has extensive experience in litigating class actions of similar size, scope, and complexity to the instant action. Fraietta Decl. ¶ 26. Bursor & Fisher was appointed Class Counsel in *Russett, et al. v. The Northwestern Mutual Life Insurance Company*, Case No. 7:19-cv-07414 (S.D.N.Y.), where it secured a $595,000 class-wide settlement, which was finally approved by Judge Kenneth Karas on October 6, 2020. *Id.* Class Counsel also regularly engages in major complex litigation, has the resources necessary to conduct litigation of this nature, and has frequently been appointed lead class counsel by courts throughout the country. *Id.* ¶ 27; *see also* Fraietta Decl. Ex. B; Firm Resume of Bursor & Fisher, P.A. Further, Class Counsel has devoted substantial resources to the prosecution of this action by investigating Plaintiffs' claims and that of the Settlement Class, aggressively pursuing those claims, conducting informal discovery, participating in a private mediation with Judge Andersen, and ultimately, negotiating a favorable class action settlement. Fraietta Decl. ¶¶ 4-15. In sum, Class Counsel has vigorously prosecuted this action and will continue to do so. *Id.*

Accordingly, since Plaintiff and Class Counsel have demonstrated their commitment to representing the Settlement Class and neither have interests antagonistic to the Settlement Class, the adequacy requirement is satisfied.

E. The Proposed Settlement Class Is Ascertainable

Though it does not appear in the text of Rule 23, courts in this Circuit have recognized an "implied requirement of ascertainability." *Ebin*, 297 F.R.D. at 566-67. "The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria

that establish a membership with definitive boundaries." *In re Petrobas Sec.*, 862 F.3d 250, 264 (2d Cir. 2017). Here, the Settlement Class is defined as "all Waste Management residential subscription customers … with a New York mailing address who from September 27, 2016 to and through the date of this Order [August 27, 2020] were charged and paid Defendant's Administrative Charge." ECF No. 27 ¶ 9. This class satisfies the ascertainability requirement as it is limited to New York residential customers who were charged and paid Defendant's Administrative Charge.

F. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986).

1. Common Questions Predominate

Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, … predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). The essential inquiry is whether "liability can be determined on a classwide basis, even when there are some individualized damage issues." *Id.* at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). Notably, Rule 23(b)(3) calls only for "a showing that questions common to the class

predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Here, Plaintiffs allege the violation of a single statute – GBL § 399-zzz – and have demonstrated above that all violations of said statute are the same. "The allegation of a common course of conduct engaged in by the defense … satisfies the predominance requirement." *Russett* Tr. at 10:14-20; *see also Pichardo*, 2016 WL 5338551, at *3 ("Courts considering similar claims of unlawful payment policies routinely certify classes based on evidence of a common policy."). In sum, Plaintiff alleges a common course of conduct engaged in by Defendant. Accordingly, predominance is met.

2. A Class Action Is A Superior Mechanism For Adjudication

Rule 23(b)(3) also requires that the class action be "superior to other available methods for fair and efficient adjudication of the litigation." Fed. R. Civ. P. 23(b)(3).[4] "Courts have found that the superiority requirement is satisfied where [t]he potential class members are both significant in number and geographically dispersed[,] [and] [t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *13-14 (S.D.N.Y. Sept. 4, 2014). "Class adjudication … is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013).

Here, Plaintiff and the Class Members have limited financial resources with which to prosecute individual actions, and Plaintiff is unaware of any individual lawsuits that have been

[4] Whether the case would be manageable as a class action at trial is not of consequence in the context of a proposed settlement. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.").

filed by Class Members arising from the same allegations. Employing the class device here will not only achieve economies of scale for putative Class Members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the expense of repetitive proceedings and preventing inconsistent adjudications of similar issues and claims. *See Hanlon v. Chrysler*, 150 F.3d 1011, 1023 (9th Cir. 1998). A class action is the most suitable mechanism to fairly, adequately, and efficiently resolve the putative settlement class members' claims.

II. THE NOTICE PLAN COMPORTS WITH DUE PROCESS

Before final approval can be granted, due process and Rule 23 require that the notice provided to the Settlement Class is "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). "Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *12 (S.D.N.Y. Dec. 23, 2009). Notice must clearly state essential information regarding the settlement, including the nature of the action, terms of the settlement, and class members' options. *See* Fed. R. Civ. P. 23(c)(2)(B). At its core, all that notice must do is "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (citation omitted).

"It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as counsel 'acted reasonably in selecting means likely to inform persons affected.'" *In re Adelphia Commc'ns Corp. Sec. & Derivative Litigs.*, 271 F. App'x 41, 44 (2d

Cir. 2008) (quoting *Weigner v. City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988)). The Federal Judicial Center notes that a notice plan is reasonable if it reaches at least 70% of the class. *See* Fed. Judicial Ctr., *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010). The notice plan here easily meets these standards, as it provided direct notice to 99.25% of the Settlement Class. *See* Settlement Admin. Decl. ¶ 11.

At preliminary approval, the Court approved the Parties' proposed Notice Plan, finding it met the requirements of Rule 23 and due process. *See* ECF No. 27 ¶ 12. The Plan has now been fully carried out by professional settlement administrator Heffler. Pursuant to the Settlement, Defendant provided Heffler with a list of 89,720 available names, addresses, Administrative Charge amounts, and WMA status for Settlement Class Members. *See* Settlement Admin. Decl. ¶ 8. After Heffler removed duplicates, the Class List contained 89,310 potential members. *See id.* Heffler successfully delivered the Court-approved notice via postal mail to 88,637 class members. *See id.* ¶ 11. Accordingly, the Court-approved notice successfully reached 99.25% of the Settlement Class directly. *See id.*[5] These summary notices also directed Settlement Class Members to the Settlement Website, where they were able to submit claims online; access important court filings, including the Motion for Attorneys' Fees; and see deadlines and answers to frequently asked questions. *See id.* ¶ 7; Ex. C. Given the broad reach of the notice, and the detailed information provided, the requirements of due process and Rule 23 are easily met.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

Final approval of the Settlement is appropriate here because it is procedurally and substantively fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e)(2). To determine whether to approve a settlement, "[c]ourts examine procedural and substantive fairness in light of the

[5] Defendant also notified the appropriate state and federal officials pursuant to CAFA. *See* Settlement Admin. Decl. ¶ 5.

'strong judicial policy in favor of settlement' of class action suits." *Tiro v. Public House Invs., LLC*, 2013 WL 4830949, at *5 (S.D.N.Y. Sept. 10, 2013). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc.*, 396 F.3d at 116.

Courts and public policy considerations favor settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. "The compromise of complex litigation is encouraged by the courts and favored by public policy," and is particularly encouraged for the compromise of class actions. *Id.* at 117. "Absent fraud or collusion … [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Courts should also consider the "four enumerated factors in the new [Federal Rule of Civil Procedure] Rule 23(e)(2), in addition to the nine *Grinnell* factors." *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 420 (S.D.N.Y. 2019). The Rule 23(e) factors are whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ.

P. 23(e)(2). The Rule 23(e)(2) factors significantly overlap or implicate the *Grinnell* factors, and the Rule 23(e)(2) factors do not displace the *Grinnell* factors. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019) ("There is significant overlap between the Rule 23(e)(2) and *Grinnell* factors, which complement, rather than displace each other.").

A. The Proposed Settlement Is Procedurally Fair

The circumstances surrounding the Settlement support the finding that the Settlement is procedurally fair. Courts examining the procedural fairness of a settlement do so "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009).

The Settlement was reached after months of arms'-length conducted by highly qualified counsel who respectively sought to obtain the best possible result for their clients. *See* Fraietta Decl. ¶¶ 10-15. In such situations the Second Circuit, adopts "a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009).

B. The Proposed Settlement Is Substantively Fair

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable, and adequate. "Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). The nine *Grinnell* factors include: "(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 trial; (7) the ability of 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." *Id*. at *4 (quoting *Grinnell*, 495 F.2d at 463). However, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement," rather courts "should consider the totality of these factors in light of the particular circumstances." *Id.* Here, the *Grinnell* factors weigh in favor of final approval.

1. Litigation Through Trial Would Be Complex, Costly, And Long (*Grinnell* Factor 1)

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiff seeks to avoid significant expense and delay, and ensure recovery for the Class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). Courts have consistently held that, unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd,* 675 F.2d 456 (2d Cir. 1982).

As discussed above, the Parties have engaged in formal discovery related to issues of class certification and summary judgment. The next steps in the litigation would presumably have been depositions of the Parties, substantial electronically stored information discovery, and contested motions for summary judgment and class certification, which would be costly and time-consuming for the Parties and the Court and create a risk that a litigation class would not be

certified and/or that the Settlement Class would recover nothing at all. More specifically, Plaintiffs are aware that Defendant would continue to assert a number of defenses on the merits. Critically, the scope of GBL § 399-zzz is in dispute. Fraietta Decl. ¶¶ 18-20; *see also Santoro v. State Farm Mutual Automobile Ins. Co.*, 2020 WL 6586630 (S.D.N.Y. Nov. 9, 2020) (dismissing GBL § 399-zzz claim on statutory interpretation grounds). Looking beyond trial, Plaintiff is also keenly aware of the fact that Defendant could appeal the merits of any adverse decision, and that in light of the statutory damages in play it would attempt to argue – in both the trial and appellate courts – for a reduction of damages based on due process concerns. *Id*. ¶ 20.

The Settlement, on the other hand, permits a resolution of this action on terms that are fair, reasonable, and adequate to the Class. This result will be accomplished years earlier than if the case proceeded to judgment through trial and/or appeals and provides certainty. Consequently, this *Grinnell* factor plainly weighs in favor of final approval of the Settlement.

2. The Reaction Of The Class Is Overwhelmingly Positive (*Grinnell* Factor 2)

With the second *Grinnell* factor, the Court judges "the reaction of the class to the settlement." *In re Vitamin C Antitrust Litig*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333 (E.D.N.Y. 2010) (internal quotation marks omitted). This "significant" factor weighs heavily in favor of final approval.

Here, the reaction of the Class Members to the Settlement has been overwhelmingly positive. Class Notice has been provided to the Settlement Class Members in accordance with the requirements of Rule 23(c)(2)(B) and the Preliminary Approval Order (ECF No. 27 ¶¶ 12-14), and direct notice reached 99.25% of the Settlement Class. *See* Fraietta Decl. ¶ 23; Settlement Admin. Decl. ¶ 11. As of December 16, 2020, zero Class Members objected to the

Settlement, and only 1 opted-out. *See* Settlement Admin. Decl. ¶¶ 12-13. Additionally, approximately 21% of Settlement Class Members with Closed WMAs have already filed claims. *Id.* ¶ 14. This exceptional participation rate and lack of objections from the Settlement Class leaves no question that the class members view the Settlement favorably, which weighs heavily in favor of final approval and further supports the "presumption of fairness." *See, e.g., Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *4 (E.D.N.Y. 2012) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness."). Consequently, this *Grinnell* factor weighs in favor of final approval of the Settlement.

3. Discovery Has Advanced Far Enough To Allow The Parties To Responsibly Resolve The Case (*Grinnell* Factor 3)

As discussed above, the Parties have conducted both written and document discovery related to issues of class certification and summary judgment. Fraietta Decl. ¶ 8. Class Counsel's experience in similar matters, as well as the efforts made by counsel on both sides, confirms that they are sufficiently well apprised of the facts of this action, and of the strengths and weaknesses of their respective cases, to make an intelligent analysis of the proposed settlement.

"The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating." *Torres v. Gristede's Oper. Corp.*, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*,

80 F. Supp. 2d at 176. The discovery conducted in this matter clearly traverses this hurdle. This *Grinnell* factor thus also weighs in favor of final approval.

4. The Continued Litigation Risks Related To Establishing Liability, Damages, And Maintaining A Class Action Through Trial Support Settlement (*Grinnell* Factors 4, 5, And 6)

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks," *i.e.*, the risks of establishing liability, damages, and maintaining the class action through trial. *In re Vitamin C*, 2012 WL 5289514, at *5. "Litigation inherently involves risks." *Willix v. Healthfirst, Inc*., 2011 WL 7584862, at *4 (E.D.N.Y. Feb. 18, 2011). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id*.

Although Plaintiff's case is strong, it is not without risk. At the time of the Settlement, Defendant made it clear that it would move for summary judgment on various issues and had made it clear that it would vigorously contest the certification of a litigation class. In weighing the risks of litigation the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian And German Bank Holocaust Litig.*, 80 F. Supp. 2d at 177.

In the context of this litigation, Plaintiff and the Class face risks in overcoming Defendant's motion for summary judgment and certifying a class. Moreover, further litigation will only delay relief (if any) to the Class Members. The Settlement alleviates these risks and provides a substantial benefit to the Class in a timely fashion.

The risk of maintaining the class status through trial is also present. The Court has not yet certified the proposed Class for litigation purposes and the Parties anticipate that such a determination would be reached only after Defendant's motion to dismiss is briefed and decided, discovery is completed, and exhaustive class certification briefing is filed. Defendant would likely argue that individual questions preclude class certification. Defendant would also likely

argue that a class action is not a superior method to resolve Plaintiffs' claims, and that a class trial would not be manageable.

Should the Court certify the class, Defendant would likely challenge certification through a Rule 23(f) application and subsequently move to decertify, forcing additional rounds of briefing. Risk, expense, and delay permeate such a process. The proposed Settlement eliminates this risk, expense, and delay as well. Consequently, these *Grinnel* factors weigh in favor of final approval of the Settlement.

5. Defendant Probably Could Not Withstand A Greater Judgment (*Grinnell* Factor 7)

While Waste Management could withstand a greater judgment, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank,* 228 F.R.D. at 186. Thus, at worst, this factor is neutral.

6. The Settlement Amount Is Reasonable In Light Of The Possible Recovery And The Attendant Risks Of Litigation (*Grinnell* Factors 8 And 9)

The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated in *Grinnell*, "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n.2.

Here, the Settlement Fund represents approximately 84% of the allegedly unlawful fees collected by Defendant. Class members with an Active WMA will automatically receive a *pro rata* share of the Settlement Fund. Settlement ¶ 2.1(a). Class members with a Closed WMA are eligible to receive a *pro rata* cash award. Settlement ¶ 2.1(b). In addition, Defendant has agreed to pay the costs of notice and administration as well as reasonable attorneys' fees and costs for Class Counsel from the Settlement Fund. Settlement ¶¶ 1.35, 8.1. And moreover, Defendant has agreed not to reinstate the Administrative Charge barring amendment or repeal of GBL § 399-zzz. Settlement ¶ 2.2(a). Weighing the benefits of the Settlement against the risks associated with proceeding in litigation and in collecting on any judgment, the Settlement is more than reasonable. Moreover, when a settlement assures immediate payment of substantial amounts to Class Members and does not "sacrific[e] speculative payment of a hypothetically larger amount years down the road," settlement is reasonable under this factor. *See Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, *5 (S.D.N.Y. Mar. 24, 2008). Thus, these *Grinnell* factors also weigh in favor of preliminary approval.

C. The Rule 23(e)(2) Factors

1. The Class Representatives And Class Counsel Have Adequately Represented The Class (Rule 23(e)(2)(A)

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019) (internal quotations omitted). Here, "plaintiff['s] interests are aligned with other class members' interests because they suffered the same injuries": paying a fee to Defendant that was allegedly illegal under GBL § 399-zzz. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). "Because of these injuries, plaintiffs have an interest in vigorously pursuing the claims of

the class." *Id.* (internal quotations omitted). Further, as explained above, Plaintiff's attorneys adequately meet the obligations and responsibilities of Class Counsel. *See supra* Argument § I.D. Thus, this Rule 23(e)(2) factor weighs in favor of preliminary approval.

2. The Settlement Was Negotiated At Arms'-Length

"If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693 (internal quotations omitted). Here, both counsel for Plaintiff and counsel for Defendant are experienced in class action litigation, and conducted arms'-length negotiations over a period of months before agreeing to the Settlement. Accordingly, this Rule 23(e)(2) factor has been met.

3. The Settlement Provides Adequate Relief To The Class

Whether relief is adequate takes into account "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Rule 23(e)(2)(C)(i-iv).

As to "the costs, risks, and delay of trial and appeal," this factor "subsumes several *Grinnell* factors . . . including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. at 36. As noted *supra*, the Settlement has met each of these *Grinnell* factors. Argument §§ I.B.1, I.B.4-I.B.5, *supra*.

As to "the effectiveness of any proposed method of distributing relief to the class," "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by

experienced and competent class counsel." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. at 40. Here, under the terms of the Settlement, active account holders will automatically receive a *pro rata* share of the Settlement Fund. Settlement ¶ 2.1(a). Thus, these active account holders need not file any claims to receive relief; they will simply receive it automatically. As to closed account holders, which comprise a minority of the Settlement Class, they must file a claim, but those whose claims are approved are nonetheless eligible for the same *pro rata* payment in the form of a check. Settlement ¶ 2.1(b). These class members will have one-hundred and eighty (180) days to cash the check. Settlement ¶ 2.1(d). This plan was proposed by experienced and competent counsel and ensures "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 695.

As to "the terms of any proposed award of attorney's fees," Plaintiff's counsel will apply for attorneys' fees "not to exceed one-third of the Settlement Fund." Settlement ¶ 8.1. "Courts in this Circuit have routinely granted requests for one-third or more of the fund in cases with settlement funds similar to or substantially larger than this one." *Massiah*, 2012 WL 5874655, at *7 (citing cases); *see also Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "attorneys' fees in the amount of one third" of a $9 million settlement fund), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting that "the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class"); *Patterson v. Premier Constr. Co.*, Case No. 1:15-cv-00662-ST at ECF No. 56 (E.D.N.Y. Dec. 28, 2017) (awarding fees of "33.3% of the settlement fund"); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement fund); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *6–7 (E.D.N.Y. Feb. 18, 2011) (awarding one-third of $7.675 million settlement fund); *In re Nigeria*

Charter Flights Litig., 2011 WL 7945548, at *4 (E.D.N.Y. Aug. 25, 2011) (awarding fees of "approximately 34 percent of the common fund of $5.7 million").

As to "any agreement required to be identified by Rule 23(e)(3)" or "any agreement made in connection with the proposal," *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 696, no such agreement exists in this case other than the Settlement. In light of the foregoing, the Settlement provides adequate relief to the Class under Rule 23(e)(2)(C).

4. The Settlement Treats All Class Members Equally

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. at 47. The Settlement distributes relief on a *pro rata* basis, which has been found by courts in this Circuit to be equitable. *Id.*; *see also Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (finding that a *pro rata* distribution plan "appears to treat the class members equitably . . . and has the benefit of simplicity"). Thus, this factor weighs in favor of approval.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion for Final Approval of the Settlement and enter the Final Approval Order in the form submitted herewith.

Dated: December 21, 2020

Respectfully submitted,

By: */s/ Philip L. Fraietta*
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