UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LORI SANBORN, BDK ALLIANCE LLC, IRON MAN LLC and STEPHANIE SILVER, DAVID STEKETEE, SUSANNA MIRKIN, BORIS MIRKIN, ELIZABETH HEMBLING, PATRICIA KULESA, STEWART CONNARD and STEVEN LANDAU on behalf of themselves and all others similarly situated, Plaintiffs, v. VIRIDIAN ENERGY, INC. and VIRIDIAN ENERGY PA, LLC, Defendants.	No. 3:14-cv-01731 (SRU) February 6, 2018

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASSES, APPROVAL OF NOTICE PLAN AND SCHEDULING OF FAIRNESS HEARING

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Plaintiffs Lori Sanborn, BDK Alliance LLC, Iron Man LLC, and Stephanie Silver (the "*Sanborn* Plaintiffs"); David Steketee (the "*Steketee* Plaintiff"); Susana Mirkin and Boris Mirkin (the "*Mirkin* Plaintiffs"); Elizabeth Hembling, Patricia Kulesa, and Stewart Connard (the "*Hembling* Plaintiffs"); and Steven Landau (the "*Landau* Plaintiff") (collectively, "Plaintiffs"), individually and on behalf of the Settlement Classes (as defined in the Settlement Agreement), respectfully submit this memorandum of law in support of their motion for preliminary approval of class action settlement, certification of settlement classes, approval of notice plan and setting of a final fairness hearing. A copy of the Settlement Agreement, setting forth the complete terms of the Settlement, is attached as Exhibit A to the Declaration of Robert A. Izard ("Izard Decl.").

I. INTRODUCTION

The proposed settlement resolves all five outstanding proposed class action litigations pending against Viridian Energy, Inc. and related entities ("Viridian" or "Defendant"):

- *Sanborn v. Viridian Energy, Inc.*, No. 14-cv-01731 (SRU) (D. Conn.)
- *Steketee v. Viridian Energy, Inc.*, No. 15-cv-00585 (SRU) (D. Conn.)
- *Mirkin v. Viridian Energy, Inc.*, No. 15-cv-01057 (SRU) (D. Conn.)
- *Hembling v. Viridian Energy, LLC*, No. 15-cv-01258 (SRU) (D. Conn.)
- *Landau v. Viridian Energy PA, LLC*, No. 16-cv-02383 (GAM) (E. D. Pa.)

In furtherance of the Settlement, the Plaintiffs in all five actions have filed an Amended Consolidated Complaint ("AC") consolidating for settlement purposes the claims advanced in each separate action into a single litigation (the "Litigation"). *Sanborn*, ECF No. 143. The Plaintiffs collectively allege that Viridian agreed in its contracts with customers that its variable rate for electricity and/or gas supply services would fluctuate to reflect changes in the wholesale energy markets, while in practice Viridian failed to decrease its variable rate when wholesale

market rates went down. *See* AC at ¶¶ 4. Plaintiffs further allege that the variable rates Viridian charged went up to match spikes in the underlying wholesale market price, but remained at inflated rates even after the wholesale power price dropped. *Id*. at ¶ 5. Finally, Plaintiffs allege additional pricing violations. *See, e.g.*, *id*. at ¶¶ 6-7. Defendant denies these allegations and maintains that it did nothing improper.

In light of the risks and expense to all parties of ongoing litigation, and with the assistance of multiple private mediators, the parties have agreed to a global Settlement valued at $18.5 million to resolve all claims against Viridian. Under the Settlement, each Class Member is entitled to receive ***65%*** of his or her "Calculated Loss" which is the maximum compensatory damages that could reasonably be recoverable at trial, up to a maximum of $425 per account for "Average Usage" Class Members and $500 per account for "Above-Average Usage" customers.[1] *See* Settlement Agreement (Izard Decl., Ex. 1) at ¶ 5.1.[2] This represents, on average, more than 50% of damages under Plaintiffs' damages model. Moreover, regardless of the Calculated Loss, ***every*** Class Member is entitled to a minimum payment of $5 or $10 (for Average Usage and Above-Average Usage customers respectively).[3] This cash option is available to all Class

[1] An "Average Usage" class member is a person enrolled in a Viridian variable rate electricity and/or gas plan with an average annual utilization rate of 25,000 or less kilowatt hours or 2,500 or less therms, respectively. *See* Settlement Agreement (Izard Decl., Ex. 1) at ¶ 2.7. An "Above-Average Usage" class member is a person with an average annual utilization rate in excess of these cutoffs. *Id*. at ¶ 2.1.

[2] The "Calculated Loss" is calculated by comparing the electric and/or gas rates actually paid by that individual customer to what that customer would have paid had he or she remained with the local public utility, plus a $0.01 per kWh "green energy" fee and 20% allowance for margin. *Id*. at ¶ 2.9.

[3] Defendant's liability (including payment of attorneys' fees and costs, Settlement Administrator expenses, and lead plaintiff awards) is capped at $18.5 million. In the event the total calculated losses claimed by Class Members exceed the funds available, each approved claimants' final award would be reduced *pro rata*.

Members. In the alternative, each Class Member with a Calculated Loss above zero, regardless of the length of their prior (or ongoing) enrollment with Defendant, has the option to select a bill credit of $8.50 per month for up to twelve months (worth up to $102). *Id*. at ¶ 5.1. The monetary value of billing credits selected by Class Members does not count against the $18.5 million cap. *Id*. at ¶ 2.46. Finally, Viridian has agreed to provide its sales agents with a written notice to abide by Viridian's policies regarding advertising and marketing, including refraining from making unsubstantiated claims regarding cost savings or how Viridian's variable rates are determined, and advising these agents that failure to comply will lead to discipline up to and including termination. *Id*. at Part VI.

Plaintiffs now request that the Court preliminarily certify a Settlement Class and preliminarily approve the proposed settlement, permitting the Settlement Class to be given notice of the terms of the Settlement so that they can make an informed decision as to its merits. As explained in detail below, the Settlement is fair, reasonable and adequate (and, indeed, constitutes an outstanding result). The Settlement successfully resolves a large, complex case and gives the enrollees in over 400,000 Viridian variable rate accounts the right to receive a potentially substantial cash recovery or meaningful billing credit. Accordingly, Plaintiffs move the Court for entry of an order:

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

(2) Preliminarily certifying the Settlement Class;

(3) Preliminarily appointing Lori Sanborn, Iron Man LLC, BDK Alliance LLC, Stephanie Silver, David Steketee, Susana Mirkin, and Boris Mirkin as Lead

Plaintiffs; and Elizabeth Hembling, Patricia Kulesa, Stewart Connard, and Steven Laundau as Representative Plaintiffs;[4]

(4) Preliminarily appointing Robert Izard, Craig Raabe, and Seth Klein of Izard Kindall & Raabe LLP and Steven Wittels and J. Burkett McInturff of Wittels Law, P.C. as Lead Settlement Class Counsel; and Richard D. Greenfield of Greenfield & Goodman LLC, Charles J. LaDuca of Cuneo Gilbert & LaDuca LLP, Jonathan Shub of Kohn Swift & Graf PC, Troy M. Frederick of Marcus & Mack PC, and Daniel Hymowitz and Andrey Belenky of Hymowitz Law Group, PLLC as Settlement Class Counsel;[5]

(5) Approving the proposed Notice Plan;

(6) Appointing a Notice and Claims Administrator; and

(7) Scheduling a Final Fairness Hearing.

II. PRELIMINARY APPROVAL IS APPROPRIATE

A. The Standard for Preliminary Approval

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, 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); *In re Painewebber Ltd. Partnerships Litig.*, 147 F3d 132, 138 (2d Cir. 1998); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). Indeed, courts favor early settlement of class

[4] For simplicity, "Lead Plaintiffs" and "Representative Plaintiffs" are referenced collectively herein as "Plaintiffs."

[5] For simplicity, "Lead Settlement Class Counsel" and "Settlement Class Counsel" are referenced collectively herein as "Class Counsel."

actions "because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Azogue v. 16 for 8 Hospitality LLC*, No. 13 Civ. 7899, 2016 WL 4411422, at *3 (S.D.N.Y. Aug. 19, 2016) (internal quotations and citation omitted).

Fed. R. Civ. P. 23(e) requires judicial approval for any class-wide compromise of claims, and approval of a proposed settlement is a matter within the district court's discretion. Once a proposed class action settlement is reached, "a court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make a 'preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (citations omitted); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled.").

A court is afforded wide discretion in determining the information that it wishes to consider at this preliminary stage, and this initial assessment can be made on the basis of information already known to the court. Manual for Complex Litigation (Fourth), at § 21.162 (2004). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties." *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637, 2015 WL 574280, at *1 (E.D.N.Y. Feb. 9, 2015) (citing *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998)) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Id.* (internal quotations omitted); *see also Garcia v. Pancho Villa's of Huntington Village, Inc.*, No. 09 Civ. 486, 2012 WL 1843785,

at *2 (E.D.N.Y. May 21, 2012); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement."). For this reason, "[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." *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 99 (E.D.N.Y. 2015) (citing *Wal-Mart Stores, Inc.*, 396 F.3d at 116) (internal quotation marks omitted).

At the preliminary approval stage, the Court is not required to make a final determination of the merits of the proposed settlement. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("At this stage of the proceeding, the Court need only find that the proposed settlement fits within the range of possible approval.") (internal quotation marks and citation omitted). To grant preliminary approval, the Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *Puglisi*, 2015 WL 574280, at *1 ("Preliminary approval of a settlement agreement requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties").[6]

Preliminary approval of a proposed settlement is warranted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no

[6] "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *NASDAQ*, 176 F.R.D. at 102.

obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the reasonable range of possible approval." *NASDAQ*, 176 F.R.D. at 102; *In re Aggrenox Antitrust Litig.*, No. 14 Civ. 02516, 2017 WL 4278788, at *3 (D. Conn. Sept. 19, 2017) (Underhill, J.) (same); *Berkson v. Gogo LLC*, 147 F. Supp. 3d 123, 130 (E.D.N.Y. 2015) (same).

B. The Proposed Settlement Was the Product of Serious, Informed Negotiations

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

Here, Plaintiffs have engaged in extensive litigation, discovery and arms'-length negotiation with Defendant to arrive at the Settlement. As set forth in the Recitals of the Settlement Agreement and in the Izard Declaration at ¶¶ 3-16, each action (both before and after consolidation) has been vigorously litigated over the course of several years.[7] Discovery

[7] Beyond the recitation in the Settlement Agreement, the *Sanborn* Plaintiffs also filed motions for summary judgment, class certification, and for a prejudgment remedy in their separate action. *See* Izard Decl. at ¶ 4.

included, among other things, more than 250,000 pages of documents and native files produced by Viridian to the *Sanborn*, *Steketee*, and *Mirkin* Plaintiffs; hundreds of pages of documents produced by the *Sanborn*, *Steketee*, and *Mirkin* Plaintiffs; depositions of several of the *Sanborn* Plaintiffs and the *Steketee* Plaintiff; depositions by the *Sanborn* Plaintiffs of Viridian's corporate representative designees; and third-party discovery taken by both the *Sanborn* Plaintiffs and Viridian. The *Sanborn*, *Steketee*, and *Mirkin* Plaintiffs also retained electricity and gas industry experts to assist in their assessment of liability and damages.

During the summer of 2016, Plaintiffs Sanborn, Silver, Iron Man LLC, Steketee, Susanna and Boris Mirkin, Hembling, Connard, and Kulesa, and Viridian held ***three*** (3) all-day mediation sessions with the Hon. Shira Scheindlin, a former United States District Judge for the Southern District of New York.[8] While the parties reached agreement on many components of a settlement, they were unable to agree on certain terms and the mediation failed to result in a settlement agreement. The parties, therefore, resumed litigation, which included additional conferences with the Court, substantial additional written discovery, discovery negotiations, document production and review, deposition testimony, and motion practice.

After extensive further litigation, the parties agreed to revisit the possibility of a settlement and engaged in more than three (3) months of vigorous negotiations toward a comprehensive settlement of the Litigation. As part of the foregoing settlement negotiations, Viridian provided Plaintiffs with a substantial amount of data regarding its variable pricing practices in all states where Viridian sells energy, which Plaintiffs and their experts reviewed and analyzed. In early August 2017, the parties agreed on the material terms of a comprehensive

[8] Plaintiffs Hembling, Connard, and Kulesa took part in some but not all three (3) days of the mediations with Judge Scheindlin.

settlement, which were memorialized in a written Memorandum of Understanding ("MOU"), signed by Plaintiffs' and Viridian's counsel. Following execution of the MOU, Viridian provided Class Counsel with substantial additional data to confirm the basis for its calculation of the benefits to be paid to Class Members and the basis for representations by Viridian to Class Counsel concerning the methodology for calculating those awards. Class Counsel, aided by expert analysis, confirmed the sufficiency of such information and reasonableness of such methodology for settlement purposes.

Given the foregoing lengthy litigation and settlement history, Class Counsel believe that the Settlement is in the best interests of the Classes. The Litigation was hard-fought with extensive discovery, and settlement was reached only after comprehensive, serious, informed, and arms'-length negotiations (including with the assistance of a retired United States District Judge).

C. Lead Class Counsel Are Highly Experienced in Consumer Class Actions

As noted above, in approving class action settlements, courts often defer to the judgment of experienced counsel who have engaged in arm's-length negotiations. *See In re Aggrenox Antitrust Litig.*, 2017 WL 4278788, at *3 ("The Court finds that the proposed settlement, which . . . was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation, falls within the range of possibly approvable settlements . . . ."). Here, Class Counsel believe that the Settlement is fair and achieves an excellent result for Class Members. Lead Class Counsel have substantial experience in consumer protection class actions and other complex litigation, have been appointed class counsel in numerous prior cases, including cases against independent energy companies such as Defendants. *See, e.g.*, Izard Decl., Exs. B (Firm Resume of Izard Kindall & Raabe LLP), C (Firm Resume of Wittels Law, P.C.). Further, Lead

Class Counsel have vigorously represented the interests of the Class throughout all phases of this three-year, multi-jurisdictional litigation.

D. The Settlement Easily Falls Within the Range of Possible Approval

As discussed above, the Settlement allows Class Members to choose between an award of (i) 65% of their Calculated Losses (up to a maximum of $425 per account for Average Usage class members and $500 per account for Above-Average Usage class members) or (ii) a credit of $8.50 per month for up to twelve months, up to $102. Settlement Agreement (Izard Decl., Ex. 1) at ¶ 5.1. 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)). However, "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 Civ. 8405, 2015 WL 10847814, at *11 (S.D.N.Y. Sept. 9, 2015). Accordingly, Class Counsel respectfully submit that the 65% recovered here is an exceptional result.

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). While not the subject of the preliminary approval analysis, a review of the key factors for final approval support the Court's preliminary approval analysis.

1. 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).

The discovery produced by Viridian provided Class Counsel with detailed nonpublic information regarding a wide range of Viridian's practices and policies with regard variable energy rates. Viridian also produced to Plaintiffs and their energy industry experts voluminous billing and pricing data for the many states where Viridian sells gas and electricity. As discussed above, by the time the Settlement was reached, Class Counsel were well informed of the strengths and weaknesses of their claims and Defendant's defenses through both documentary and deposition evidence and through the work of Plaintiffs' experts, which permitted them to fully consider and evaluate the Settlement's fairness. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 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.'"). "[A] prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice." *McKenzie Construction Inc. v. Maynard*, 758 F.2d 97, 101–2 (3d Cir.1985). In the context of a complex class action, early

settlement has far reaching benefits in the judicial system. *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002).

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

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987). Moreover, the Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted).

Here, as discussed above, the Settlement represents a 65% recovery of each Class Member's Calculated Loss, subject to $450 or $500 per-claimant caps (for "Average Usage" and "Above-Average Usage" claimants respectively) and an overall $18.5 million cap should the amounts claimed threaten Defendant's viability as a going concern. *See* Settlement Agreement (Izard Decl., Ex. 1) at ¶¶ 2.46, 5.1. This equates to, on average, more than 50% of the alleged damages based on Plaintiffs' damages model that they would present at trial. The payments received by Class Members will be based directly upon their actual energy usage. Moreover, as also set forth above, all Class Members will be entitled to receive a minimum of either $5 (for Average Usage claimants) or $10 (for Above-Average Usage claimants), even if their Calculated Loss falls below that threshold (or even is $0). Accordingly, all Class Members are entitled to a substantive recovery in return for their release. This level of recovery far 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).[9]

Moreover, the Court must consider this recovery in light of the risks of litigation and the value of Class Members receiving money now and not several years from now after trial and appeal, if ever.

As the Settlement meets the "range" requirement for final approval, it clearly is "within the range" of *possible* approval, and thus the Class should be notified and given the opportunity to evaluate the terms of the proposed Settlement.

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. *Grinnell*, 495 F.2d at 463. While Class Counsel believe that Plaintiffs' claims are meritorious, Class Counsel are both experienced and realistic and understand that the resolution of liability issues, the results at trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. *See In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y 1997) ("Litigation inherently involves risks."). Indeed, "the primary purpose of settlement is to avoid the uncertainty of a trial on the merits." *Siler v. Landry's Seafood House–*

[9] As discussed above, Class members may, if they so choose and if they have a Calculated Loss above zero dollars, select an alternative credit option benefit representing significant savings of $8.50 per month, up to a maximum of $102. *See* Settlement Agreement (Izard Decl., Ex. 1) at ¶ 5.1. These settlement benefits are not subject to an aggregate cap. *Id.*

North Carolina, Inc., No. 13 Civ. 587, 2014 WL 2945796, at *6 (S.D.N.Y. June 30, 2014). For example, Defendant would vigorously contest Plaintiffs' claims that Defendant charged excessive amounts for power, and this issue would be resolved through a "battle of the experts." Additionally, although Plaintiffs believe that their damage model is sound, Defendants' experts will challenge the basis of Plaintiffs' damages model. Indeed, Defendants contend that no Plaintiff was overcharged.

Moreover, there is no guarantee that this case will lend itself to class certification. Certain of Plaintiffs' claims hinge upon the question of how a reasonable consumer would interpret Viridian's specific contract language regarding its pricing. *See* AC at ¶¶ 41-48. Viridian has raised, and undoubtedly would continue to raise, numerous arguments, including *inter alia* arguments concerning the proper understanding of Viridian's pricing language. Although Plaintiffs believe that the plain meaning of each of Viridian's contracts is clear, there is no guarantee that Plaintiffs would prevail on these points. Accordingly, absent the proposed settlement, there is a genuine possibility that no class would be certified and thus Class Members would recover no part of losses. *Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (emphasis in original).[10]

[10] Further, although Plaintiffs are confident that the Court would grant a contested motion for class certification, Defendant would have likely taken any opportunity to argue for decertification at a later stage of the case. 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 Mazzei v. Money Store*, 829 F.3d 260 (2d Cir. 2016) (affirming decertification order following $32,000,000 jury verdict in favor of certified class). 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 consumer protection and contract law, including whether reliance is a necessary element of Plaintiffs' claims. The costs and risks associated with maintaining this Litigation to a verdict, not to mention through the inevitable appeals, will be high, and the process will require significant use of the Court's time and resources. Further, 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 many years, thus reducing any additional sums potentially recoverable on behalf of the Class. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071, 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").

5. The Risk of Recovery

Viridian Energy, Inc., Viridian Energy, LLC, and Viridian Energy PA, LLC are among many subsidiaries of Crius Energy, LCC, which in turn is owned by Crius Energy Trust ("Trust'), an Ontario provincial trust. As these entities simply buy and sell energy, they would

not be expected to have sufficient assets to satisfy a judgment in the event plaintiffs were to succeed at trial. Accordingly, absent settlement, execution may be a significant issue.

* * *

Based on all of the foregoing factors, Plaintiffs respectfully submit that 56 cents on the dollar is a reasonable settlement amount.

III. THE PROPOSED CLASSES MEET THE PREREQUISITES FOR CLASS CERTIFICATION UNDER FED. R. CIV. P. 23

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Fed. R. Civ. P. 23. Plaintiffs propose the following Class definitions:

> **Average Usage Class:** All persons in the United States who, during the Class Period, were enrolled (either initially or through "rolling over" from a fixed rate plan) in a Viridian variable rate electricity and/or gas plan with an average annual utilization rate of 25,000 or less kilowatt hours or 2,500 or less therms.
>
> **Above Average Usage Class:** All persons in the United States who, during the Class Period, were enrolled (either initially or through "rolling over" from a fixed rate plan) in a Viridian variable rate electricity and/or gas plan with an average annual utilization rate of more than 25,000 kilowatt hours or more than 2,500 therms, respectively.
>
> Excluded from the Settlement Classes are: Viridian Energy, Inc., Viridian Energy PA LLC, Viridian Energy NY, LLC, and Viridian Energy, LLC; any of their parents, subsidiaries, or affiliates; any entity controlled by any of them; any officer, director, employee, legal representative, agent, predecessor, successor, or assignee of Viridian Energy, Inc., Viridian Energy PA LLC, Viridian Energy NY, LLC, and/or Viridian Energy, LLC; any person enrolled in a Viridian Energy, Inc., Viridian Energy PA LLC, Viridian Energy NY, LLC, or Viridian Energy, LLC Minus-5, 3DOM, or Term Free Index plan; any person who has previously released claims that will be released by this Settlement; federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof); Independent Viridian Associates and former Viridian employees; and the Judges to whom any of the actions in the Litigation are assigned and any members of their immediate families.

Fed. R. Civ. P. 23(a) 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, a class must meet one of the three requirements of Fed. R. Civ. P. 23(b).

A. Numerosity, Commonality and Typicality

The Classes meets the numerosity, commonality, and typicality standards Fed. R. Civ. P. 23(a)(1)-(3). First, the number of proposed 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). Here, approximately 430,000 Viridian accounts are included in the Classes.[11] *See* Izard Decl. at ¶ 17.

Second, there are substantial questions of law and fact common to all Class Members. Plaintiffs' claims all revolve around a core factual allegation: Defendant's form contracts promised that Viridian's variable energy rates would be based on changes in the wholesale energy markets, when in fact they were not. Accordingly, the fundamental question of how a reasonable consumer would interpret Viridian's contract language is common to all Class Members. Also common to all of Plaintiffs' claims—and to the Classes as a whole—is the question of whether Viridian's variable pricing ***actually*** did or did not reflect wholesale market conditions. Likewise, the question of whether Viridian's alleged misconduct harmed the Classes is common to all Class Members.

[11] Certain individual Class Members may have had multiple accounts (including, for example, a Class Member with multiple properties enrolled in a Viridian variable rate account). Accordingly, while over 430,000 Viridian ***accounts*** are eligible to participate in the Settlement, there are not necessarily 430,000 individual Viridian account ***holders*** (*i.e.*, 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 Viridian used for all variable rate customers. Here, Plaintiffs' claims arise from the same course of conduct – and the same alleged contract violation – as the other Class Members' claims. Viridian's policies and practices with regard to setting variable energy rates affected Plaintiffs and all other Class Members in the exact same way. Plaintiffs also represent both Settlement Classes: Plaintiff BDK Alliance, LLC, is an "Above Average Usage" Class Member; the remaining Plaintiffs are "Average Usage" Class Members. 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 Fed. R. Civ. P. 23(a)(4) requires Plaintiffs to demonstrate that: (1) there is no conflict of interest between Plaintiffs and the other Class Members; and (2) 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 Class Members, as Plaintiffs are pursuing the same legal theories as the rest of the Class relating to the same course of Viridian's conduct. Additionally, all Lead Class Counsel firms have extensive backgrounds 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, e.g.*, Izard Decl., Exs. 2 (Firm Resume of Izard Kindall & Raabe LLP), 3 (Firm Resume of Wittels Law, P.C.).

C. Predominance of Common Issues and Superiority

Fed. R. Civ. P. 23(b)(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 *Amchem Prods., 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 of Rule 23(b)(3), 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). Here, all

Class Members have a claim for breach of contract: it is Plaintiff's theory that either Defendant breached the uniform language of its form consumer contract, or it did not.[12] The Second Circuit has upheld the certification of nationwide contract claims, observing that "state contract law defines breach consistently such that the question will usually be the same in all jurisdictions." *In re U.S. Foodservice, Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013); *see generally id.* at 124-27. Accordingly, the Court concluded that contract law does not "differ in a material manner that precludes the predominance of common issues." *Id.* at 127. Because this common issue of law and fact predominates over any potential individual issues which may arise and this common issue can be resolved through the presentment of proof common to all Class Members, the predominance requirement Fed. R. Civ. P. 23(b)(3) is satisfied. Indeed, this Court has certified at least two actions in which an individual plaintiff represented a multistate class with regard to breach of contract claims. *See Held v. AAA Southern New England*, No. 11-cv-105, 2012 WL 4023367 (D. Conn. Sept. 12, 2012) (Underhill, J); Judgment Order [ECF No. 37] in *Mathena v. Webster Bank, N.A.*, No. 10-cv-1338 (SRU) (D. Conn. March 28, 2011) (settlement class).[13]

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[12] Through discovery and the settlement process, Plaintiffs have ascertained that there are essentially three forms of Viridian contract nationwide: the "3 factor" contract, the "15 factor" contract, and the "wholesale market conditions" contract. Plaintiffs' individual contracts cover all three types of Viridian form contracts. Accordingly, a named plaintiff entered into a contract that is materially identical to the contract of each Class Member. Therefore, the named Plaintiffs can represent all Class Members.

[13] Given Defendant's assets as discussed above, Class Members' ability to recover even full contract damages after a trial verdict is questionable. The possibility of recovering any additional statutory damages that may be available under individual state consumer protection laws is also questionable. Accordingly, it is appropriate to certify a nationwide settlement class on the contract claims. Although Plaintiffs believe that the state statutory claims also raise common questions in that they are materially identical under applicable choice of law provisions, given the judgment execution issues described above, the Court need not consider the issue.

The superiority requirement of Fed. R. Civ. P. 23(b)(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 Class Members' claims, 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 Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Viridian given the comparatively small size of each individual Class member's claims. Thus, it is desirable to adjudicate this matter as a class action.

In light of the foregoing, all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied, and, thus, the Court should certify this Class for settlement purposes in connection with the present Settlement.

IV. NOTICE

Fed. R. Civ. P. 23(c)(2)(B) requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort." However, there are no "rigid rules" to apply when determining the adequacy of notice for a class action settlement; and "the standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005). Further, it is clearly established that "notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (*citing Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988)).

A. Notice Procedures

Pursuant to the Notice Plan set forth in the Settlement Agreement (Izard Decl., Ex. 1), ***individual*** notice will be sent to all Class Members (whether current or former customers of Viridian). Within 10 days of the Court's entry of a preliminary approval order, Viridian will provide a list of all Class Members with mailing addresses and, where available, email addresses. *Id*. at ¶ 2.18. The Settlement Administrator will send "short-form" notice to all Class Members in substantially the form attached as Exhibits D and E to the Settlement Agreement as follows: all Class Members who provided an email address to Viridian will be sent email notice, and all other Class members (and Class Members whose email notices bounce-back or are otherwise undeliverable) will be sent the short form notice by U.S. mail to their last-known physical address as provided by Viridian. *Id*. at ¶ 7.3. The Settlement Administrator will also use customary search protocols to verify addresses and to obtain current addresses for Class Members whose notices are returned to sender. *Id*. at ¶¶ 7.3, 7.9.

Informational websites will also be established and will contain documents (including the Settlement Agreement and important pleadings) and other information regarding the Settlement, including a full notice (in substantially the form attached as Exhibits B and C to the Settlement Agreement) that will be available for download (or which will also be mailed to Class Members upon request). *Id*. at ¶¶ 2.48, 7.6. The websites will also allow Class Members to print claims forms or to fill-out and submit claim forms electronically. *Id*. at ¶ 7.6.

The Settlement Administrator will also establish a toll-free telephone support line. *Id*. at ¶ 7.7. Class Members will be able to request the full notice in paper upon request through the telephone support line and through the website. *Id*.

Contact information for Lead Class Counsel will also be set forth on the full notice, on the website, and through phone support, so that Class Members may inquire directly of Lead Class Counsel concerning any questions they have. *Id*. at ¶ 7.6.

B. Contents of Notice

The proposed full notice, short form notice, and claim form are attached to the Settlement Agreement (Izard Decl., Ex. 1) as Exs. A–E. The notices include a fair summary of Plaintiffs' and Viridian's respective litigation positions; the general terms of the Settlement as set forth in the Settlement Agreement; instructions for how to opt-out of or object to the Settlement; the process and instructions for making a claim; and the date, time, and place of the Final Fairness Hearing. *Id.*

The proposed notice plan is more than sufficient because it "fairly apprise[s] the . . . 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." *See Maywalt v. Parker and Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) (internal quotations omitted). The short and long

notices will provide Class Members with information on the class, the purpose and timing of the fairness hearing, opt-out procedures and deadlines, and the deadline and process for filing claims packages. In addition, as discussed above, they will provide a telephone number and website that Class Members may use to the extent they have any questions.

V. APPOINTING A SETTLEMENT ADMINISTRATOR

The parties are evaluating three potential national claims administration firms to serve as Settlement Administrator, subject to the approval of the Court: Heffler Claims Group, KCC LLC, and JND Legal Administrator. The parties will be prepared to discuss the selection of a Settlement Administrator at the preliminary approval hearing set by the Court.

VI. CONCLUSION

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

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

(2) Preliminarily certifying the Settlement Class;

(3) Preliminarily appointing Lori Sanborn, Iron Man LLC, BDK Alliance LLC, Stephanie Silver, David Steketee, Susana Mirkin and Boris Mirkin as Lead Plaintiffs; and Elizabeth Hembling, Patricia Kulesa, Steward Connard and Steven Laundau as Representative Plaintiffs;

(4) Preliminarily Robert Izard, Craig Raabe and Seth Klein of Izard Kindall & Raabe LLP and Steven Wittels and J. Burkett McInturff of Wittels Law, P.C. as Lead Settlement Class Counsel; and Richard D. Greenfield of Greenfield & Goodman LLC, Charles J. LaDuca of Cuneo Gilbert & LaDuca LLP, Jonathan

Shub of Kohn Swift & Graf PC, Troy M. Frederick of Marcus & Mack PC, and Daniel Hymowitz and Andrey Belenky of Hymowitz Law Group, PLLC as Settlement Class Counsel

(5) Approving the proposed Notice Plan;

(6) Appointing a Settlement Administrator; and

(7) Scheduling a Final Fairness Hearing.

Dated: February 6, 2018

PLAINTIFFS

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CERTIFICATE OF SERVICE

I, Seth R. Klein, hereby certify that on this 6th day of February, 2018, the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access these documents though the court's CM/ECF system.

/s/ Seth R. Klein
Seth R. Klein