IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEVEN BASILE, on behalf of himself and all others similarly situated, Plaintiff, vs. STREAM ENERGYP ENNSYLVANIA, LLC, et al., Defendants.	Case No. 1:15-CV-01518-YK **CLASS ACTION** **(HON. YVETTE KANE)**

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff Steven Basile ("Plaintiff"), now moves the Court to enter an order preliminarily approving the Class Action Settlement reached by the parties to resolve the claims of Plaintiff and the proposed Settlement Class.

In support of this motion, Plaintiff relies upon the accompanying Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and the Declaration of Jonathan Shub in Support of

Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement which presents the Class Action Settlement with all supporting documentation.

Plaintiff respectfully requests that the Court enter an order:

1. Finding that the proposed settlement is sufficiently fair, reasonable and adequate to allow dissemination of notice of the settlement to the proposed Settlement Class;
2. Appointing Jonathan Shub, Esquire, of the firm Kohn Swift & Graf, P.C., and Troy M. Frederick, Esquire, of the firm Marcus & Mack, P.C., as Class Counsel for the Settlement Class;
3. Establishing dates for a hearing on final approval of the proposed settlement, Plaintiff's service award and Class Counsels' request for attorneys' fees and expenses;
4. Approving the form of class notice;
5. Approving the notice plan and directing that notice be made available and published;
6. Establishing a deadline for filing papers in support of final approval of the proposed settlement and a request for expenses;
7. Establishing a deadline for the filing of objections by Settlement Class members; and
8. Establishing a deadline for Settlement Class members to exclude themselves from the proposed Settlement Class with respect to the settlement.

Respectfully submitted this 28th day of December 2017.

Date: December 28, 2017

Respectfully submitted By:

/s/ Jonathan Shub
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Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the forgoing PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT was served via the Court's ECF system upon all counsel of record on December 28, 2017.

/s/ Jonathan Shub
JONATHAN SHUB

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STEVEN BASILE, on behalf of himself and all others similarly situated, Plaintiff, vs. STREAM ENERGYP ENNSYLVANIA, LLC, et al., Defendants.	Case No. 1:15-CV-01518-YK **CLASS ACTION** **(HON. YVETTE KANE)**

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

RULES

This brief is submitted in support of preliminary approval of a class action settlement between Plaintiff Steven Basile ("Plaintiff") and Defendants Stream Energy Pennsylvania, LLC, Stream Energy Pennsylvania, LLC d/b/a Stream Energy, and Stream Energy d/b/a Stream Energy Pennsylvania, LLC ("Defendants"), on behalf of himself and a proposed Settlement Class. As detailed below, this settlement satisfies Fed. R. Civ. P. 23 and is fair, reasonable, and adequate. Consequently, Plaintiff respectfully requests that preliminary approval be granted.

I. Introduction and Background

This putative class action lawsuit arises from allegations that the electric energy supply activities of the Defendants constitutes breach of contract. Defendants deny these allegations.

Plaintiff, Steven Basile, on behalf of himself and the Settlement Class has entered into a Settlement Agreement with Defendants. Plaintiff and Defendants executed a Settlement Agreement on December 27, 2017 after months of negotiations conducted by Plaintiff's counsel and Defendants' counsel and over two years of active litigation. A copy of the Settlement Agreement, Exhibit "1", and all supporting Exhibits, "A" through "E", are attached hereto. The negotiations, conducted by experienced and able counsel, were lengthy, vigorous, and at all times conducted at arms-length.

As of the execution date of the Settlement Agreement, Plaintiff has conducted substantial discovery. Therefore, he has sufficient information to be able to weigh the strengths and weaknesses of his case and to conclude that a settlement on the terms set forth below is in the best interests of the proposed Settlement Class Members.

The Settlement Agreement resolves all the claims asserted in this case and confers substantial benefits on the Settlement Class, defined as: "All persons in the Commonwealth of Pennsylvania who were enrolled as a customer of Defendants and were on Defendants' Variable Rate Electricity Plan at any time during the Class Period."[1]

Plaintiff now moves the Court to enter a Preliminary Approval Order that will: (1) preliminarily approve the Class Action Settlement and finding that its terms are sufficiently fair, reasonable, and adequate for notice to be issued to the Settlement Class as defined in the Settlement Agreement and pursuant to Federal Rule of Civil Procedure 23(e); (2) conditionally certify the proposed class

[1] *See* Settlement Agreement at Section II.A.21. "Class Period" is defined as June 1, 2011 through the Preliminary Approval Date. *Id*. at Section II.A.6. Excluded from the Settlement Class are: Defendants, any entities in which they have a controlling interest, any of their parents, subsidiaries, affiliates, officers, directors, the presiding judge(s) in this case and her(their) immediate family, and any person who has previously released claims against the Defendants, including but not limited to persons who released claims against Defendants pursuant to the settlement of a complaint submitted to the Pennsylvania Public Utility Commission (PUC). *Id*. at Section II.A.21.

described in the Settlement Agreement (the "Settlement Class") for purposes of the settlement only pursuant to Federal Rule of Civil Procedure 23(c); (3) conditionally appoint Plaintiff and his counsel, Jonathan Shub of Kohn, Swift & Graf, P.C. and Troy M. Frederick of Marcus & Mack, P.C., as Representative of the Settlement Class and Class Counsel for the Settlement Class, respectively, and authorize each to represent the Settlement Class; (4) approve and direct the form and content and manner of service of the Settlement Notice to be sent to the Settlement Class and published pursuant to the terms of the proposed notice plan; (5) find that such notice constitutes the best notice practicable under the circumstances; (6) approve Angeion Group as Settlement Administrator; (7) schedule dates by which the parties and Settlement Class members are to comply with their requirements and obligations as more fully described in the proposed Order filed concurrently herewith; and (8) set a hearing date for the final approval of the proposed settlement no later than one hundred twenty (120) days after granting this motion, at which the Named Plaintiff Enhancement Award and the award of attorneys' fees and costs also may be considered.

Plaintiff submits that the proposed settlement satisfies the required standards for preliminary approval, and respectfully requests that the Court preliminary approve the settlement, conditionally certify the Settlement Class, and authorize

dissemination of notice pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

II. Settlement Terms

Defendants have agreed to a settlement structure which provides the following benefits to Settlement Class Members who submit valid and timely Claim Forms and who have not previously released claims against Defendants including, but not limited to, persons who released claims against Defendants pursuant to the settlement of a complaint submitted to the PUC:

1. Each Class member who was on Stream's Variable Rate Plan at any point between June 1, 2011 and February 29, 2015 (Time Period 1) will receive payment in the amount of 5% of all amounts he or she paid to Stream for service provided under the Variable Rate Plan during Time Period 1.

2. Each Class member who was on Stream's Variable Rate Plan at any point between March 1, 2015 and the date of preliminary approval (Time Period 2) will receive payment in the amount of 2% of all amounts he or she paid to Stream for service provided under the Variable Rate Plan during time Period 2.

Defendants have also agreed that, subject to the Court's final approval, Plaintiff may seek a service award in recognition of the amount of time and effort expended in acting as Representative of the Settlement Class. Defendants agreed

not to oppose the payment of an amount not to exceed five thousand dollars ($5,000) to Plaintiff.

Defendants also agreed that, subject to the Court's final approval, Class Counsel will be entitled to seek an award of attorneys' fees and costs of up to one million fifty thousand dollars ($1,050,000.00). The award will be paid by Defendants and is separate from and in addition to the payment of the Settlement amounts available to the eligible members of the Settlement Class.

Additionally, separate and apart from paying the sums described above, Defendants have agreed to pay the costs of notice to the Settlement Class and the cost of settlement and claims administration.

The Settlement also provides that there will be a release of claims by Settlement Class members against Defendants and all of their current and former parents, subsidiaries, affiliates, predecessors, successors, and assigns, and each of their respective, current, and former officers, directors, partners, owners, employees, agents, attorneys, and insurers relating to Defendants' Variable Rate Energy Plans. The Released Claims are further described in Sections II.A.16, II.A.17, and II.J of the Settlement Agreement.

III. Proposed Timetable

The Settlement Agreement and the proposed Preliminary Approval Order set forth an orderly procedure and timetable for disseminating notice to the Settlement Class and for final approval:

(1) Settlement Notice shall be disseminated by first-class mail within thirty (30) days after the Preliminary Approval Date.

(2) Summary Notice to be published within thirty (30) days after the Preliminary Approval Date;

(3) No later than twenty-one (21) days prior to the Final Approval Hearing, the Settlement Administrator and Defendants shall certify to the Court compliance with the notice provisions pursuant to the Settlement Agreement;

(4) Any requests for exclusion from the Settlement Class must be postmarked no later than seventy-five (75) days after the Preliminary Approval Date;

(5) Plaintiff's motion for final approval of the settlement to be filed no later twenty-one (21) days prior to the Final Approval Hearing;

(6) Plaintiff's motion for attorneys' fees, expenses, and service awards to be filed within sixty (60) days after the entry of the Preliminary Approval Order;

(7) Any objections to the settlement or to the request for expenses must be filed with the Court and served on Class Counsel and counsel for Defendants no later than seventy-five (75) days after the entry of the Preliminary Approval Order; and

(8) The parties to the proposed settlement respectfully request that the final fairness hearing be scheduled on or after one hundred twenty (120) days from the entry of the Preliminary Approval Order.

IV. Conditional Certification of the Settlement Class for Purposes of Disseminating Notice is Appropriate

At this juncture, Plaintiff is only seeking preliminary approval of the settlement, conditional certification of the Settlement Class, and authorization from the Court to send notice of the Settlement to the Settlement Class members. Plaintiff will later seek final approval of the settlement and the Settlement Class after notice and the opportunity for the members of the Settlement Class to opt-out or present their views of the Settlement. As with the preliminary approval of the settlement, Plaintiff will address the factors for final certification of the Settlement Class for purposes of the settlement with the Defendants in his final approval papers. As a general matter, an action may be certified for class treatment for settlement purposes only. *See, e.g., Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997); *In re General Motors Corp. Pick-up Fuel Tank Litig.*, 55 F.3d 768, 777-78 (3d Cir. 1995). The Court first approves preliminary certification of the class. *In re Certainteed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 476 (E.D. Pa. 2010); *Gates v. Rohm and Haas Co.*, 248 F.R.D 434, 439 (E.D. Pa. 2008). Final certification of the settlement class is determined by the court at the same time as the court rules on final approval of the settlement class. *In re Certainteed*, 269 F.R.D. at 476; Gates, 248 F.R.D. at 439.

A proposed settlement class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), that is, 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), *see also Amchem,* 521 U.S. at 620 (requiring proponents of class certification to demonstrate that all of the Rule 23(a) requirements are met). Additionally, "the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal– Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2548 (2011). Under Rule 23(b)(3), a class action may be maintained if "the court finds that the 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 efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). "A party seeking class certification must affirmatively demonstrate his compliance with" Rule 23. *Dukes*, 131 S.Ct. at 2551. "Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The first requirement for maintaining a class action under Rule 23(a) is that the proposed class be so numerous that joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). This requirement does not necessitate a showing that

joinder is impossible, but only that joining all class members would be "impracticable," *i.e.*, difficult or inconvenient. *See In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 477 (W.D. Pa. 1999) ("Flat Glass").

"[T]here is no magic minimum number necessary to satisfy the ... numerosity requirement." *Seidman v. American Mobile Sys., Inc.*, 157 F.R.D. 354, 359 (E.D. Pa. 1994). When considering the number of class members necessary to satisfy the numerosity requirement, this court has recognized that classes as small as 25 may prove sufficient. *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968); *see also Stewart v. Abraham*, 275 F.3d 220, 266 (3d Cir. 2001) (a class with more than 40 will satisfy the numerosity requirement). In addition, when considering the numerosity of the class, "[i]t is proper for the court 'to accept common sense assumptions in order to support a finding of numerosity."' *Cumberland Farms, Inc. v. Browning Ferris Ind.*, 120 F.R.D. 642, 645 (E.D. Pa. 1988) (quoting *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168,171 (E.D. Pa. 1979)).

As the Settlement Class includes Defendants' current and former customers, which Defendants' records indicate could be in excess of 70,000 accounts, it is estimated to far exceed 40 members, rendering joinder impracticable. Thus, the numerosity requirement is satisfied.

The second requirement of Rule 23(a), commonality, focuses on whether there exists questions of law or fact common to the class. Questions are common to the class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. The Third Circuit has "a very low threshold for commonality." *See e.g., Flat Glass*, 191 F.R.D. at 478; *In re School Asbestos LItig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1984) *aff'd in part and rev'd in part sub nom. In re School Asbestos Litig,* 789 F.2d 996 (3d Cir. 1986). A common question is one that "arises from a common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Id*. In particular, the commonality requirement may be satisfied by a single common issue. *Baby Neal, et al. v. Robert P. Casey, et al.*, 43 F.3d, 48, 56 (3d Cir. 1994). The "threshold of commonality is not high." *School Asbestos Litig.*, 789 F.2d at 1010.

Here, there are many common issues of fact and law, to wit, whether Defendants breached the price terms in their agreements with Plaintiff and the Settlement Class by utilizing factors not contained in the agreements to set their prices. As a result of Defendants' alleged inability or unwillingness to provide Plaintiff with the savings it contracted/promised to provide, Plaintiff and the

Settlement Class members all allegedly incurred significant overcharges for electricity.

Furthermore, Rule 23(a)(3) requires that the Representative Plaintiff's claims or defenses be "typical" of the claims or defenses of the class. The typicality requirement "is a safeguard against interclass conflicts, ensuring that the named Plaintiff's interests are more or less coextensive with those of the class." *Cumberland Farms*, 120 F.R.D. at 646 (E.D. Pa. 1988). "The threshold for establishing typicality is low, and Rule 23(a)(3) will be satisfied as long as the factual or legal position of the named Plaintiff is not markedly different from that of the other members of the class." *Seidman*, 157 F.R.D. at 360 (internal quotations and citations omitted). "Typicality is not identical," and atypical elements of a claim may be adequately treated by using subclasses. *Id*. (citations omitted). In fact, "'even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *In re Prudential Ins. Co. American Sales Litigation*, 148 F.3d 283, 311 (3d Cir. 1998).

Here, the claims of the Plaintiff and the members of the Settlement Class arise from the same conduct. Defendants' Disclosure Statement provides specific factors that Defendants are required to rely upon in setting their rates. Dkt. 1 at ¶

13, *Complaint*. Plaintiff alleged that Defendants' rates (after the initial "teaser" rate) are not competitive with other suppliers and are not based on the factors outlined in the Disclosure Statement. *Id*. ¶¶ 13 & 16. There are no unique facts or circumstances that would render Plaintiff as atypical. This same alleged conduct caused the same alleged injury to members of the Settlement Class.

The final requirement, adequacy, requires that a representative party must fairly and adequately protect the interests of the class. Adequate representation depends on two factors: (a) the Plaintiff's attorneys must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiff must not have interests antagonistic to those of the class. *Seidman*, 157 F.R.D. at 365.

As to the first factor, Plaintiff is represented by counsel that is highly experienced and skilled in matters relevant to this litigation. Mr. Jonathan Shub and his firm, Kohn, Swift & Graf, P.C. possess substantial experience in class actions and other complex litigation, including consumer fraud and consumer protection class actions, such as this. Mr. Troy M. Frederick of Marcus & Mack, P.C. is an experienced attorney who regularly represents consumers, including those with claims against energy providers, like Defendants. Mr. Frederick has participated in multiple class actions and other complex litigation, including consumer fraud and consumer protection class actions, such as this. In short, Plaintiff and his counsel have demonstrated that they "are fully capable of

litigating this case." *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 218 (M.D. Pa. 2012).

As to the second factor, Plaintiff and each member of the Settlement Class have similar interests in seeing liability established and damages levied against Defendants. No conflicts of interest exist.

Having satisfied the four prerequisites of Rule 23(a), Plaintiff need only show that the requirements of one subsection of Rule 23(b) have been met for the claims to be certified for class-wide treatment. *See Baby Neal*, 43 F.3d at 55. Plaintiff seeks certification under Rule 23(b)(3), which requires a showing of predominance and superiority. *Sala v. National Railroad Passenger Corp.*, 120 F.R.D. 494, 498 (E.D. Pa. 1988).

This rule requires only a "predominance of common questions, not a unanimity of them." *Rodriguez v. McKinney*, 156 F.R.D. 118, 119 (E.D. Pa. 1994). As long as the claims of the class members are not in conflict with each other, class members need not be identically situated and may have individualized issues. *See O'Keefe v. Mercedes Benz USA, LLC*, 214 F.R.D. 266, 290 (E.D. Pa. 2003). "The question is whether the class is cohesive enough to warrant adjudication by representation." *Fisher v. Virginia Elec. and Power Co.*, 217 F.R.D. 201, 213 (E.D. Va. 2003).

Here, Defendants' liability turns on whether Defendants breached the price

term in their agreement with their customers by failing to abide by the factors set forth therein when setting their rates. Moreover, determining whether Settlement Class members were injured will turn on common proof regarding the extent to which Defendants' rates are higher than competitive rates otherwise available in the market.

The superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of the class action against those of alternative available methods of adjudication." *Prudential*, 148 F.3d at 316; *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004). Rule 23(b)(3) lists the following factors to guide the superiority inquiry: the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. Fed R. Civ. P. 23(b)(3). With respect to both requirements, the Court need not inquire whether the "case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc.*, 521 U.S. at 620 (citation omitted).

Plaintiff addresses each of the other factors in turn.

The interest of individual class members in controlling the litigation. It is in the interest of individual class members to proceed with this litigation as a class action. Individual prosecution of these claims is impractical – the cost of litigating a single case would exceed the potential return. "Indeed, the size of each claimant's alleged loss is undoubtedly too small to be economically litigated at all outside of a class action." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 191 (D.N.J. 2003).

The extent and nature of litigation already commenced by the class. Plaintiff is not aware of other pending litigation in Pennsylvania seeking relief for the same wrongdoing as is asserted in this proposed class action.

The desirability of concentrating the litigation in a given forum. This factor supports certification. Concentrating the litigation in a single forum will allow the litigation to proceed in an efficient manner without the risk of inconsistent outcomes.

The case is manageable as a class action. Given the overwhelming predominance of the core issues in this case, the major features are easily managed.

Class treatment is far superior to any alternative available method of adjudication. Ultimately, "the superiority requirement asks a district court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication.'" *In re Community Bank*

of Northern Virginia, 418 F.3d 277, 309 (3d Cir. 2005) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996)). Class treatment is clearly superior to the only available alternative here, an absence of justice for the class members who simply believed they would be charged less than they actually were for Defendants' energy service.

V. The Settlement Should be Preliminarily Approved

Review of a proposed class action settlement is a two-step process. The first step involves preliminary approval of the settlement and the successive procedural steps, such as notice, the claim form, and the schedule for a final fairness hearing. *See Manual For Complex Litigation* (Fourth) § 21.632 (2004); *see also Klingensmith v. BP Products North America, Inc.*, 2008 WL 4360965, at *5 (W.D. Pa. Sept. 24, 2008*); In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002). At the preliminary approval stage, a settlement is presumed to be fair when the negotiations were at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation. *See In re GMC Pick–Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *Gates*, 248 F.R.D. at 444. At step two, after notice to the class and an opportunity for class members to object to the proposed settlement or otherwise be heard, the Court determines whether the settlement is fair, reasonable and adequate and whether the settlement should be finally approved under Federal Rule of Civil

Procedure 23(e). *In re National Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 197 (E.D. Pa. 2014).

A. The Settlement Should Be Preliminarily Approved in this Action

The Court should be mindful of the "strong presumption in favor of voluntary settlement agreements," which "lighten the increasing load of litigation faced by the federal courts" and allow the parties to "gain significantly from avoiding the costs and risks of a lengthy and complex trial." *In re Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010). "This presumption is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Id.* at 595 (internal citation omitted).

Preliminary approval analysis "often focuses on whether the settlement is the product of 'arms-length negotiations.'" *Curiale v. Lenox Grp., Inc.*, 2008 WL 4899474, at *4 (E.D. Pa. Nov. 14, 2008) (citation omitted); *see also In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004) (granting preliminary approval of settlement reached "after extensive arms-length negotiation between very experienced and competent counsel"); *Gates*, 248 F.R.D. at 444 (preliminarily approving settlement where there was "nothing to indicate that the proposed settlement ... [was] not the result of good faith, arms-length negotiations between adversaries"). Here, the parties

engaged in ample discovery, including the production and review of tens of thousands of pages and depositions of Defendants' key personnel, before engaging in strongly contested, arms-length negotiations. On September 14, 2017, the Parties participated in a full day mediation at JAMS in Philadelphia, PA conducted by the Honorable Diane Welsh (Ret.) where the Parties ultimately reached an agreement on the settlement of the claims of the Named Plaintiff and the putative class. *See Wal-Mart Stores*, 396 F.3d at 116 (quoting *Manual for Complex Litigation* (Third) § 30.42 (1995)) ("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.") (internal quotations marks omitted).

Such value to the class reflects the extensive litigation, including comprehensive discovery, which preceded the settlement and informed the parties' settlement. The attorneys representing the Settlement Class are experienced litigators in class actions, and they believe that this settlement provides significant benefits to the Settlement Class, avoids the risk and delays associated with continued litigation, and is in the best interest of the Settlement Class. While Plaintiff believes that he would prevail in this lawsuit if it were to continue, Defendants are also confident that they would prevail, and the result is far from assured. Defendants maintained that they would defeat class certification in this

case and that, even if the class was certified, they would prevail on the merits. Defendants have consistently maintained that the contract at issue provides them with substantial discretion over the rates they charge their customers on variable rate electricity plans and that they properly exercised their discretion in setting rates. Defendants have also argued that they were not profitable in Pennsylvania during the time period at issue in this case, and therefore Plaintiff's argument that they should have charged less for their electricity is unsupported. While Plaintiff disagrees with Defendants, it is clear that there is risk to both sides on these key legal issues, and the result obtained here is more than reasonable – it is a significant achievement for the class.

At the preliminary approval stage, the Court does not engage in a full fairness analysis. Instead,

> the Court is required to determine only whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.

Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 472 (E.D. Pa. 2007). Preliminary approval "is granted unless a proposed settlement is obviously deficient." *Jones v. Commerce Bancorp, Inc.*, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007); *accord Gates*, at 438. Here, there are neither grounds to doubt the fairness of the settlement, nor any obvious deficiencies.

Settlements proposed by experienced counsel and which result from arms-length negotiations are entitled to deference from the court. *See In re Automotive Refinishing Paint Antitrust Litig.*, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003); *see also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery."); *Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("[t]he opinions and recommendation of such experienced counsel are indeed entitled to considerable weight*."); Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (giving "due regard to the recommendations of the experienced counsel in this case, who have negotiated this settlement at arms-length and in good faith."). The initial presumption in favor of such settlements reflects courts' understanding that vigorous negotiations between seasoned counsel protects against collusion and advances the fairness concerns of Rule 23(e).

This settlement falls within the range of reasonableness, and there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied.

B. The Proposed Notice Program Satisfies Rule 23 and Due Process and Should Be Approved

1. The Proposed Notice Program is Adequate

As the Supreme Court explained in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id. at 314. The notice provisions in the Settlement Agreement ("Notice Program") in this case, described below, meet this standard.

Under Rule 23(c)(2)(B), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." What constitutes reasonable effort as well as what constitutes the best notice practicable under the circumstances depends upon the individual facts in the case. *See In re Prudential Insurance Co. of America Sales Practices Litig.*, 177 F.R.D. 216, 232 (D.N.J. 1997) (quoting *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993) ("In all cases the Court should strike an appropriate balance between protecting class members and making Rule 23 workable").

The Settlement Administrator, Angeion Group, will be responsible for the notice and claims process and brings to the task well-established experts and credentials. *See* Affidavit of Steven Weisbrot, attached hereto as Exhibit "2".

Here, Defendants have class members' names and last known addresses, and Defendants have agreed to provide that information to the Settlement Administrator, who will send direct written notice (the "Long Form Notice") to each class member, attached hereto as Exhibit "A". The Long Form Notice will be sent by first-class mail. The Long Form Notice also directs class members to an internet website where they can find further information. The Long Form Notice also includes a phone number for class members for further information.

Additional notice will be provided by publishing a summary notice of the Settlement and the Fairness Hearing to be published once in each of the following publications: Philadelphia Inquirer, Pittsburgh Post-Gazette, Harrisburg Patriot News, Allentown Morning Call, and Erie Times-News. That notice is attached hereto as Exhibit "B".

2. The Form and Content of the Class Notice is Adequate

The form of the class notice is governed by Rule 23(c)(2), which provides that the notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) That a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The proposed Short Form Notice and Long Form Notice in this case meet all of these requirements.

3. The Proposed Claim Form is Adequate

To submit a claim, a Class member need only print their name and other requested information, sign, date and place the claim form in the mail or submit the claim form electronically via the Internet Website. The Claim Form clearly informs the Settlement Class Members of the process they must follow. Plaintiff believes that the Claim Form is adequate and that the simplicity of the process will increase participation from Settlement Class members.

VI. Plaintiff's Counsel Should Be Appointed As Class Counsel

Jonathan Shub of Kohn, Swift & Graf, P.C. and Troy M. Frederick of Marcus & Mack, P.C. should be appointed as Class Counsel. Rule 23(g) enumerates four factors for evaluating the adequacy of proposed counsel:

> (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and types of claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(C)(i). All of these factors militate in favor of appointing Mr. Shub and Mr. Frederick as Class Counsel. Counsel has spent a significant amount of time identifying and investigating Plaintiff's claims before filing this case. *See* Declaration of Jonathan "Shub Dec." Exhibit "3", ¶ 3. Mr. Shub and Kohn, Swift & Graf, P.C. have extensive experience in class actions, particularly those involving alleged consumer frauds, as demonstrated by the numerous times the firm and its attorneys have been appointed Class Counsel. *See* Kohn, Swift & Graf, P.C. Firm Resume, attached hereto as Exhibit "4" Kohn, Swift & Graf, P.C. is an established law firm that currently litigates dozens of cases in state and federal courts throughout the nation, and they have more than sufficient resources to represent the Class. *Shub Dec*. at ¶ 22. In addition, Troy M. Frederick is an attorney who regularly represents consumers, including those with claims against energy providers. Mr. Frederick and his firm have participated in multiple class actions and other complex litigation, including consumer fraud and consumer protection class actions, such as this. *See* Marcus & Mack, P.C. Firm Resume, attached hereto as Exhibit "5".

VII. Conclusion

Plaintiff believes that the settlement is in the best interests of the Settlement Class and meets the requirements for preliminary approval. Therefore, for the reasons set forth above, he respectfully requests that the Court preliminarily

approve the settlement and the Settlement Class for the purpose of sending notice of the settlement to the Settlement Class.

Dated: December 28, 2017

Respectfully Submitted By:

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Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the forgoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT was served via the Court's ECF system upon all counsel of record on December 28, 2017.

/s/ Jonathan Shub
JONATHAN SHUB