

I. BACKGROUND

A. Factual and Procedural History

In February of 2013, Silvis switched from her local energy provider to Ambit Energy after being enticed with attractive rates. Silvis contends that Ambit Energy solicited customers throughout Pennsylvania and in other states with "teaser" rates. After a short while, Ambit Energy would replace the teaser rate with a variable rate that it asserted would be based on "energy and capacity markets, plus all applicable taxes." However, Silvis contends that the variable rate was not based solely on market pricing and, by one year after switching to Ambit Energy, was approximately double that of her local energy provider. Silvis alleges that Ambit Energy knew it would not base its rates solely on market prices and failed to act in good faith when contracting with her and other putative class members.

Silvis initiated this action on behalf of herself and others similarly situated on August 27, 2014, against Ambit Energy and its associated entities alleging breach of contract and unjust enrichment. The Court has jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332(d).

Ambit Energy filed a motion for summary judgment on May 13, 2015. ECF No. 45. The Court granted the motion on March 21, 2016 after finding that the contract language at issue was

unambiguous. ECF No. 57; see Silvis v. Ambit Energy L.P., 170 F. Supp.3d 754 (E.D. Pa. 2016). Silvis appealed this Court's order, and on January 9, 2017, the Third Circuit vacated summary judgment after concluding that the contract terms were ambiguous, remanding the case for further proceedings. Silvis v. Ambit Energy L.P., 674 Fed. App'x. 164 (3d Cir. 2017).

On July 31, 2017, the parties filed a joint stipulation requesting to stay the proceedings pending mediation. ECF No. 76. The parties subsequently participated in a full day mediation at JAMS in Philadelphia, Pennsylvania conducted by the Hon. Diane Welsh (Ret.). These negotiations resulted in the present Settlement Agreement.

After a February 1, 2018 hearing, the Court granted Silvis' motion to conditionally certify the settlement class and for preliminary approval of the settlement. ECF Nos. 89-90. The order also set, *inter alia*, notice procedures; dates for opting in and out of the settlement; and a date for the final approval hearing.

Silvis filed her Unopposed Motion for Approval of Attorney's Fees and Expenses on April 13, 2018 and her Unopposed Motion for Final Approval of Class Action Settlement on July 9, 2018. ECF Nos. 91-94. On August 8, 2018, the Court held a hearing on the motions.

B. The Proposed Class Action Settlement

The terms of the proposed class action settlement are set forth in the Settlement Agreement and Release ("Settlement Agreement"), see, e.g., ECF No. 79-2, and are outlined below.

1. The Proposed Settlement Terms

The Settlement Agreement provides that Ambit Energy will reimburse two subclasses of class members: (1) those who enrolled in its Select Variable Plan between January 1, 2011 and January 12, 2014 will receive a check in the amount of 15% of all amounts paid; and (2) those who enrolled in its Select Variable Plan between January 13, 2014 and the Preliminary Approval Date will receive a check in the amount of 2% of all amounts paid.¹ The parties estimate that the potential aggregated pay out for 100% claims participation would be \$9,300,000.

Notice and claims administration costs were paid by Ambit Energy. Ambit also agreed to separately pay Silvis' service award of up to \$5,000 and attorney's fees and costs of up to \$1,450,000. In exchange for the benefits provided by the

¹ A limited number of settlement class members with enrollment dates from January 13, 2014, through the Preliminary Approval Date did not receive an updated Disclosure Statement from Ambit Energy prior to becoming enrolled in the Select Variable Plan. These members of the settlement class will be treated as if they had enrolled on or before January 12, 2014, for purposes of determining the amount of the check they will receive.

settlement, the class members agreed to release all claims that they alleged or could have alleged in the action.

2. Class Notice

The parties selected, and the Court approved, Angeion Group to disseminate notice and handle claims administration. Angeion Group certified that it complied with the approved notice program. ECF No. 93. As part of the notice program, Angeion Group, after updating addresses through the United States Postal Service, sent long form notices to 73,676 class members' last known addresses and to 71,782 email addresses. Of the 6,783 mailed notices that were returned as undeliverable, Angeion Group was able to successfully resend 4,844 of them. It also successfully sent notices to 59,872 of the email accounts. The settlement website, which included information about the settlement, all forms, as well as on-line claim submission, received 13,634 visitors. The toll-free phone number received 1,044 calls. Angeion Group also had a summary notice published in the Philadelphia Inquirer, Pittsburgh Post-Gazette, Harrisburg Patriot News, Allentown Morning Call, and Erie Times-News.

Angeion Group received 12,542 timely claim forms, ten requests for exclusion from the settlement, and no objections to the settlement. Thus, the notice program generated approximately a 17% claims rate.

II. DISCUSSION

Under Federal Rule of Civil Procedure 23(e), the settlement of a class action requires court approval. Fed. R. Civ. P. 23(e)(2). A district court may approve a settlement agreement only “after a hearing and on finding that it is fair, reasonable, and adequate.” Id. The factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008). “The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court.” In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 299 (3d Cir. 1998) (quoting Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975)).

Where, as here, the court has not already certified the class prior to evaluating the settlement, it must determine whether the proposed settlement class satisfies the requirements of Rule 23(a) and (b), and then separately determine whether the settlement is fair to the class under Rule 23(e). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997); In re Nat’l Football League Players Concussion Injury Litig., 775 F.3d 570, 581 (3d Cir. 2014); In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010).

Under Rule 23(h), at the conclusion of a successful class action, class counsel may apply to a court for an award of attorney's fees. The amount of an attorney's fee award "is within the district court's discretion so long as it employs correct standards and procedures and makes finding of fact not clearly erroneous[.]" Sullivan v. DB Invs., Inc., 667 F.3d 273, 329 (3d Cir. 2011) (en banc) (internal quotation marks omitted).

A. Whether Class Certification Is Proper

At the final fairness stage, the court must undertake a "rigorous analysis" as to whether class certification is appropriate. In re Nat'l Football League Players, 775 F.3d at 582-83, 586. Under Rule 23(a), a plaintiff must demonstrate 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 party are typical of the claims or defenses of the class; and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Rule 23(b)(3), under which Silvis seeks class certification, requires 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 efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These twin requirements

are commonly referred to as predominance and superiority.
Sullivan, 667 F.3d at 296.

Finally, in addition to the Rule 23(a) and (b)(3) requirements, the Third Circuit imposes another factor that must be considered by the court: the ascertainability of the class.

1. Rule 23(a) Factors

a. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds forty, the numerosity prong has been met. Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001).

Numerosity is easily satisfied here as Ambit Energy's records show that there are 73,676 settlement class members.

b. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This commonality element requires that a plaintiff "share at least one question of fact or law with the grievances of the prospective class." Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (3d Cir. 2013). To satisfy the commonality requirement, class claims "must depend upon a common contention . . . of such

a nature that it is capable of classwide 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." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

Commonality exists in this case because all of the class members' claims stem from common issues such as what the rate term was for the supply of variable rate electric services, whether Ambit Energy breached its contracts with its customers in setting the actual variable rate charged, and the amount that Silvis and other members of the class have been injured.

c. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality inquiry is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994). Where claims of the representative plaintiff arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied. In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004).

The typicality element is satisfied because Silvis' claims are identical to those of the settlement class. All of the claims arise out of Ambit Energy's practices with respect to variable electricity rates. All of the class members share the same legal theories and all seek the same relief.

d. Adequacy of Representation

Rule 23(a)(4) requires a representative plaintiff to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "serves to uncover conflicts of interest between the named parties and the class they seek to represent." Amchem, 521 U.S. at 625. The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the "qualifications of counsel to represent the class," and second, it must assess whether there are "conflicts of interest between named parties and the class they seek to represent." Prudential, 148 F.3d at 312 (internal quotation marks and citations omitted).

First, class counsel is adequate. They have consulted with experts regarding the operation of the wholesale electricity market in Pennsylvania and conducted substantial discovery. Class counsel also have significant experience in litigating consumer class actions and other complex commercial cases.

Second, there are no conflicting or antagonistic claims. Silvis' claims are consistent with those of the class. The claims she asserted in her amended complaint and the terms of the Settlement Agreement apply the same to all class members and do not allow for preferential treatment. Silvis' interests are aligned with those of all class members, and all class members will have an equal opportunity to obtain benefits under the Settlement Agreement based on when they purchased electricity from Ambit Energy.

In sum, Silvis has demonstrated compliance with each of the Rule 23(a) prerequisites for class certification.

2. Rule 23(b)(3) Factors

In addition to satisfying each of the prerequisites in Rule 23(a), a class representative must show that the action falls into at least one of the three categories provided in Rule 23(b). Silvis brings this action under Rule 23(b)(3). Under Rule 23(b)(3), a class action may be maintained if: (1) common questions of law or fact predominate over questions affecting only individual members; and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623. Further, it assesses

whether a class action “would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.” Fed. R. Civ. P. 23(b)(3) Advisory Committee’s Note to 1966 Amendment.

The superiority requirement “asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.” Warfarin, 391 F.3d at 533-34 (internal quotation marks omitted). When assessing superiority and “[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.” Amchem, 521 U.S. at 620.

Silvis satisfies the predominance requirement because liability questions common to the settlement class substantially outweigh any possible individual issues. Such common questions include whether Ambit Energy set its variable electricity rates in the manner it represented to its customers or whether it overcharged them for electricity. Silvis’ claims and those of the class are based on the same legal theories and same uniform conduct.

Resolution of the claims of the settlement class is superior to individual law suits because it promotes consistency and efficiency of adjudication. Since the individual claims are

relatively small, without the class, individuals might lack incentive to pursue their claims. This resolution also provides specific relief to the class through well-defined administrative procedures, including the right to opt out or object. Finally, the settlement relieves the substantial judicial burden of repeated adjudications of the same issue.

Thus, the Court concludes that the class action meets the predominance and superiority requirements of Rule 23(b)(3).

3. Ascertainability

In addition to the Rule 23(a) and (b)(3) requirements, the Third Circuit imposes another requirement under Rule 23: ascertainability. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015). In Byrd, the Third Circuit explained that "[t]he ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria, and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." Id. (internal quotation marks omitted).

In this case, the putative class is ascertainable because the class is made up only of those who subscribed to a specific energy program during specific periods of time, and Ambit Energy's customer billing records provide a reliable and

administratively feasible mechanism for identifying such individuals.

Based on the above, the settlement class satisfies the requirements of Rule 23(a) and (b) (3), as well as the Third Circuit's ascertainability requirement. Therefore, the Court will certify the class for the purposes of this settlement.

B. Whether the Notice to the Class Members Was Adequate

Having determined that the class may be certified, the Court next reviews the notice procedures implemented by Silvis. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." Prudential, 148 F.3d at 306. Rule 23 includes two provisions concerning notice of the class members.

First, Rule 23(c) (2) (B) requires that class members be given the best notice practicable under the circumstances, including individual notice to all potential class members identifiable through reasonable efforts. Specifically, the Rule provides that such notice must, in clear, concise, and plain language, state: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) the class member's right to enter an

appearance by an attorney; (v) the class member's right to be excluded from the class; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of settlement on class members. Fed. R. Civ. P. 23(c)(2)(B).

Second, Rule 23(e) requires notification to all members of the class of the terms of any proposed settlement. Fed. R. Civ. P. 23(e)(1). This "notice is designed to summarize the litigation and the settlement" and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." Prudential, 148 F.3d at 327 (internal quotation marks omitted).

In the Court's memorandum and order granting preliminary approval of the settlement, the Court approved notice by direct mail, periodical publication, a settlement-specific website, and a toll-free telephone number. At that time, the Court reviewed the parties' notice program, including the language of the notices and found that they were clear, included all requisite information, and met the requirements of Rule 23(c)(2)(B) and (e). As described above, Angeion Group has represented that it complied with the approved notice program and that notice reached the vast majority of class members due to its diligent efforts.

Accordingly, the Court finds that the notice program used in this case satisfied Rule 23(c)(2)(B) and (e) and was

reasonably calculated to apprise the class of the pendency of the action, the proposed settlement, the class members' rights to opt out or to object, and the applicability of a final judgment on all participating class members. Fed. R. Civ. P. 23(c) (2) (B); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

A. Whether the Proposed Settlement Is Fair and Reasonable

After class certification, the court must approve the settlement of a class action and determine whether the proposed settlement is "fair, adequate, and reasonable," as required by Rule 23(e) (2). Prudential, 148 F.3d at 316-17. Where the parties simultaneously seek certification and settlement approval, the Third Circuit requires "'courts to be even more scrupulous than usual' when they examine the fairness of the proposed settlement." Id. at 317 (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)). This heightened standard is designed to ensure that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members. Id. Ultimately, "[t]he decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." Girsh, 521 F.2d at 156.

In Girsh, the Third Circuit identified nine factors to be considered when determining the fairness of a proposed 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 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. 521 F.3d at 157. The Court addresses the Girsh factors below, some individually, some together as a group.

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

The first Girsh factor is the complexity, expense, and likely duration of the litigation, which aims to take into account the “probable costs, in both time and money, of continued litigation.” In re Cendant Corp. Litig., 264 F.3d 201, 233 (3d Cir. 2001) (internal quotation marks omitted).

This case has been pending since August 27, 2014. Its continuation would necessitate complex, expensive, and lengthy litigation. As shown by its previous responsive briefs, Ambit

Energy would have defended itself vigorously. The parties would have been required to file comprehensive class certification briefs and the Court would have held a hearing with witnesses on the issue. The parties also would have faced the possibility of a Rule 23(f) interlocutory appeal of the certification decision. After resolution of this issue, the parties would still be required to perform merits and expert discovery, file additional dispositive motions, and face a trial. The likely prospect of continued protracted litigation weighs strongly in favor of approving the settlement.

2. The Reaction of the Class to Settlement

The second Girsh factor to be considered is the reaction of the class to the settlement. "In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors." Gen. Motors, 55 F.3d at 812.

Of the 12,542 claims received, only ten class members requested exclusion from the class and no members objected to the settlement or attorney's fee petition. Thus, this factor also weighs heavily in favor of the settlement. See, e.g., Prudential, 148 F.3d at 318 (affirming district court's conclusion that class reaction was favorable when 19,000 out of 8,000,000 class members opted out and 300 objected); Stoetzn
v. U.S. Steel Corp., 897 F.2d 115, 118-19 (3d Cir. 1990) (noting

that the second Girsh factor “strongly favor[ed]” settlement where “only twenty-nine” “of 281 class members” objected to the settlement’s terms).

3. The Stage of the Proceedings

The third factor to be considered is the stage of the proceedings and the amount of discovery completed. This Girsh factor requires the Court to evaluate whether Plaintiffs had an “adequate appreciation of the merits of the case before negotiating” settlement. Prudential, 148 F.3d at 319 (internal quotation marks omitted).

Here, the settlement was finalized only after a rigorous mediation during which the parties engaged in analysis of the substantive claims and defenses in the case. Moreover, the case has been pending since August 2014 and the parties have briefed multiple dispositive motions which afforded counsel an opportunity to assess the strengths and weaknesses of the case. Finally, class counsel has litigated similar cases and has a thorough understanding of the factual and legal issues involved. The Court concludes that this factor weighs in favor of settlement and that the parties sufficiently appreciate the merits and dangers of the case.

4. The Risks of Continued Litigation

The fourth, fifth, and sixth Girsh factors are the risks of establishing liability, the risks of establishing

damages, and the risks of maintaining the class action throughout the trial. These factors "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." Prudential, 148 F.3d at 319. As to the risks of establishing liability, this factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." Gen. Motors, 55 F.3d at 814. As to damages, this factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." Cendant Corp., 264 F.3d at 238-39 (quoting Gen. Motors, 55 F.3d at 816). Finally,

[b]ecause the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor [concerning the risks of maintaining the class action through trial] measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial.

Warfarin, 391 F.3d at 537 (internal quotation marks and citations omitted).

As discussed above, the parties have had sufficient opportunity to evaluate the strengths and weaknesses of the case, including the risks of continuing the litigation. Such risks include the possibility of class decertification or that conflicting state laws would hamper certification. Silvis would

also risk a finding that she failed to establish that Ambit Energy breached its contract or overcharged the class members for electricity. The class members would also run the risk of being unable to adequately prove their individual damages. The Settlement Agreement provides a remedy now to all class members, rather than risking an uncertain result after years of expensive litigation. Thus, these factors weigh in favor of the settlement.

5. The Ability of the Defendant to Withstand Greater Judgment

The seventh factor regards the ability of the defendant to withstand a greater judgment. This factor is “most clearly relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant’s financial circumstances do not permit a greater settlement,” Reibstein v. Rite Aid Corp., 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). That is not the case here.

Ambit Energy is capable of withstanding a larger judgment. However, it would still not be required to pay more than the class members are entitled. See Warafin 391 F.3d at 538 (finding this factor irrelevant since the defendant would not have to pay more than what the class members were owed). The Court finds that this factor does not weigh heavily for or against the settlement. See, e.g., In re Processed Egg Prod.

Antitrust Litig., No. 08-MD-2002, 2016 WL 3584632, at *16 (E.D. Pa. June 30, 2016) (“Even if the Court were to presume that the defendants’ resources far exceeded the settlement amount, in light of the balance of the other factors considered which indicate the fairness, reasonableness, and adequacy of the settlement, the ability of the defendants to pay more, does not weigh against approval of the settlement.”).

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

The eighth and ninth factors are the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation. These factors examine “whether the settlement represents a good value for a weak case or a poor value for a strong case.” Warfarin, 391 F.3d at 538.

In light of the risks of establishing liability and damages at trial, Silvis believes that the settlement falls within the range of reasonableness and is better than the other possible alternatives, which include little or no recovery. Although a verdict in this case might possibly have been greater than the value of the settlement, such a verdict would still face the risk of being overturned on appeal. The proposed settlement gives the class members significant relief at the

earliest possible time, and, thus, these factors weigh in favor of settlement.

It is clear that upon balancing of the Girsh factors, they tip strongly in favor of the settlement. Thus, the Court finds the settlement fair and will approve the Settlement Agreement.

D. Attorney's Fees, Costs, and the Service Award

When class counsel successfully settle a class action, they may apply for reasonable attorney's fees and nontaxable costs. Fed. R. Civ. P. 23(h). "[A] thorough judicial review of fee applications is required in all class action settlements." Gen. Motors, 55 F.3d at 819. The amount of the fee award "is within the district court's discretion so long as it employs correct standards and procedures and makes finding of fact not clearly erroneous[.]" Sullivan, 667 F.3d at 329 (internal quotation marks and citation omitted).

In the Settlement Agreement, Ambit Energy agreed to separately pay Silvis' service award of up to \$5,000 and attorney's fees and costs of up to \$1,450,000. As of the time Silvis filed her motion for attorney's fees, class counsel contended that their fee loadstar was \$1,367,506 with \$39,705.90 in expenses. At the final settlement approval hearing, counsel represented that the loadstar likely had increased by \$30,000 or \$40,000, and that, by the end of case, it would likely increase

by a similar amount. Counsel reported that the then current loadstar figure represents 2,187.8 hours of work at an average rate of \$623 per hour.

In that attorney's fees are not being paid from a common fund, the use of the loadstar method is appropriate. "The lodestar method is 'designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." In re Diet Drugs, 582 F.3d 524, 540 (3d Cir. 2009) (quoting Prudential, 148 F.3d at 333). "The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." In re Rite Aid Corp. Secs. Litig., 396 F.3d 294, 305 (3d Cir. 2005). The lodestar is then subject to a multiplier when justified by the specific facts of the case. See, e.g., id.; Lindy Bros. Builders, Inc. v. Am. Radiator & Std. Sanitary Corp., 540 F.2d 102, 117-18 (3d Cir. 1976).

The Court concludes that given the scope and complexity of the litigation, including the time spent on pre-litigation investigation and research, motions practice, and mediation, that the hours spent by counsel are reasonable.

The Court further concludes that the hourly rates charged by class counsel, and which average \$623 per hour, are "reasonable in light of the given geographical area, the nature of the services provided, and the experience of the attorneys." In re AT&T Corp. Secs. Litig., 455 F.3d 160, 164 (3d Cir. 2006) (internal quotations and citations omitted); see also, e.g., Moore v. GMAC Mortg., No. 07-4296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (finding reasonable rates between \$325 and \$860 per hour); In re Merck & Co., Inc. Vytorin Erisa Litig., No. 08-285DMC, 2010 WL 547613, at *13 (D.N.J. Feb. 9, 2010) (approving rates up to \$835 per hour).

The loadstar reported in the motion was \$1,367,506. In that counsel seeks \$1,450,000 in fees, the multiplier at that time was 1.1. However, given the additional time spent on the case, and the additional work left to be performed, it is likely that the multiplier will ultimately be one. This further indicates that the fees requested are reasonable. See In re Cendant Corp. Prides Litig., 243 F.3d 722, 742 (3d Cir. 2001) ("[m]ultipliers ranging from one to four are frequently awarded") (internal quotation marks and citation omitted). The Court concludes that, based upon the loadstar method, the attorney's fees requested are reasonable.

The Court has also determined that counsel's fee meets the Gunter/Prudential factors. See In re Diet Drugs, 582 F.3d at

541. These factors were formulated for use with the percentage-of-recovery method for determining fees, but are also helpful when utilizing the loadstar method. The factors are: (1) the size of the fund created and the number of beneficiaries; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by class counsel, (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement. Id.

Applying the Gunter/Prudential factors to this case: (1) the total class is 73,676 and the settlement will compensate all class members who submitted a timely claim form (of which there were 12,542); (2) there have been no objections to the settlement and only ten opt-outs; (3) class counsel is nationally recognized in consumer class actions and Ambit Energy was represented by experienced and skilled attorneys; (4) the case is complex and the parties have already expended

significant time and resources on it, and would expend far more if it went to trial; (5) there is a real risk of non-payment in that class counsel's fee is fully contingent and there is a genuine risk of no recovery; (6) class counsel's time and expense records show a substantial expenditure of hours since 2014, including extensive pre-suit investigation, opposition to dispositive motions, appellate briefing, discovery, and settlement negotiations; (7) The award is similar to others obtained, see, e.g., Wise v. Energy Plus Holdings LLC, 11-cv-7345 ECF No. 74 (Sept. 17, 2013 S.D.N.Y. 2013) (approving \$3,300,000 in fees in a similar case with an economic value of \$12,478,451 to \$14,314,142); (8) no work was performed by other groups such as government agencies; (9) had Silvis won at trial, class counsel's contingency fee would have been higher than what they now seek in that it would have been a third of the estimated \$9,300,000 full recovery; and (10) while the settlement terms are beneficial, it is not clear to the Court how they are particularly innovative. In weighing these factors, all support the fee request except for the final factor, which is neutral.

Silvis' counsel also represented that the \$39,705.90 in costs consists of standard expense items such as copying fees, expert fees, computerized research, travel, and discovery expenses. The Court recognizes that in bringing the action to a

close, counsel will incur additional expenses. After examining the records provided by counsel, the Court concludes that these costs are reasonable.

Finally, class counsel seeks a \$5,000 service award for Silvis. Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation and [] reward the public service of contributing to the enforcement of mandatory laws." Sullivan, 667 F.3d at 333 n.65 (internal quotation marks omitted).

The support for Silvis' contributions is not detailed. Counsel declared that "Ms. Silvis came forward to prosecute this litigation for the benefit of the class" and that she "provided a valuable service to the class in both the prosecution and settlement of this action, including producing documents and answering interrogatories. Although her scheduled deposition was cancelled due to the parties' settlement negotiations, Ms. Silvis was fully prepared to provide testimony on behalf of herself and the class." ECF No. 92-2 pp. 2-3. The Court finds that counsel has not fully justified a \$5,000 service award. However, the Court will award Silvis \$2,500, which the Court concludes is commensurate with the apparent time and effort expended by her.

II. CONCLUSION

The Court finds that the requirements for class certification under Rule 23 have been met for settlement purposes. The Court further concludes that the Settlement Agreement is fair, reasonable, and adequate and, thus, will approve it. Finally, the Court finds that the requests for counsels' fees and costs, and a \$2,500 service award for Silvis are reasonable. As a result, the Court will grant Silvis' Unopposed Motion for Final Approval of Class Action Settlement and Unopposed Motion for Approval of Attorney's Fees and Expenses.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMY SILVIS, on behalf of herself and all others
similarly situated,

Plaintiff,

v.

AMBIT NORTHEAST, LLC,

Defendant.

No. 2:14-CV-05005-ER

CLASS ACTION

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter came before the Court for hearing, on February 1, 2018, pursuant to the Order of this Court, dated February 22, 2018 (“Preliminary Approval Order”) (ECF No. 90), and on the application of the Plaintiff for a judgment finally approving the Settlement that is set forth in *Plaintiff’s Amended Unopposed Motion For Preliminary Approval Of Class Action Settlement* dated October 17, 2017, (collectively, including the Exhibits, the “Settlement Agreement”), (ECF Nos. 81 through 81-10). Due and adequate notice having been given to the Settlement Class as required in said Preliminary Approval Order, and the Court having considered all papers filed and proceedings had for this matter and otherwise being fully informed in the premises and good cause appearing thereupon, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal incorporates by reference the Preliminary Approval Order (ECF No.’s 89 and 90). This Final Judgment and Order of Dismissal further incorporates by reference the definitions in the Settlement Agreement (specifically, ECF No. 81-3) and unless otherwise specified herein all capitalized terms

contained in this Final Judgment and Order of Dismissal shall have the meanings attributed to them in the Settlement Agreement.

2. For purposes of effectuating this Settlement only, the Court hereby Orders final certification of the proposed Settlement Class, having found that the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. The Settlement Class is defined as:

All persons in the Commonwealth of Pennsylvania who were enrolled as a customer of Defendant and were on Defendant's Select Variable Plan at any time from January 1, 2011 through February 22, 2018.

Excluded from the Settlement Class are:

Defendant, any entities in which it has a controlling interest, and any of their parents, subsidiaries, affiliates, officers, directors, employees, and members of such person's immediate family; the presiding judge(s) in this case and their immediate family; and any person who has previously released claims against Defendant.

3. Under the Settlement, Defendant has agreed to pay Eligible Class Members as follows:

- i. Each Class Member with a date of enrollment as Defendant's Customer from January 1, 2011, through January 12, 2014, and who was on Defendant's Select Variable Plan at any time, will receive a check in the amount of 15% of all amounts paid to Defendant by the Class Member only for the Time Periods during which such Settling Class Members were on the Select Variable Plan.
- ii. Each Class Member with a date of enrollment as Defendant's Customer from January 13, 2014, through the date of Preliminary Approval, and who was on Defendant's Select Variable Plan at any time, will receive a check in the amount of 2% of all amounts paid to Defendant by the Class Member only for the Time Periods during which such Class Member was

on the Select Variable Plan¹.

4. A list of those persons who timely and validly filed requests for exclusion from the Settlement Class is attached as Exhibit “C” to the Declaration of Settlement Administrator (ECF No. 93). The persons appearing on Exhibit “C” to the Declaration of Settlement Administrator shall not be members of the Settlement Class and shall have no right to receive any portion of the Settlement. All members of the Settlement Class (whether or not he, she or it submits a valid Claim Form) who have not validly excluded themselves from the Settlement Class shall be bound by all determinations and judgments concerning the Settlement Agreement and the Settlement contemplated thereby.

5. The Court appoints Plaintiff Amy Silvis to serve as representative of the Settlement Class (“Class Representative”). The Court appoints the law firms of Kohn, Swift & Graf, P.C., and Marcus & Mack, P.C. as Class Counsel for the Settlement Class.

6. Solely for the purposes of effectuating the Settlement, with respect to the Settlement Class and pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court further finds and concludes that:

- a) Solely for purposes of the proposed settlement, certification of the Settlement Class is warranted because: (i) the members of the Settlement Class are so numerous that joinder is impracticable; (ii) there are questions of law and fact common to the Settlement Class; (iii) Plaintiff’s claims present issues that are typical of the

¹ A limited number of members of the Settlement Class with dates of enrollment as Defendant’s customer from January 13, 2014, through the Preliminary Approval Date did not receive an updated Disclosure Statement from Defendant prior to becoming enrolled on Defendant’s Select Variable Plan. These members of the Settlement Class, if they are Eligible Class Members, will be treated as if they had enrolled as Defendant’s customer on or before January 12, 2014, for purposes of determining the amount of the check they will receive in the Settlement. Defendant states that 4,274 Class Members qualify for this exception.

proposed Settlement Class; and (iv) the Plaintiff and Class Counsel fairly and adequately represent and protect the interests of the Settlement Class. The Court further finds that for purposes of this Settlement, issues of law and fact common to the Settlement Class predominate over issues affecting only individual Settlement Class members and that settlement of this action is superior to other means available for fairly and efficiently adjudicating the controversy. The Court also concludes that, because this Action is being settled rather than litigated, the Court need not consider manageability issues that might be presented by the trial of a class action involving the issues in this Action.

- b) Notice has been provided to the Settlement Class of the pendency of this Action, the conditional certification of the Settlement Class for purposes of this Settlement, and the preliminary approval of the Settlement Agreement and the Settlement contemplated thereby. The Court finds that the notice provided was the best notice practicable under the circumstances to all persons entitled to such notice and fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process.
- c) The Court finds that the claims administration plan described in the Settlement Agreement fairly and adequately addresses the matters of settlement administration, claims submission and provision of the Settlement to Authorized Claimants. To become an Authorized Claimant to the Class Settlement, a Settlement Class member must submit a claim in the manner set forth in the instructions accompanying the Claim Form. The Claims Administrator shall

provide the appropriate Settlement distribution to Authorized Claimants in accordance with the claims administration plan and the Settlement Agreement.

- d) All Settlement Class members whose claims are not approved (including, without limitation, anyone who does not submit a Claim Form by the end of the Claims Period) will be barred from receiving any distribution from the Settlement, but in all other respects will be bound by all of the terms of the Settlement Agreement and the terms of this Final Judgment and Order of Dismissal, including without limitation, the releases provided for in the Settlement Agreement and in this Order, and will be barred from bringing or prosecuting any action against the Released Persons concerning the Released Claims.
- e) The Court finds that the Settlement Agreement was arrived at in good faith following extensive arm's-length negotiations between experienced counsel, and the Settlement is fair, reasonable and adequate as to the Settlement Class within the meaning of Rule 23 of the Federal Rules of Civil Procedure. The Court therefore approves the Settlement Agreement and the Settlement contemplated thereby in all respects, and orders the Parties to perform in accordance with its terms to the extent the Parties have not already done so.
- f) This Action and all of the Released Claims are dismissed with prejudice. The Parties are to bear their own costs, except as otherwise provided in the Settlement Agreement.
- g) Upon the Effective Date, the Plaintiff and the Settlement Class shall be deemed to have, and by operation of this Final Judgment and Order of Dismissal shall have,

fully, finally, and forever released, relinquished and discharged the Released Persons from all Released Claims.

- h) The Court further orders that (a) all proceedings in the Action are stayed, other than proceedings in furtherance of the Settlement; and (b) all Settlement Class members and all persons acting or purporting to act on behalf of any Settlement Class member(s), who did not timely and properly opt-out from the Settlement Class in accordance with the court-ordered procedures, are enjoined under applicable law, including but not limited to the All Writs Act, 28 U.S.C. 1651, the Anti-Injunction Act, 28 U.S.C. 2283, and Federal Rule of Civil Procedure 65, from commencing or prosecuting any action, suit, proceeding, claim, or cause of action (except those based on personal injury), in any jurisdiction, court or forum against a Released Party relating to or arising out of the subject matter of the Action.
- i) Neither the Settlement Agreement, nor the fact or any terms of the Settlement, is evidence, or an admission or concession by any Party, any Released Person or any signatory to the Settlement Agreement, of any fault, liability or wrongdoing whatsoever, as to any facts or claims alleged or asserted in the Action, or any other actions or proceedings. The Settlement Agreement is not a finding or evidence of the validity or invalidity of any claims or defenses in the Action or any wrongdoing by the Defendant or any damages or injury to any Settlement Class member. Neither the Settlement Agreement, nor any of the terms and provisions of the Settlement Agreement, nor any of the negotiations or proceedings in connection therewith, nor any of the documents or statements

referred to therein, nor the Settlement, nor the fact of the Settlement, nor the Settlement proceedings, nor any statements in connection therewith: (i) will (A) be argued to be, used or construed as, offered or received in evidence as, or otherwise constitute an admission, concession, presumption, proof, evidence, or a finding of any liability, fault, wrongdoing, injury or damages, or of any wrongful conduct, acts or omissions on the part of any of the Released Persons, or of the validity or infirmity of any defense, or of any damage to Plaintiff or any Settlement Class member; or (B) otherwise be used to create or give rise to any inference or presumption against any of the Released Persons concerning any fact alleged or that could have been alleged, or any claim asserted or that could have been asserted in the Action, or of any purported liability, fault, or wrongdoing of the Released Persons or of any injury or damages to any person; or (ii) will otherwise be admissible, referred to or used in any proceeding of any nature, for any purpose whatsoever, except in connection with consummating or enforcing the Settlement Agreement, the Preliminary Approval Order, or this Final Judgment and Order of Dismissal.

- j) The Court finds that a “Fee and Expense Award” to Class Counsel in the amount of \$1,450,000.00 is fair and reasonable. Therefore, pursuant to the Settlement Agreement, Defendant shall pay, within ten (10) business days of the latest date of the following: (1) the Effective Date; (2) the date that the time for taking an appeal from the order awarding the fees has expired, with no appeal being filed; or (3) if an appeal is taken from the order awarding the fees, the highest court to which such appeal may be taken affirms the order awarding the fees.

- k) The Court further finds that a Named Plaintiff Enhancement Award of \$2,500.00 to the Class Representative is fair and reasonable, which Named Plaintiff Enhancement Award shall be paid separately by Defendant within ten (10) business days of the latest date of the following: (1) the Effective Date; (2) the date that the time for taking an appeal from the order awarding the Named Plaintiff Enhancement Award has expired, with no appeal being filed; or (3) if an appeal is taken from the order awarding the Named Plaintiff Enhancement Award, the highest court to which such appeal may be taken affirms the order awarding the Named Plaintiff Enhancement Award.
- l) Pursuant to the agreement of the Parties, the Court hereby severs the above Fee and Expense Award from this Final Judgment and Order of Dismissal so that it shall immediately become a separate and independent Order and not part of this Final Judgment and Order of Dismissal.
- m) Without affecting the finality of this Final Judgment and Order of Dismissal in any way, this Court hereby retains continuing jurisdiction over: (i) implementation of the Settlement and the claims administration plan, including without limitation, administrative determinations of the Settlement Administrator or Defendant accepting and rejecting claims and any provision regarding payment of the Settlement; (ii) the payment of attorneys' fees and expenses; and (iii) both Parties and the Parties' Counsel for the purpose of construing, enforcing, and administering the Settlement Agreement.
- n) If (i) said Final Judgment and Order of Dismissal is reversed or (ii) the Effective Date otherwise does not occur, then, in any such event:

- 1) The Settlement Agreement , and all orders entered and releases delivered in connection with the Settlement, including without limitation the certification of the Action as a Settlement Class Action, the Preliminary Approval Order, this Final Judgment and Order of Dismissal and the Fee and Expense Award, will be null and void and of no further force or effect, without prejudice to either Party, and may not be introduced as evidence, referred to, or used as the basis for any arguments or taking any position whatsoever in any actions or proceedings by any person or entity, in any manner or for any purpose, including but not limited to claim preclusion (res judicata), issue preclusion (collateral estoppel) or judicial estoppel; and
- 2) Each Party will be restored to her or its respective position as of the date the Settlement Agreement was signed (October 6, 2017) and they will proceed in all respects as if the Settlement Agreement had not been circulated, the Settlement Agreement had not been entered into, and the related orders had not been entered, and in that event all of their respective claims and defenses as to any issue in the Action will be preserved without prejudice in any way.
- 3) In addition, the Released Persons shall retain all substantive and procedural rights and defenses, including but not limited to the right to take any action and take any position in opposition to certification of a litigation class action, which rights and defenses shall not be affected by the doctrines of judicial estoppel, issue preclusion (collateral estoppel) or

claim preclusion (res judicata), or any other doctrine, or waived, limited, or prejudiced in any way whatsoever by the Parties' efforts to obtain approval of the certification of a Settlement Class action, the Settlement, and the Settlement Agreement.

SO ORDERED, this 16th day of August, 2018

/s/ Eduardo C. Robreno
Eduardo C. Robreno
U.S. DISTRICT JUDGE