UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEGAN BARRETT, LINDSEY HOUSER, JENNIFER JONES, JENNIFER SEARD, KIMBERLY CLINTON, ERIN ECKENRODE, JULIE SMYTH, MARIE AVILA, CHRISTY LOWDER and TRACY LE individually and on behalf of a class of similarly situated female employees, **Plaintiffs,** **-- against --** **FOREST LABORATORIES, INC. and FOREST PHARMACEUTICALS, INC.** **Defendants.**	**Civil Action No. 1:12-cv-05224 (RA) (GWG)** **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF THE CLASS SETTLEMENT**

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I. INTRODUCTION

This case involves individual, class, and collective claims of gender and pregnancy discrimination. Class Representatives Marie Avila, Megan Barrett, Kimberly Clinton, Erin Eckenrode, Lindsey Houser, Jennifer Jones, Tracy Le, Christy Lowder, Jennifer Seard, and Julie Smyth (collectively, "Class Representatives" or "Plaintiffs"), on behalf of themselves and members of the Class defined below, and Defendants Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc. (collectively, "Forest," or "Defendants"), have entered into a proposed settlement of the class and collective claims ("Settlement") and executed a Class Action Settlement Agreement ("Settlement Agreement"). See Exhibit 1 to the accompanying Declaration of Deborah K. Marcuse ("Marcuse Decl."). Plaintiffs and Defendants (the "Parties") also have agreed on a proposed class notice ("Class Notice"), Exhibit B to the Settlement Agreement (Marcuse Decl. Ex. 1).

After more than five years of litigation and months of intensive arms' length negotiations, the Parties reached this Settlement to resolve the class and collective claims in exchange for a $4 million non-reversionary payment. In accordance with the "strong judicial policy in favor of settlements, particularly in the class action context," *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted), the Court should preliminarily approve the proposed Settlement.

In particular, and as discussed below, the Court should grant the Class Representatives' Unopposed Motion for Preliminary Approval of the Class Settlement ("Preliminary Approval Motion"), and preliminarily approve the proposed settlement, certify the proposed Class for purposes of settlement, certify the collective action for purposes of settlement, approve the proposed Class Notice, and enter an order setting dates for the fairness hearing and related matters.

II. BACKGROUND

On July 5, 2012, Class Representatives Barrett, Houser, Jones, and Seard filed a Class Action Complaint against Defendants in the United States District Court for the Southern District of New York. See Dkt. #1. Plaintiffs are represented by Sanford Heisler Sharp, LLP and Feinstein Doyle Payne & Kravec, LLC ("Class Counsel"). Defendants are represented by Morgan, Lewis & Bockius LLP.

Plaintiffs filed an Amended Class Action Complaint on November 5, 2012, *inter alia*, joining Class Representatives Clinton, Eckenrode, Smyth, Avila, and Lowder.[1] See Dkt. #73-1. On March 20, 2013, Plaintiffs filed a Second Amended Class Action Complaint (the "Complaint"), *inter alia*, joining Class Representative Le. See Dkt. #114.

In their Complaint, Plaintiffs bring claims on behalf of a nationwide class of female sales representatives under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII") and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (the "Equal Pay Act" or the "EPA"). Plaintiffs assert class claims of gender discrimination in pay and promotion as well as individual claims of gender discrimination and violation of the Family and Medical Leave Act ("FMLA"). On September 2, 2015, the Court conditionally certified a collective action regarding certain claims under the EPA. Dkt. #143.

For purposes of the proposed settlement, both the class and the collective (together, "Class") are defined as:

> All female sales force employees who are or were employed by Forest Laboratories, Inc., Forest Pharmaceuticals, Inc., or any of their affiliates, parents, predecessors, successors, and assigned to a legacy-Forest position of Sales Representative,

[1] Andrea Harley was also added as a named plaintiff in the Amended Class Action Complaint. On February 22, 2016, Ms. Harley voluntarily dismissed her individual, collective, and class claims against Forest with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), with each party bearing its own attorneys' fees, costs, and expenses.

> Specialty Representative, Hospital Representative, Institutional Representative and/or Regional Sales Trainer in the United States for at least one day between February 6, 2010 and April 3, 2017.

Settlement Agreement § 3.1(d).

The Parties engaged in extensive formal discovery, including document production, interrogatories, and more than 40 depositions, including depositions of the 10 Named Plaintiffs and 16 Opt-In Plaintiffs from around the country. In addition, Class Counsel have conducted extensive investigation into the facts, circumstances, and legal issues associated with the litigation. This investigation included examining the numerous documents and data relating to the underlying events and transactions and Forest's defenses, and reviewing the law applicable to Plaintiffs' claims and Forest's defenses. Forest's counsel has also conducted a thorough investigation into Plaintiffs' claims and the underlying events and transactions.

In an effort to avoid further unnecessary litigation, cost, and expense, the Parties engaged in mediation after almost five years of litigation. The Parties retained a well-known and experienced mediator, David A. Rotman, Esq., who is skilled at mediating complex class actions, to assist them in their negotiations. On April 3, 2017, the Parties participated in a full-day mediation before Mediator Rotman. Declaration of Deborah K. Marcuse ¶ 24. After more than twelve hours of intense negotiations, the Parties reached an agreement in principle to settle the case and executed a term sheet. (*Id.*) In the nearly four months since the mediation, the Parties have expended significant time negotiating and finalizing the details of the settlement. (*Id.* ¶ 25). The Settlement Agreement (Marcuse Decl. Ex. 1) was finalized by the parties on September 18, 2017 and fully executed on October 4, 2017.

The Parties and their Counsel recognize that, in the absence of an approved settlement, they will face a long litigation course, including a Rule 23 motion for class certification, a motion for

final certification of the EPA collective action, motions for summary judgment, and trial and appellate proceedings that would consume time and resources and present all Parties with ongoing litigation risks and uncertainties. Marcuse Decl. ¶ 31; Declaration of David W. Sanford ("Sanford Decl.") ¶¶ 18-19. The Parties wish to avoid these risks and uncertainties, as well as the consumption of further time and resources, through a settlement pursuant to the terms and conditions of the Settlement Agreement.

After extensive discovery, analysis, and deliberation, the Parties are of the opinion that the Settlement described in the Settlement Agreement is fair, reasonable, and adequate. Class Counsel and the Class Representatives believe that the Settlement serves the best interest of the Class based on all the facts and circumstances, including the risk of significant delay and the uncertainty of class certification. In reaching this conclusion, Class Counsel has considered, among other things, the risks of litigation (including the risks of establishing Forest's liability and the costs incurred by the Class Members), the time necessary to achieve a final resolution through trial and any appeals, the complexity of Plaintiffs' claims, and the benefits accruing to the Class under the Settlement. Sanford Decl. ¶¶ 18-20.

Although Forest continues to deny all liability with respect to any and all of the claims alleged in the Complaint, Forest nevertheless considers it desirable that the action be conclusively settled and terminated on the terms and conditions set forth below. The settlement of the action and the attendant final dismissal of the action will avoid the substantial expense, inconvenience, and risk of continued litigation and will bring Plaintiffs' claims to an end. [2]

[2] Forest has entered into separate settlement agreements with each of the Class Representatives to resolve their individual claims. These agreements provide the Class Representatives with monetary relief in addition to that set forth in this Agreement.

Plaintiffs now seek preliminary approval of the Parties' Settlement. Plaintiffs further request that the Court certify the proposed Class, approve the proposed Class Notice, and establish a date for a fairness hearing before the Court on final approval of the Settlement, as well as dates for objections and responses. A proposed preliminary approval order ("Preliminary Approval Order") is included as Exhibit 2 to the Marcuse Declaration.

III. KEY TERMS OF THE PROPOSED SETTLEMENT

Under the terms of the proposed settlement, Forest will pay $4,000,000 ("Total Settlement Amount") to settle and satisfy the "Released Claims", as that term is defined in the Settlement Agreement. Marcuse Decl. Ex. 1 § 4.1(a). The Total Settlement Amount will be allocated for payments to Class members ("Class Member Awards"), service awards ("Service Awards"), attorneys' fees and costs, and the fees and costs of the settlement administrator ("Settlement Administrator"). *Id.* The Total Settlement Amount will be placed in the Class Monetary Awards Settlement Fund, as specified in the Settlement Agreement. *Id.* § 4.2.

Class members who do not opt out of the Settlement ("Settlement Class Members") will be eligible to receive Class Member Awards as determined by a formula (the "Allocation Formula"). *Id.* § 5.1(a). The Allocation Formula is based on the total number of weeks worked during the liability period ("Workweeks") by all Settlement Class Members and the number of Workweeks worked by each Settlement Class Member. *Id.* § 5.1(a).

Subject to Court approval, the following service awards ("Service Awards") will be paid from the Class Monetary Awards Settlement Fund: (i) Service Award of $15,000 for each of the ten Class Representatives; (ii) Service Award of $2,500 for each of the sixteen collective action members who were deposed, provided they do not opt out of the settlement; and (iii) $1,000 for

each of the three collective action members who submitted written discovery but who were not deposed, provided they do not opt out of the settlement. *Id*. § 6.1.

The Service Awards are designed to compensate the Class Representatives for their dedicated service in pursuing the class and collective claims and for procuring the Settlement. Each of the Class Representatives has undertaken substantial efforts, risks, and expenditures on behalf of the Class Members, without which the Settlement could not have been achieved. Marcuse Decl. ¶¶ 35-38. The Service Awards will also provide smaller awards for opt-in Class Members who assisted the Class by appearing for deposition and responding to written discovery, and still smaller awards for opt-ins who submitted written discovery. *Id*. The Court need not rule on the Service Awards now; a formal application will be filed prior to the Final Approval Hearing.

In addition, Class Counsel will request an award of Class Counsel's attorneys' fees and reasonable litigation expenses in a total amount to be determined by the Court, up to a maximum of $1,626,666. Marcuse Decl. Ex. 1 § 7.2. To date, Class Counsel has incurred more than $480,000 in reasonable and necessary litigation costs. Marcuse Decl. ¶ 40. After reimbursement of litigation expenses, the remaining amount sought – approximately $1.14 Million (29% of the Total Settlement Amount) – will compensate Class Counsel for a fraction of the thousands of hours they have expended on behalf of the class. *Id.* ¶ 42. Indeed, Class Counsel have expended over 13,000 hours on this matter, and their current lodestar exceeds $7,000,000. *Id.* ¶ 41. The Court need not rule on Class Counsel's fees and expenses now; a formal application will be filed prior to the Final Approval Hearing.

Finally, Class Counsel will apply to the Court for payment from the Total Settlement Amount of the Settlement Administrator's fees and costs, which may not exceed $35,000. Settlement Agreement § 7.6.

IV. THE COURT SHOULD CERTIFY THE PROPOSED RULE 23 CLASS FOR PURPOSES OF SETTLEMENT

A. General Standards

The Court may certify a class for settlement purposes if the proposed class meets the requirements for class certification under Federal Rule of Civil Procedure 23. *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). A settlement class must satisfy both Federal Rules of Civil Procedure 23(a) and 23(b) for the Court to certify the class.

Under Rule 23(a), a class action must meet the following requirements: (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). If each of the Rule 23(a) factors are met, "parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Here, the parties propose certification pursuant to Rule 23(b)(3), which permits a litigant to maintain a class action if the Court "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy."

B. Numerosity Is Satisfied

The numerosity requirement is satisfied "if the class is sufficiently numerous that joinder is 'impracticable.'" *Zeller v. PDC Corporation*, No. 13–cv–5035, 2016 WL 748894, at *3 (E.D.N.Y. Jan. 28, 2016) (quoting *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)). Numerosity is presumed when a putative class has 40 members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d

473, 483 (2d Cir. 1995). Because the Class here includes approximately 3200 individuals, numerosity is easily satisfied. Marcuse Decl. ¶ 32.

C. Commonality Is Satisfied

There are also questions common to the Class. In determining whether a plaintiff can show that the claims of potential class members share common questions of law or fact, the Rule does **not** require that "'all questions of law or fact raised be common.'" *Karic v. Major Auto. Companies, Inc.*, No. 09-cv-5708, 2015 WL 9433847, at *5 (E.D.N.Y. Dec. 22, 2015) (citing *Halford v. Goodyear Tire & Rubber Co.*, 161 F.R.D. 13, 18 (W.D.N.Y. Dec. 22, 1995) (other citations omitted)). To warrant class certification, there must be a "unifying thread" among the claims. *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986). So long as "common questions...predominate," any differences in the circumstances raised by individual members will not defeat the requirement of commonality. *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 304 (S.D.N.Y. 2010). Indeed, even a single common question will suffice to satisfy the commonality requirement. *Meyer v. U.S. Tennis Ass'n*, 297 F.R.D. 75, 84 (S.D.N.Y. 2013).

Common questions here include whether Forest administered its policies regarding base salary such that women disproportionately received lower base salaries than men and whether Forest's policies and practices disproportionately disadvantaged women—including women who are pregnant—in obtaining promotions. *See also* Complaint (Dkt. #114) ¶ 414 (detailing other common questions). This is sufficient to satisfy Rule 23(a)(2). See *Velez v. Novartis Pharms. Corp.*, No. 04-cv-09194, 2010 WL 4877852, at *9 (S.D.N.Y. Nov. 30, 2010) (commonality established where "[a]ll Class Members bring the common claim that Novartis discriminated against female sales employees with respect to wages, promotion and pregnancy"); *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07-cv-2207, 2010 WL 3119374, at *1 (S.D.N.Y. Aug. 5, 2010) ("The commonality

requirement is met because the Named Plaintiffs' claims involve allegations of common pay and promotion claims arising from the same alleged policies and practices of the company").

Consistent with *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356 (2011), federal circuit courts have repeatedly held that class certification is appropriate where the claims derive from uniform and centrally determined practices and policies and where any managerial discretion is exercised within a common mode or framework. For example, in *McReynolds v. Merrill Lynch,* plaintiffs contested two national, company-wide policies relating to teaming and account distribution. 672 F.3d 482, 488 (7th Cir. 2012). In reversing the district court's denial of class certification, the Seventh Circuit held that, as in this case, the policies in question were specific employment practices that were "practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore, challenging those policies in a class action is not forbidden by the *Wal-Mart* decision." *Id.* at 489-90. Similarly, in *Brown v. Nucor,* the court specifically noted that anecdotal evidence of discrimination "provide a critical nexus" between a company's culture of discrimination and employment decisions. *Brown v. Nucor,* 785 F.3d 895, 917 (2015). The court went on to clarify that, "using Wal-Mart's language, the evidence of pervasive [gender] hostility in the working environment provides a 'common mode of exercising discretion that pervaded the entire company.'" *Id.*

D. The Class Representatives' Claims Are Typical Of The Class

Typicality has been found "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani,* 987 F.2d at 936. Typicality is "usually met irrespective of varying fact patterns which underlie individual claims" so long as the claims of the class representative are typical of the

class members' claims. *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 351 (E.D.N.Y. 2006) (quoting *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. at 456–57).

Here, Plaintiffs have alleged that Forest's pattern and practice of discrimination against women was accomplished through company-wide policies regarding compensation, performance review, merit increase, probation, promotion, leave, job sharing and human resources that applied to all sales representatives, and thus applied to and affected the Class Representatives and Class members in the same or similar ways. Because the Class Representatives' claims are for the same type of injury and under the same legal theory as the rest of the class, typicality is satisfied. See *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011).

E. Rule 23(a)(4) And Rule 23(g) Are Satisfied – The Class Representatives And Class Counsel Will Fairly And Adequately Protect The Class' Interests

Adequacy is also satisfied. The Class Representatives and Class Counsel have actively and intensively investigated this case. Throughout the pendency of this action, the Class Representatives have adequately and vigorously represented their fellow female employees. They have spent significant time assisting their counsel, providing information regarding Forest's policies and practices, providing pertinent documents, and assisting in settlement negotiations. Marcuse Decl. ¶¶ 37.

Class Counsel is highly experienced and well-versed in complex class litigation. Sanford Decl. ¶¶ 5-16; Marcuse Decl. ¶¶ 7-11. Sanford Heisler Sharp, LLP has a particular expertise in gender discrimination class actions, *see, e.g.*, *Velez*, 2010 WL 4877852, at *10 ("[Sanford Heisler], has just the sort of established record contemplated by the Rules."); *Bellifemine*, 2010 WL 3119374, at *1 (recognizing Sanford Heisler as having "an established record of competent and successful prosecution of large . . . class actions"). Feinstein Doyle Payne & Kravec has often been appointed

as well-qualified class counsel in complex class actions. *See, e.g., Barton v. Constellium Rolled Prods. Ravenswood, LLC*, No. 2:13-cv-3127, 2014 WL 1660388, at *5 (S.D. W.Va. Apr. 25, 2014). Class Counsel here is "qualified, experienced, and has successfully litigated this case, thereby demonstrating their adequacy as counsel for the Settlement Classes." *Gonqueh v. Leros Point To Point, Inc.*, No. 14-cv-5883, 2016 WL 791295, at *4 (S.D.N.Y. Feb. 26, 2016). *See also* Marcuse Decl. Ex. 3.

Accordingly, both Rule 23(a)(4) and Rule 23(g) are satisfied.

F. The Requirements Of Rule 23(b)(3) Are Satisfied

a. Common Issues Predominate

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Meyer v. U.S. Tennis Ass'n*, 297 F.R.D. 75, 87 (S.D.N.Y. 2013) (citation omitted). This requirement is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Id.*; s*ee also Kaplan v. S.A.C. Capital Advisors, L.P.*, 311 F.R.D. 373, 380 (S.D.N.Y. Dec. 2, 2015) (same); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Rule 23(b)(3) predominance means that certain issues resolvable through generalized proof "are more substantial than the issues subject only to individualized proof"). A finding of Rule 23(a) typicality "goes a long way towards satisfying" the Rule 23(b)(3) predominance requirement. *Stinson v. City of New York*, 282 F.R.D. 360, 382 (S.D.N.Y. 2012).

Here, for purposes of this Settlement, "[r]esolution of Plaintiffs' challenge to [alleged discriminatory employment] practices will resolve significant issues with respect to the class as a whole, and this dwarfs individualized issues as to particular employment decisions." *Ellis v.*

Costco Wholesale Corp., 285 F.R.D. 492, 538 (N.D.Cal. 2012). *See also, e.g.*, *Bellifemine*, 2010 WL 3119374, at *2 ("For purposes of this settlement, the Named Plaintiffs' claims meet [Rule 23(b)(3)] because they are unified by common factual allegations that Sanofi-Aventis allegedly disfavored female sales force employees compared to males in terms of compensation and promotion.").

To comport with Rule 23(b), Plaintiffs need only show that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). As the *Amgen* court explained, Rule 23 "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," merely that "common questions 'predominate over any questions affecting only individual class members.'" *Id.* at 1196 (citing Fed. Rule Civ. Proc. 23(b)(3)). Here, the common questions far outweigh any individualized issues.

b. Class Settlement is Superior to Alternative Methods of Adjudication

Under the factors set forth in Fed. R. Civ. P. 23(b)(3), Plaintiffs' class treatment is superior to other methods of adjudication. *See Velez*, 2010 2010 WL 4877852, at *10; *Ellis*, 285 F.R.D. at 539-40. Notably, the manageability factor strongly favors class treatment because there is hardly a form of adjudication more manageable than a voluntary settlement. *Cf. Amchem Prods. v. Windsor*, 521 U.S. 591, 610 (1997). Accordingly, the Court should grant certification for settlement purposes.

V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT COLLECTIVE ACTION

Certification of an EPA[3] collective action under 29 U.S.C. § 216(b) typically proceeds under a two-stage procedure. *See, e.g., Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010). Here, the parties seek final (stage-two) certification of an EPA collective action for settlement purposes. As with Rule 23 certification, this will facilitate completion of the settlement and the final resolution of this matter. *See Gonqueh*, 2016 WL 791295, at *3.

Under the EPA, a plaintiff must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). To establish "equal work," a plaintiff need not demonstrate that her job is identical to a higher paid position, but only must show that the two positions are "substantially equal." *Lavin-McEnerey v. Marist College*, 239 F.3d 476, 480 (2d Cir. 2001) (citation omitted); *King v. James*, No. 14-CV-974-RJA-MJR, 2016 WL 8715674, at *7 (W.D.N.Y. Nov. 18, 2016), *report and recommendation adopted*, No. 14-CV-974-A, 2017 WL 1317108 (W.D.N.Y. Apr. 10, 2017).

Under 29 U.S.C. § 216(b), a collective action is appropriate if the employees are "similarly-situated." Although the standard of review is "more stringent" after discovery, plaintiffs still need only show by "a preponderance of the evidence that members of a proposed collective action are similarly situated in order to obtain final certification and proceed with the case as a collective

[3] "As part of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*], the EPA utilizes the FLSA's enforcement mechanisms and employs its definitional provisions." *Moore v. Publicis Groupe SA*, 2012 WL 2574742, at *8 (S.D.N.Y. June 29, 2012) (quotation omitted).

action." *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 537 (3d Cir. 2012).[4] In considering whether to grant final certification of an FLSA/EPA collective action, courts apply an *ad hoc* balancing test composed of several factors, including: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individualized to each plaintiff; and (3) fairness and procedural considerations." *Torres v. Gristede's Operating Corp*., No. 04 CIV. 3316 (PAC), 2006 WL 2819730, at *9 (S.D.N.Y. Sept. 29, 2006) (alterations omitted); *see also Jason v. Falcon Data Com, Inc*., No. 09-CV-03990 JG ALC, 2011 WL 2837488, at *4 (E.D.N.Y. July 18, 2011); *Ayers v. SGS Control Servs., Inc*., No. 03 CIV. 9078 RMB, 2007 WL 646326, at *5 (S.D.N.Y. Feb. 27, 2007).

A. Plaintiffs' Factual and Employment Settings

For purposes of settlement, Plaintiffs seek final certification of an EPA collective with a definition identical to the class definition set forth in Settlement Agreement § 3.1(d) (*see supra* at II). The employees in this group are characterized by similar titles, similar levels of authority and responsibility, and similar job functions. *See* Dkt. 143 at 5-7. Further, the members of this group contend that this discrimination was effectuated by common policies and practices, including centralized decision-making. *Id.* at 7-9.

B. Individualized Defenses

Plaintiffs assert a pattern or practice of discrimination and are not aware of any individualized defenses that could potentially prevent certification. As set forth above, common issues predominate over any minor individual differences between employees. The claims of the

[4] While the Second Circuit has not yet addressed the specific level of proof for this inquiry, courts within the Second Circuit have applied the preponderance standard adopted by the Third Circuit in *Zavala*, 691 F.3d at 534. *See, e.g., Indergit v. Rite Aid Corp*., 293 F.R.D. 632, 639 n.4 (S.D.N.Y. 2013).

Class Representatives and class members all arise from the same alleged course of conduct: Defendants' alleged systemic discriminatory policies and systems resulting in female employees being denied equal pay and promotions to similar male employees. There are no defenses to these pay and promotion claims that are unique to the Class Representatives.

C. Fairness and Procedural Considerations

Without the benefit of a collective action, the members of the EPA Collective would be required to hire their own lawyers and expend resources bringing duplicative individual actions. Many employees would simply be unable to litigate their clams due to the costs and time necessary to litigate a lawsuit. *Cf. Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The Settlement fairly and efficiently resolves the claims of the members of the proposed EPA Collective and avoids any potential manageability issues.

VI. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE PRELIMINARILY APPROVED UNDER RULE 23(E)

Courts favor the settlement of complex class action litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (citing *In re Paine Webber Ltd P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). In accordance with the "strong judicial policy in favor of settlements, particularly in the class action context," *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted), the Court should endorse the Settlement and grant preliminary approval.

At the first step in this process, "[t]he court need only find, after considering the proposed settlement's procedural and substantive fairness, that there is probable cause to submit it to the class members and to hold a fairness hearing." *Zeller v. PDC Corp.*, 2016 WL 748894, at *2 (E.D.N.Y. Jan. 28, 2016) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85–86 (2d Cir. 2001); *In*

re Traffic Executive Ass'n -- Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980)). At the fairness hearing – following the dissemination of settlement notice – the Court will be in a position to "consider the submissions by proponents and potential opponents of the settlement and the reaction of the Class Members" and evaluate the fairness of the settlement under the *Grinnell* factors.[5] *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995).

"Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

Here, the proposed settlement resulted from the parties' arms-length negotiations after significant discovery proceedings and motions practice. The proposed settlement is procedurally fair and not the result of collusion, but rather the result of negotiations between experienced counsel based upon years of discovery. *Stinson v. City of New York*, 2017 WL 2544831, at *3 (S.D.N.Y. June 12, 2017) ("There is a presumption of fairness when settlements are "'reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'") (quoting *Wal-Mart Stores*, 396 F.3d at 116). Moreover, where, as here, the Settlement is the product of mediation with an experienced mediator, there is a presumption of fairness and arm's length negotiations.

[5] In *Grinnell*, the Second Circuit set forth nine factors for a court to consider before approving a class settlement: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the Defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all attendant risks of litigation. *City of Detroit v. Grinnell Corp*. 495 F.2d 448 (2d Cir. 1974), *abrogated on other grds. by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

See, e.g., deMunecas v. Bold Food, LLC, 2010 WL 2399345, at *1 (S.D.N.Y. 2010) ("The assistance of an experienced mediator . . . reinforces that the Settlement Agreement is non-collusive."); *Dorn v. Eddington Sec., Inc.*, 2011 WL 382200, at *1 (S.D.N.Y. Jan. 21, 2011) (same).

At this stage, the court need not conclude that the proposed class settlement is "fair," "only that it 'appears to fall within the range of possible approval[.]'" *Zeller*, 2016 WL 748894, at *2 (quoting *Torres*, 2010 WL 2572937, at *2). Nevertheless, courts recognize that it can still be useful to consider the nine *Grinnell* factors. *See, e.g. Karic*, 2015 WL 9433847, at *8. The Grinnell factors further support a finding that the Settlement falls within the range of possible approval.[6]

A. The Complexity, Expense, and Likely Duration of this Litigation

"Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd,* 236 F.3d 78 (2d Cir. 2001). Discrimination class actions are particularly complex, "[a]nd the duration of litigation in such cases often rivals that of even the most notorious antitrust cases." *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1405 (D. Minn. 1987). As recognized by the Ninth Circuit, "[t]he track record for large class action employment discrimination cases demonstrates that many years may be consumed by trials and appeals before the dust finally settles." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 629

[6] As there has yet to be a dissemination of notice, discussion of the second *Grinnell* factor – the reaction of the class members to the settlement – is premature. There is also little need for discussion of the seventh *Grinnell* factor. While Plaintiffs have no reason to believe that Defendants are financially at risk, courts recognize that a defendant's ability to withstand a greater judgment is a factor that should be assigned "relatively little weight." *Morris*, 859 F. Supp. 2d at 621 (citation omitted); *Davis v. J.P. Morgan Chase & Co*., 827 F. Supp. 2d 172, 178 (W.D.N.Y. 2011). "A defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (citation omitted).

(9th Cir. 1982) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). *See also Vaszlavik v. Storage Tech. Corp*., No. 95-B-2525, 2000 U.S. Dist. LEXIS 21129, at *5 (D. Colo. Mar. 9, 2000) ("discrimination class actions have a well-deserved reputation for being complex and difficult to win").

This complex case is already over five years old, and the docket attests that it has been hard fought by both parties over that time. Approximately 3,200 Class Members bring claims for gender-based discrimination in pay and promotion. The action would likely continue for additional years. The parties would face enormous expense and burden in conducting further discovery, including completing multiple outstanding depositions of Opt-in Plaintiffs and fact witnesses and resolving several significant outstanding discovery disputes, one of which was scheduled for a hearing before Judge Gorenstein in early April 2017 (Dkt. 247). Once fact discovery was complete, the parties would have to litigate class certification (and likely decertification) motions, as well as dispositive motions, and would then face proceeding to trial and pursuing appeals. There would be no guarantee of a more favorable result. These facts strongly support preliminary approval of the Settlement.

B. The Stage of the Proceedings and the Amount of Discovery Completed

The parties have engaged in substantial discovery. Defendants have taken written discovery from and subsequently deposed the ten Named Plaintiffs as well as sixteen representative Opt-In Plaintiffs from around the country. Plaintiffs have taken the depositions of seven 30(b)(6) witnesses on topics such as compensation, promotions, performance management and electronically-stored information (ESI). The parties have exchanged hundreds of thousands of pages of written discovery, including electronically stored information collected from over 70 custodians. Plaintiffs' expert, labor economist Alexander Vekker, Ph.D., produced a preliminary report in support of conditional

certification (cite docket) that was cited by Judge Dolinger in his order granting Plaintiffs' motion (Dkt. 143 at 8). Further, the Parties reached the Settlement only after extensive investigation and analysis.

C. The Risks of Establishing Liability and Damages and Maintaining a Class Through Trial

Plaintiffs face considerable risks in establishing class-wide liability and in obtaining certification of the proposed class and collective action. If liability is established, Plaintiffs will also have to establish damages. "The risk of maintaining class status throughout trial also weighs in favor of final approval." *DeLeon v. Wells Fargo Bank, N.A.*, No. 1:12-CV-04494, 2015 WL 2255394, at *4 (S.D.N.Y. May 11, 2015). But for the Settlement, Defendants would strongly dispute the propriety of Rule 23 certification. Marcuse Decl. ¶ 15; Sanford Decl. ¶ 18; *see, e.g.*, *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (this factor favors approval where "it is not certain that the case would be certified in the absence of a settlement."). Even if the Court were to grant certification, maintaining certification through trial could continue to present challenges. Defendants are likely to move for decertification, which would result in further expense and delay. Sanford Decl. ¶ 18; *see, e.g.*, *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) ("This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial.") (citation omitted); *DeLeon*, 2015 WL 2255394, at *4 ("A motion to decertify . . . would require extensive briefing, possibly followed by an appeal. Settlement eliminates the risk, expense, and delay inherent in this process."). Further, Defendants might file a Rule 23(f) appeal, necessitating further briefing and attendant delays. *See, e.g.*, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 620 (S.D.N.Y. 2012). Finally, the manageability of a class trial would likely remain an issue.

See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001) (noting possibility of decertification if manageability issues become intractable).

D. The Settlement Benefits are Reasonable in Light of the Best Possible Recovery, the Strengths and Weaknesses of Plaintiffs' Case, and All Attendant Risks of Litigation.

"The Court's inquiry into whether the proposed settlement falls within the range of reasonableness 'is not susceptible of a mathematical equation yielding a particularized sum,' but rather 'must be judged in light of the strengths and weaknesses of the plaintiff[s'] case.'" *Collins v. Olin Corp.*, No. 303-CV-945CFD, 2010 WL 1677764, at *6 (D. Conn. Apr. 21, 2010) (citations omitted). *See also In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 340 (E.D.N.Y. 2010). As discussed above, the Representative Plaintiffs – and the Class – face great risks and "significant obstacles" in proving liability and damages. *Collins*, 2010 WL 1677764, at *6.

Weighing the benefits of the Settlement against the risks associated with proceeding in the litigation, the Settlement amount is more than reasonable. *See Henry v. Little Mint, Inc*., No. 12 CIV. 3996 CM, 2014 WL 2199427, at *10 (S.D.N.Y. May 23, 2014) ("range of reasonableness" of a settlement "recognize[s] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion") (citation omitted); *Wright v. Stern*, 553 F. Supp. 2d 337, 339 (S.D.N.Y. 2008) ("[t]here is simply no assurance that more years of litigation would result in any greater recovery.").

The proposed total settlement amount represents 30% of Dr. Vekker's estimate of economic damages to the class. Marcuse Decl. ¶ 30. Following all deductions, the Class Monetary Awards Settlement Fund of over $2 million constitutes approximately 17% of estimated economic losses to the class. *Id*. ¶ 33. The percentage of the potential recovery represented by this settlement is well

within the range courts have accepted as reasonable, particularly in a complex case where the risks are significant.[7]

The Settlement provides substantial relief to the class members and will be distributed to them in a matter of months, rather than after years of further litigation and appeals. *See, e.g., Long v. HSBC USA Inc.*, No. 14 CIV. 6233 HBP, 2015 WL 5444651, at *5 (S.D.N.Y. Sept. 11, 2015) (where settlement "assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, [it] is reasonable under this factor.") (citation omitted); *see also Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 CIV. 3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008).

As the settlement "fall[s] within the range of possible approval, the court should order that the class members receive notice of the settlement." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 1832181, at *1 (S.D.N.Y. Apr. 30, 2013) (internal quotation omitted).

[7] As the Second Circuit stated in *Grinnell*: "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455, n.2. *See, e.g., In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 483-84 (S.D.N.Y. 2009) (approving settlement which provided for 2% of the maximum possible liability, observing that "the Second Circuit has held that a settlement amount of even a fraction of the potential recovery does not render a proposed settlement inadequate"); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293 VLB, 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012) (settlement providing for "approximately 3.5% of Lead Plaintiff's 'most aggressive estimate of maximum provable damages'" was reasonable "[i]n light of the legal and factual complexity" of the case and "the unpredictability of a lengthy trial and appellate process"); *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 103 (D. Conn. 2010) ("in light of the considerable risks," "costs" and "uncertainty" of success, a class settlement worth 8% of maximum recoverable damages was reasonable); *In re Prudential Sec., Inc.*, No. M-21-67 (MP), 1995 WL 798907, at *1 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 and 5% of claimed damages); *Dillworth v. Case Farms Processing, Inc.*, No. 5:08-CV-1694, 2010 WL 776933, at *8 (N.D. Ohio Mar. 8, 2010) (noting that "average result achieved for class members" in class actions is between 7 and 11%) (citation omitted).

E. The Proposed Allocation of Attorney's Fees and Expenses is Reasonable and Does Not Undermine the Fairness of the Settlement

Class Counsel will apply for fees and reimbursement of expenses in connection with final approval, after Class Members have an opportunity to opt out or object, including to object with respect to Class Counsel's fees and expenses. The Court need not rule on the proposed requests at this time. *See, e.g.*, *Alli v. Boston Mkt. Corp*., No. 3:10-CV-00004-JCH, 2011 WL 6156938, at *6 (D. Conn. Dec. 9, 2011). For now, it suffices to say that the Settlement's provisions regarding fees and costs do not take the Agreement out of the range of possible approval.

First, as courts have widely recognized, "Counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *In re Marsh & McLennan Companies, Inc. Sec. Litig*., No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009). *See also Clark v. Ecolab Inc*., No. 04CIV.4488PAC, 2010 WL 1948198, at *9 (S.D.N.Y. May 11, 2010). Class Counsel will thus seek reimbursement for expenses reasonably incurred in litigating and settling this case on behalf of the Class.

"The trend in this Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases such as this one . . . [and] 33.3% of the Fund . . . is reasonable 'and consistent with the norms of class litigation in this circuit.'" *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12CV4216 RLE, 2014 WL 3778173, at *9 (S.D.N.Y. July 31, 2014) (quoting *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05cv3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)). *See also In re Facebook, Inc. IPO Sec. & Derivative Litig*., No. MDL 12-2389, 2015 WL 6971424, at *11 (S.D.N.Y. Nov. 9, 2015) ("A fee award of one-third of the Settlement Fund is well within the range accepted by courts in this circuit." (internal quotation marks omitted)). Class Counsel's anticipated fee request of 29% of the Total Settlement Amount is clearly modest

compared to the majority of class settlements in the Second Circuit, especially in light of Class Counsel's unreimbursed lodestar.[8]

F. The Provision of Reasonable Service Payments Does Not Undermine the Fairness of the Settlement

Pursuant to the Settlement, Plaintiffs seek the following Service Awards: (i) Service Award of $15,000 for each of the ten Class Representatives; (ii) Service Award of $2,500 for each of the sixteen collective action members who were deposed, provided they do not opt out of the settlement; and (iii) $1,000 for each of the three collective action members who submitted written discovery but who were not deposed, provided they do not opt out of the settlement. Marcuse Decl. ¶ 35. The proposed Class Notice advises Class Members of the proposed Service Awards. *See* Ex. B to the Settlement Agreement, attached to the Marcuse Declaration as Ex. 1.

Service payments of this type are commonly awarded to named plaintiffs, opt-ins, and class members who actively assisted in prosecuting a class case. Here, the Class Representatives joined this case early on and expended considerable time, effort, and resources on behalf of the Class.

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[8] *See, e.g. Wright v. Stern* 553 F. Supp. 2d 337, 347 (S.D.N.Y. 2008) (awarding an $8 million fee in employment case, representing over 38% of total relief, in addition to $999,999.79 in litigation expenses); *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 188-89 (W.D.N.Y. 2005) (awarding 38.26% of fund in wage class action); *Hart v. RCI Hosp. Holdings, Inc*., No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *17 (S.D.N.Y. Sept. 22, 2015) ("In numerous such common fund cases, fees have been awarded that represent one-third of the settlement fund."); *Flores v. One Hanover, LLC*, No. 13 CIV. 5184 AJP, 2014 WL 2567912, at *8 (S.D.N.Y. June 9, 2014) ("Class Counsel's request for one third of the fund is reasonable and consistent with the norms of class litigation in this circuit." (internal quotation marks omitted); *Willix v. Healthfirst, Inc*., No. 07 CIV. 1143 ENV RER, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) ("Class Counsel's request for 33 1/3% of the Fund is reasonable and 'consistent with the norms of class litigation in this circuit.'") (collecting cases); *Campos v. Goode*, No. 10 CIV. 0224 DF, 2011 WL 9530385, at *8 (S.D.N.Y. Mar. 4, 2011) (approving attorneys' fees of one-third of class fund in part because "reasonable, paying client[s] typically pay one-third of their recoveries under private retainer agreements") (internal citation and quotation omitted); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 CIV.4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit.") (citing cases); *In re Lloyd's Am. Tr. Fund Litig*., No. 96 CIV.1262 RWS, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("In this district alone, there are scores of . . . cases where fees . . . were awarded in the range of 33-1/3% of the settlement fund.")

They also incurred significant risk in lending their names to the action, helping to plan and organize the litigation, and consulting with Class Counsel to the benefit of their fellow Class Members. Marcuse Decl. ¶¶ 36-37. Plaintiffs also seek much smaller Service Awards for opt-ins who expended time and energy preparing for depositions and then sitting for those depositions, as well as still smaller awards for opt-ins who provided written discovery. Without the efforts and sacrifices of all these individuals, the Settlement could not have been achieved. *Id*.

The Court should approve the service awards provided for in the Settlement. "Service awards, also called enhancement or incentive awards, are common in class actions." *Mills v. Capital One, N.A.*, 14-cv-1937, 2015 WL 5730008, at *17 (S.D.N.Y. 2015). Such payments "serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts." *Id.* As courts within this Circuit have noted, plaintiffs in employment class actions, including discrimination cases, are particularly deserving of incentive awards:

> [T]here is a fundamental distinction between litigation based on claims of racial, gender or other discrimination, and securities-based litigation . . . or antitrust suit . . . [T]he plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.

Roberts v Texaco, Inc., 979 F. Supp. 185, 201 (S.D.N.Y. 1997).

The amounts sought here are well within or below the range of awards approved as reasonable. *See, e.g., Calibuso v. Bank of America Corp.,* 299 F.R.D. 359, 376 (E.D.N.Y. 2014) (discrimination case with five awards of $35,000 each and one award of $7,500); *Bellifemine v. Sanofi-Aventis U.S. LLC,* No. 07 CIV. 2207 JGK, 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) (awarding $75,000 to named plaintiffs and $25,000 to $60,000 to non-named plaintiff class members for "the time and energy that they have devoted to this case, and the benefit conferred on the Class."); *Flores v. Anjost Corp*., No. 11 CIV. 1531 AT, 2014 WL 321831, at *9 (S.D.N.Y. Jan.

29, 2014) (awarding $25,000 each to five named plaintiffs in wage and hour case); *Wright*, 553 F. Supp. 2d at 342 ($50,000 awards to each of 11 named plaintiffs in employment discrimination action); *Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359, 364 (E.D.N.Y. 2014) (discrimination case with five awards of $35,000 each and one award of $7,500).

The Court need not rule on the proposed service awards now. Plaintiffs will move for approval of the awards simultaneously with their motion for final approval of the Settlement. At that point, class members will have had an opportunity to weigh in on the settlement and object to any provisions with which they disagree. *See Alli*, 2011 WL 6156938, at *6.

VII. THE COURT SHOULD APPROVE THE PROPOSED SETTLEMENT UNDER THE EQUAL PAY ACT

While an FLSA/EPA settlement does not involve the rights of absent class members and is not subject to Rule 23(e), courts nonetheless review the settlement to ensure that it is fair and reasonable. *See, e.g.*, *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 (11th Cir. 1982); *Reyes v. Buddha-Bar NYC*, No. 08 CIV. 02494(DF), 2009 WL 5841177, at *3 (S.D.N.Y. May 28, 2009). "The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement." *Willix*, 2011 WL 754862, at *5. "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." *Id.* As set forth in cases such as these, an FLSA/EPA settlement need only reflect a reasonable compromise of contested litigation involving a *bona fide* dispute between the parties. *E.g. Aros v. United Rentals, Inc.*, No. 3:10-CV-73 JCH, 2012 WL 3060470, at *2 (D. Conn. July 26, 2012).

Here, because the Settlement meets the stricter Rule 23(e) standard, *a fortiori* it also easily passes muster under the FLSA/EPA. First, the parties plainly have *bona fide* disputes over (i)

Defendants' liability under the Equal Pay Act, including whether collective action members were paid less than their male counterparts for performing equivalent work; (ii) the applicable statute of limitations under the willfulness standard of 29 U.S.C. § 255, as well as the availability of liquidated damages under 29 U.S.C. § 260; and (iii) whether, absent settlement, collective action certification is appropriate. The parties would continue to contest these issues absent a settlement. Second, under the circumstances, there is little question that the Settlement potentially represents a fair and reasonable compromise of contested claims. *See, e.g.*, *Aros*, 2012 WL 3060470, at *2 ("the Settlement Agreement resolves a clear and actual dispute under circumstances supporting a finding of fair and reasonable arm's-length settlement, and is therefore appropriate for approval."); *Campanelli v. Hershey Co*., No. C 08-1862 BZ, 2011 WL 3583597, at *1 (N.D. Cal. May 4, 2011) ("substantial" payments achieved through arm's length negotiations); *Reyes*, 2009 WL 5841177, at *3; *Willix*, 2011 WL 754862, at *5.

VIII. THE PROPOSED FORM AND METHOD OF NOTICE OF THE CLASS SETTLEMENT SHOULD BE APPROVED

The proposed Class Notice attached as Exhibit B to the Settlement Agreement, which is attached to the Marcuse Declaration as Exhibit 1, complies in all respects with the requirements of Rule 23 and due process. Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), a notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed.R.Civ.P. 23(c)(2)(B).

The proposed Class Notice satisfies each of these requirements and adequately puts Class Members on notice of the proposed settlement. Notice will be made by United States first class mail to the last known addresses in Defendants' records.

The proposed Notice is appropriate because it describes the pendency and nature of the controversy; the details of the Settlement Agreement; Class Members' right to object to the settlement; Class Members' right to opt out of the settlement; the adequacy of representation; the attorneys' fees, cost and expenses requested by Class Counsel; the deadline for submitting objections; and Class Members' right to appear and be heard at the fairness hearing.

The Court should approve the Notice as described herein and attached as Exhibit B to the Settlement Agreement, which is attached as Exhibit 1 to the Marcuse Declaration. It is (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the action and of their right to object to or exclude themselves from the proposed Settlements; and (iii) reasonable, and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice of the fairness hearing. The proposed Notice also (iv) fully satisfies all applicable requirements of Rule 23 of the Federal Rules of Civil Procedure, Due Process, and any other applicable rules or laws. *See Laydon v. Bank of Tokyo-Mitsubishi UFJ, Ltd.*, No. 12-cv-3419, 2016 WL 4401148, at *3 (S.D.N.Y. 2016).

IX. CONCLUSION

The Settlement Agreement is fair, adequate and reasonable and meets the criteria for approval of class action settlements. The Settlement Agreement is the product of arm's-length negotiation between Counsel for the Parties, and the benefits of the settlement outweigh the uncertainty and added time and expense that continued litigation of this matter would entail. Plaintiffs therefore respectfully request that the Court preliminarily approve the Settlement

Agreement and enter the proposed preliminary approval order attached as Exhibit 2 to the Marcuse Declaration.

Date: October 6, 2017

Respectfully Submitted,

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