IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DARRYL CHALMERS, DARREN CONNORS, GLENN MENDEZ, JAMES NOVA, FATIMA Q. ROSEMOND, and AFSCME DISTRICT COUNCIL 37 LOCAL 2507,

Plaintiffs,

and

BRANDEN BOWMAN and SEBASTIAN STACK,

Intervenors-Plaintiffs

v.

THE CITY OF NEW YORK,

Defendant.

Case No. 20 Civ. 3389 (AT)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CORRECTED REVISED MOTION FOR PRELIMINARY APPROVAL OF STIPULATION OF SETTLEMENT

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I. INTRODUCTION

Five individual plaintiffs and AFSCME District Council 37 Local 2507 filed a motion on August 30, 2023, for preliminary approval of a settlement of racial discrimination claims on behalf of themselves and two proposed classes of New York City fire protection inspectors and associate fire protection inspectors (together "FPIs"), the "Damages Class" and the "Pay Adjustment Class." ECF 119. The Court denied the motion without prejudice, finding that the plaintiffs and original counsel could not represent both proposed classes. ECF 137. Since then, two FPIs, Branden Bowman and Sebastian Stack, who are only members of the Pay Adjustment Class ("Pay Adjustment Plaintiffs"), represented by separate counsel ("Pay Adjustment Counsel"), have intervened, and the original individual plaintiffs ("Damages Plaintiffs") and their counsel ("Damages Counsel") now represent only the Damages Class.

Pay Adjustment Counsel has fully and independently reviewed the original proposed settlement and concluded that the settlement was fair, reasonable, and adequate for the Pay Adjustment Class when executed. But negotiations over a collective bargaining agreement ("CBA") between the Union and the City, which the parties thought would begin in the fall of 2023, did not commence until June 2024. As a result, Pay Adjustment Counsel has negotiated awards equal to a five-and-a-half month extension of the period of salary increases for class members, which now will end on February 14, 2025, instead of August 31, 2024. This will increase the City's payment into the Settlement Fund by $707,150 from $29,200,000 to $29,907,150.

The settlement has been revised in other ways as well. Most notably, the Pay Adjustment Class representatives now seek certification under Fed. R. Civ. P. 23(b)(3) instead of 23(b)(2) as originally proposed; the Pay Adjustment Plaintiffs, who propose to represent the Pay Adjustment Class, will seek service awards of $2,500 apiece; Damages Counsel will seek $510,000 less in fees

and about $9,000 more in expense reimbursements; Pay Adjustment Counsel will petition for fees of up to $115,000 to be awarded outside the settlement fund; and awards to members of both classes will be distributed later than originally contemplated because of the passage of time. With these changes, the Pay Adjustment Plaintiffs join the Damages Plaintiffs in moving for preliminary approval. And while the City denies Plaintiffs' allegations and contends that it complied with the law, Stip., ¶ IX.3, it also supports the motion for preliminary approval.

To grant preliminary approval, the Court must preliminarily determine that the settlement classes satisfy the requirements of Rule 23 and that the settlement is fair, reasonable, and adequate to the members of both classes. Those requirements are met. The settlement requires the City to pay $29,907,150 and the employer's share of employment taxes and pension contributions, likely to exceed one million dollars, into a settlement fund.[1] That fund will be used to pay Pay Adjustment Class members awards sufficient to make their salaries equal to equivalent building inspectors for 17.5 months—full relief for the members of that class. After deductions for service awards and attorney, administrator, and expert fees and expenses, the remainder of the fund will be used to pay awards to Damages Class members. Even after those deductions, Damages Class member awards are slated to average about $35,000. For a legal theory that the Court described as "atypical," this level of recovery for both classes is extraordinary.

In support of the proposed settlement, the Plaintiffs submit a revised Stipulation of Settlement (the "Stipulation"), attached as Exhibit 1; a revised written notice to class members (the "Notice"), attached as Exhibit 1.A; a notice to Pay Adjustment Class members about their right to object to their awards, attached as Exhibit I.B; a revised settlement timeline (the "Timeline"),

[1] Assuming conservatively that backpay is $13 million, the City's payment of the employer's share of employment taxes will be almost exactly $1,000,000 (the employer share of employment taxes is 7.65%). The amount of the City's pension contributions will be determined actuarially.

attached as Exhibit 1.C; and a revised proposed order for preliminary approval of the settlement (the "Order"), attached as Exhibit 1.D. Based on these documents, the Court should preliminarily approve the settlement, tentatively approve both classes, and direct that Notice be sent to class members.

II. BACKGROUND

Damages Plaintiffs filed the initial complaint on May 1, 2020. ECF 1. The complaint asserted pay discrimination claims arising out of the pay disparities between FPIs and BIs going back to FY 2005 under the continuing violation doctrine. It sought to certify a class of all FPIs (including white FPIs alleging pay discrimination claims based on their association with the other, predominantly non-white, FPIs) and also a subclass of non-white FPIs. *Id*. 49.

The City filed a motion to dismiss the complaint (ECF 25), which the Court granted with respect to the associational discrimination claims of white FPIs and otherwise denied. ECF 63. The Court granted leave to re-plead (ECF 68) and Damages Counsel filed the first amended complaint ("FAC") with additional allegations supporting the associational discrimination claims. ECF 69. The City sought to dismiss those claims of white FPIs in the FAC but, this time, the Court denied its motion. ECF 93.

While the parties litigated these motions to dismiss, they also engaged in extensive discovery, including the production of voluminous human resources and payroll data and other written discovery, expert witness reports, and depositions of fact and expert witnesses. ECF 124, ¶¶ 14-15, 17. Competing motions to exclude expert testimony (ECF Nos 61 and 80) and Plaintiffs' motion for certification of a class (and subclass) (ECF 61) ensued. On September 19, 2022, the Court granted in part and denied in part Plaintiffs' motion to exclude the City's expert witness

testimony, denied the City's motion to exclude Plaintiffs' expert testimony, and granted Plaintiffs' class certification motion. ECF 98.

Shortly after the Court's ruling on these motions, in late September 2022, the parties entered into settlement negotiations. ECF 124, ¶ 18. The parties selected Robin Gise of JAMS ADR Services as the mediator. She has extensive experience resolving complex employment and labor disputes, including class actions. https://www.jamsadr.com/gise/.

The mediation consumed over nine months. Plaintiffs provided the City a large spreadsheet prepared by their expert analyzing the Class's damages. ECF 124, ¶ 19. The City produced additional human resources and payroll data for the relevant years through March 2023 and both parties' experts performed supplemental statistical analyses. *Id.*, ¶ 22. Plaintiffs' Counsel prepared analyses of key legal issues that they gave to the City. *Id.*, ¶ 23. And the parties negotiated through six in-person full-day mediation sessions, more than ten video conference calls, numerous telephonic conference calls, and scores of email exchanges. *Id.*, ¶¶ 20-21.

During the mediation sessions, the parties debated issues including: (1) the likelihood of the claims' success on the merits, (2) the continuing violation theory, (3) the size of salary adjustments needed to bring the salaries of each level of FPIs up to the average salaries of comparable BIs, (4) whether a municipality was likely to be required to pay prejudgment interest and, if so, the appropriate rate of interest, (5) the timing of the City's payments into the settlement fund, and (6) equitable relief intended to foster an environment of inclusion and respect for FPIs. *Id.*, ¶ 24. The parties also agreed on an administrator of the settlement and an expert to perform damages calculations, and they engaged in discussions with the administrator and expert to ensure that all the settlement agreement's provisions could be feasibly performed. *Id.*

The parties signed a stipulation as of August 11, 2023, and Plaintiffs filed a motion for preliminary approval of the settlement on August 30. ECF No. 118. Damages Plaintiffs later filed a motion for payment of service awards and attorneys' fees and reimbursement of attorneys' expenses out of the settlement fund. ECF No. 122. The City opposed the request for attorneys' fees but not the requests for service awards and expenses. ECF No. 136.

But on January 16, 2024, the Court denied the preliminary approval motion without prejudice, ECF 137, and a few days later directed the Clerk to terminate the motion for service awards, fees, and expenses with leave to re-file if Plaintiffs renewed their motion for preliminary approval. ECF 138. The Court denied preliminary approval based on two determinations. First, the Plaintiffs, all of whom were either members of the Damages Class or members of both classes, were inadequate representatives of the Pay Adjustment Class because they "are incentivized 'to maximize their overall recovery,' posing a risk that they would 'sell out' FPIs with only pay adjustment claims 'for terms that would tilt toward' the class representatives' other claims." ECF 137, at 8 (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 827 F.3d 223, 233 (2d Cir. 2016). Second, if the Pay Adjustment Class qualified for certification, it would be under Fed. R. Civ. P. 23(b)(3), not 23(b)(2), as the stipulation of settlement provided. ECF 137, at 8-11.

Since then, the two Pay Adjustment Plaintiffs, both of whom are exclusively members of the Pay Adjustment Class, have intervened in the action and seek to represent the members of that class. ECF 142, 146, 148; Stack Decl., ¶ 4; Bowman Decl., ¶ 4. They have retained the firm of Gladstein, Reif & Meginniss, LLP ("Pay Adjustment Counsel") to represent them. ECF 142. The original five Plaintiffs and their counsel now seek to represent only the Damages Class.

Pay Adjustment Counsel has rigorously reviewed the original proposed settlement submitted and concluded that it was fair, reasonable, and adequate to the Pay Adjustment Class members when it was signed, except that, as the Court made clear, it should have been proposed for certification under Rule 23(b)(3), not (b)(2). Declaration of Jessica Harris in Support of Motion for Preliminary Approval ("Harris Decl.") ¶¶ 6-8. Nonetheless, the Stipulation of Settlement and its exhibits contain many changes. Most important, CBA negotiations did not start in the fall of 2023, as contemplated when the settlement was negotiated. Instead, they began on June 18, 2024. The Pay Adjustment Plaintiffs, through their counsel, have negotiated a five and a half month extension of the Pay Adjustment Period, from one year to 17.5 months, to allow more time for the CBA negotiations. The parties estimate that pay adjustment awards for the extra 5.5 months will approximate $707,150, requiring an increase in the settlement fund from $29,200,000 to $29,907,150. Harris Decl. ¶¶ 9, 12; Supplemental Declaration of Michael Lieder in Support of Motion for Preliminary Approval ("Lieder Supp. Decl.") ¶ 9. Thus, Damages Plaintiffs will reduce their request for attorneys' fees for Damages Counsel by $510,000, while Pay Adjustment Plaintiffs will move for an award of attorneys' fees for Pay Adjustment Counsel based on the traditional lodestar approach to be paid by the City outside the settlement fund. Lieder Supp. Decl. ¶ 10; Harris Decl. ¶ 12;. In addition, the deadlines for many actions required under the settlement have been revised because of the passage of time and because the parties have simplified the processes for paying out awards to class members. Lieder Supp. Decl., ¶ 11.

Each of the revised documents, plus redlines showing the changes from the documents submitted on August 30, 2023, accompanies this memorandum.

III. SUMMARY OF THE SETTLEMENT

A. Definition of Settlement Classes

The Stipulation provides for two "Settlement Classes" to be certified under Rule 23(b)(3): one for damages suffered by FPIs employed from May 1, 2017, through August 31, 2023 (the "Damages Class"), and the other (the "Pay Adjustment Class") to provide awards sufficient to make FPIs' total pay equal to the average pay of comparable levels of BIs from September 1, 2023, until February 14, 2025 (the "Pay Adjustment Period"). Stip., ¶ II.4.

The Damages Class includes "all persons whom the City has employed as an FPI at any time between May 1, 2017 and August 31, 2023." *Id.*, ¶ I.12. It is the same class that the Court previously certified, except that the end date is about 11 months later. *Id.*, ¶ II.4.

The Pay Adjustment Class includes "all persons who have served as a fire protection inspector or associate fire protection inspector in the FDNY at any time between September 1, 2023, and February 14, 2025, except that persons who are attending the Fire Protection Academy during the Pay Adjustment Period must graduate before becoming a Pay Adjustment class member." *Id.*, ¶¶ I.27, 28.

The Damages Class had 547 members as of March 25, 2023, the last date for which Plaintiffs currently have data, many of whom had resigned or retired between May 2017 and March 2023. ECF 121, ¶ 27. The eventual number of Pay Adjustment Class members will be unknown until the end of the Pay Adjustment Period (February 14, 2025), but as of May 1, 2024, there were approximately 385 FPIs. *Id.* Forty-eight newly minted FPIs graduated from the academy in February 2024 and are only in the Pay Adjustment class; most or all of the other FPIs on May 1, 2024, were members of both classes. Lieder Supp. Decl., ¶ 5. With turnover, there probably are over 400 Pay Adjustment Class members.

B. Payments to and Distributions from the Qualified Settlement Fund

1. General

The Stipulation provides that the City will pay a total of $29,907,150.00 (the "Settlement Amount") plus the employer's portion of any payroll taxes and pension contributions into a Qualified Settlement Fund ("QSF"). *Id.*, ¶¶ I.36, III.3-5, VII.3. The Settlement Amount, plus interest earned by the QSF, will be used to pay adjustments to Pay Adjustment Class members, awards to members of the Damages Class, service awards to the seven individual Plaintiffs and class member Michael Riordan, attorneys' fees and expenses, and the administrator and joint expert's fees and expenses. *Id.*, ¶¶ IV.1.

The parties anticipate that the distributions from the QSF will occur in the summer of 2025, although the parties cannot provide a date certain because a set of calculations must be made by the non-party New York City pension fund. *Id.*, ¶¶ IV.23, VII.3; Timeline, p. 3. The Administrator will pay members of the Pay Adjustment Class their full adjustments for the period from September 1, 2023, through February 14, 2025, pay the full amounts of the service awards and attorneys' fees and expenses awarded by the Court, and pay the remaining money to Damages Class members in proportion to their claims under the settlement. If 50% of Settlement Class members do not opt out, no money will revert to the City. Stip., ¶ XI.3.

2. Distributions to Pay Adjustment Class Members

Each Pay Adjustment Class member will receive awards based on a formula set out in a table in the Stipulation. Stip., ¶ IV.10. The award amounts will be calculated based on the differences in average pay between five levels of FPIs and the corresponding levels of construction BIs during fiscal year 2023 multiplied by the number of straight and overtime hours worked. *Id.* If each Pay Adjustment Class member as of spring 2023 worked the standard 2,088 hours a year

without any overtime pay during the entire Pay Adjustment Period, the adjustments would total about $1,430,000 over 12 months and about $2,085,000 over 17.5 months.

But because some class members have been or will be hired during the Pay Adjustment Period, most have worked or will work overtime, and some will not work a full year because of retirement, resignation, or unpaid leave, the exact amount of pay adjustment awards in the distribution will be unknown until after February 14, 2025. *See id.*, ¶ IV.11. Class Counsel anticipate that $2.4 million will be distributed to Pay Adjustment Class members, with a maximum of about $2.6 million. Lieder Supp. Decl. ¶ 9. All Pay Adjustment awards will be considered wages for taxes and pension purposes. Stip., ¶ VII.2.

3. Distributions to Damages Class Members

Damages Class members will receive whatever remains in the settlement fund after distributions to Pay Adjustment Class members, payment of service awards, and payment of the fees and expenses of Damages Counsel, the administrator, and the joint expert. *Id.*, ¶ IV.20. Damages Counsel anticipates that at least $18.9 million will be available for distribution to the 547 Damages Class members,[2] a net average of about $34,500. The $18.9 million is estimated by subtracting $11.0 million ($2.4 million to Pay Adjustment Class members, $8.4 million in attorneys' fees and expenses if the Court awards 30% of $27.5 million as fees and awards all requested expense reimbursements, $95,000 in service awards, and about $80,000 to the Administrator and Expert) from the approximately $29.9 million fund. Lieder Supp. Decl., ¶ 12. Interest earned by the fund will increase the payout.

The Stipulation sets out a formula that the Administrator will use to allocate the roughly $18.9 million among Damages Class members. The formula considers whether a member was an

[2] This is the number of Damages Class members as of March 2023, and it is unlikely that the number increased by August 31, 2023. Thus, using the $27.5 million figure, the average gross amount is $50,274.

FPI during each fiscal year from 2005 through 2023, what title the member had during each of these years (new hire, incumbent FPI, AFPI I, AFPI II, or AFPI III), and the difference between that member's salary and the average salary of comparable construction BIs in that year. The formula discounts the differences between FPI and average construction BI salaries before 2016 because of the increasing risk that old claims may be rejected notwithstanding the continuing violation doctrine. Finally, the formula establishes a minimum award of $500 per class member. Stip., ¶ IV.5.. Dr. Charles Scherbaum, who will serve as the settlement's joint expert, will calculate the amount of each Damages Class member's award, including an estimate before final amounts are known that will appear on the first page of the Notice. *See* Stip., ¶ IV.5, X.2; Timeline, p. 1; Notice, p. 1. *Id.*, ¶ I.17, VI.3.

For tax and pension purposes, Damages Class awards will be allocated between wages that will be subject to payroll withholding and deductions and interest for which a 1099 will be issued. The allocation will depend on the year in which a Damages Class member first became an FPI. *Id.*, ¶ IV.9.

4. Payment of Pension Contributions and Employment Taxes

The City will pay its portion of employment taxes and pension contributions for members of both classes as it does when paying regular wages. *Id.*, ¶ I.40, III.5, VII.3. While the amount of the City's pension contributions is unknown, it will pay 7.65% of the backpay portion of the awards as the employer share of employment taxes, which will be roughly one million dollars. The QSF administrator will withhold the employee's share of pension contributions and employment taxes from the Class members' backpay awards and make the necessary pension contributions and tax payments. *Id.*, ¶ VII.2, 3.

5. Service Awards

No later than 14 days after the filing of this motion, Plaintiffs will apply for service awards totaling $95,000: $20,000 to lead Damages Plaintiff Darryl Chalmers, $15,000 apiece to Damages Plaintiffs Darren Connors, Glenn Mendez, James Nova, and Fatima Rosemond, $10,000 to class member Michael Riordan, and $2,500 apiece to Pay Adjustment Plaintiffs Branden Bowman and Sebastian Stack. *Id.*, ¶ V.1. As will be explained in more detail in the service award memorandum, the Damages Plaintiffs have devoted tremendous time to the case, including talking with Class Counsel before the case was filed, answering written discovery, being deposed, reviewing numerous emails from Class Counsel, participating in conference calls with Class Counsel about the progress of the case, and actively participating in the mediation process. ECF 124, ¶¶ 4, 5, 11, 14, 16, 20-21. Class member Reardon did not participate in discovery but otherwise engaged in all the same types of activities. *Id.* The Pay Adjustment Plaintiffs, who intervened in the case in January 2024, have not devoted close to the same amount of time to the case but did assume the risk of retaliation by taking on a leadership role in the litigation. Harris Decl., ¶ 13.

6. Attorneys' Fees and Expenses

Within 14 days after filing the motion for preliminary approval, Plaintiffs will file two motions for payment of attorneys' fees and reimbursement of expenses. Damages Plaintiffs will apply for reimbursement of up to $250,000 in expenses incurred by Damages Counsel and payment of fees of $8,250,000 (30% of the estimated $27,500,000 of the settlement fund not being distributed to the Pay Adjustment Class). Stip., ¶ V.2. This is $510,000 less than sought in the initial motion for attorneys' fees. Damages Class Counsel have worked on this case for over four and a half years without any reimbursement or compensation, and, by the time their duties under the settlement are concluded, they will have devoted about six years to the litigation. ECF No. 124, ¶ 31.

Pay Adjustment Plaintiffs will apply for payment of fees of and reimbursement of expenses totaling not more than $115,000 to Pay Adjustment Counsel, to be paid by the City outside the settlement fund. This amount is based on the lodestar value of Pay Adjustment Counsel's work on the case. Harris Decl., ¶ 12.

Plaintiffs do not know whether the City will object to the requested fee awards as it did the original request for Damages Counsel. All class members may object to or otherwise comment about the requested fee and expense award, which will be set forth in the Notice. If the Court reduces the requested service fees or attorneys' fees and expenses, the money not awarded shall become part of the QSF available for distribution to Damages Class members.

7. Fees and Expenses of the Administrator and the Expert

The parties have selected Settlement Services, Inc. ("SSI") as the Administrator of the settlement. Stip., ¶ I.2. The Administrator will have many duties that are identified in the Stipulation of Settlement and Timeline, including: (1) sending the Notice to Settlement Class members; (2) creating a website with information about the settlement; (3) receiving data from the City concerning Settlement Class members, providing that information to the Expert, and incorporating information from the Expert in various ways; (4) receiving and alerting counsel for both parties about opt-outs, objections and comments; (5) summarizing for the Court information about the provision of notice, opt-outs, objections, and comments; (6) calculating withholdings and employer tax contributions; (7) deciding any objections to awards made by Pay Adjustment Class members; (8) cutting and mailing checks in the appropriate amounts; and (9) making tax and pension payments. SSI has submitted a non-binding estimate of fees in the total amount of $43,500. Lieder Supp. Decl., ¶ 13.

The joint expert, Dr. Scherbaum, will calculate awards for Pay Adjustment and Damages Class members for the Notice and the distributions to class members at the rate of $350 per hour (less to the extent he delegates work to people under his direction) and a total cost of not more than $30,000. Stip., ¶ VI.4.

The Administrator and the Expert may submit monthly invoices to all counsel for their work and, if no counsel objects within ten days of receipt, the invoices will be paid. Any disputes that cannot be resolved internally will be submitted to the Court. *Id.*, ¶¶ VI.2, 5.

C. Labor-Management Committee.

Although the Complaint states only pay discrimination claims, it alleges that FDNY has treated FPIs adversely in other ways because of their racial composition. ECF 69, ¶¶ 156-67. To address this continuing perceived disparate treatment of FPIs, the Stipulation creates a labor-management committee that will meet quarterly for the first year after final approval and at least six other times. Stip., ¶ VIII.1. The parties contemplate that the meetings will result in a healthier and more productive work environment.

D. Releases

Settlement Class members who do not opt out will release the City for only "discriminatory compensation claims that were pled or could have been pled arising out of the same facts and circumstances within the time period alleged in the Complaint, including under Title VII, Sections 1981 and 1983, and the NYCHRL." Stip., ¶¶ I.37, IX.1. The time period covered by each class member's release also is tied to the period for which they will receive awards: "the later of July 1, 2004, or the beginning of their employment as an FPI until the earlier of the end of their employment as an FPI or February 14, 2025." *Id.*, ¶ IX.1.

E. Notice, Opt-Outs, and Objections/Comments

The notice plan is designed to make all Settlement Class members aware of their rights. The City will provide the Administrator with last-known mailing and email addresses for all members. *Id.*, ¶ X.2. Because class members are either current or former FPIs for the City and/or participate in the City's pension plan, those addresses should be substantially up to date. The Administrator then will send the Notice by U.S. mail and email. *Id.* In plain English, the Notice (Ex. 1.A) will describe the background and claims in the litigation, inform class members of the terms of and their rights under the settlement, and provide an individualized estimate of the award for each Damages Class member and individualized projection of the award for each Pay Adjustment Class member. Notice, pp. 1, 6.

If a Notice is returned as undeliverable, the Administrator will use its best efforts to acquire current address and addressee information, and promptly re-mail the Notice to the Settlement Class members for whom a new address is found. Stip., ¶ X.4. And to increase the chances that Settlement Class members will not discard the Notice as unread junk, Local 2507 will send class members a written announcement about the terms of the proposed Settlement that also will alert them to the anticipated communications from the Administrator. *Id.*, ¶ X.5. Finally, the Administrator will create a website, the url address of which is referenced in the Notice, that will contain information about the settlement beyond that in the Notice. Stip., ¶ X.3.

The Notice informs class members of their right to opt out of the settlement or object or otherwise comment on it and, if so, their right to speak at the final fairness hearing. Notice, § 8. The deadline for submitting opt outs, objections, or other comments is 60 days after the Notice is mailed. *Id.*

F. Approval Process

Plaintiffs request that the Court enter the proposed Order (Exhibit D) or an alternative that:

- Finds that the proposed settlement appears sufficiently fair, adequate, and reasonable to be submitted to class members for their consideration;
- Provisionally finds that both proposed classes should be certified under Rule 23(b)(3);
- Approves the Notice and directs the Administrator to provide it to Settlement Class members as set out in the Stipulation;
- Approves the procedures for Settlement Class members to opt out of the settlement and to object to or otherwise comment on the settlement;
- Sets the date and time for the final fairness hearing, at which the Court will consider whether to certify the two proposed classes, whether to approve the settlement, and whether to approve the motions for payment of service awards and attorneys' fees and reimbursement of attorneys' expenses.

The Timeline organizes chronologically the dates to which the parties have agreed.

IV. ARGUMENT

Preliminary approval is the first step in the process required before a class action may be finally settled. MANUAL FOR COMPLEX LITIGATION, FOURTH, at 320. Preliminary approval permits notice of the settlement to be given to the class members and informs them, among other information, how class members may be heard with respect to final approval. *Id.* at 322; *see* Fed. R. Civ. P. 23(e) (setting out procedures for settling class actions).

In evaluating whether to preliminarily approve a proposed class settlement:

> a court must assess "whether it is 'likely' it will be able to finally approve the settlement after notice, an objection period, and a fairness hearing." 4 *Newberg and Rubenstein on Class Actions* § 13:10 (6th ed.) (citation omitted). To approve a proposed settlement, a court must find "that it is fair, reasonable, and adequate" after considering four factors: (1) adequacy of representation, (2) existence of

> arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members.

Soler v. Fresh Direct, LLC, No. 20 Civ. 3431 (AT), 2023 U.S. Dist. LEXIS 42647, at *5 (S.D.N.Y. Mar. 14, 2023).[3] Considerations affecting the third and fourth factors include "the monetary and non-monetary benefits provided to the Settlement Class through the Settlement, the specific risks faced by the Settlement Class in prevailing on their claims, the stage of the proceedings at which the Settlement was reached and the discovery that was conducted, the effectiveness of the proposed method for distributing relief to the Settlement Class, [and] the proposed manner of allocating benefits to Settlement Class Members." *Chen-Oster v. Goldman Sachs & Co. LLC*, 10 Civ. 6950 (AT), 2023 U.S. Dist. LEXIS 99669, at *6 (S.D.N.Y. May 15, 2023). "[T]he Court must also find that it will likely be able to certify the class[es] for purposes of judgment on the Settlement." *Soler*, 2023 U.S. Dist. LEXIS 42647, at *13.

As discussed below, it is "likely" that the Court will be able to approve the revised settlement at the final fairness hearing because (A) "it is fair, reasonable, and adequate" based on the four principal considerations and (B) it is "likely" that the Court will be able to certify both Settlement Classes.

A. The Court "Likely" Will Conclude that the Settlement Is Fair, Reasonable, and Adequate.

1. The Classes Are Adequately Represented.

[3] As this Court explained, "Before the 2018 amendments to Rule 23, courts in the Second Circuit considered whether a settlement was 'fair, reasonable, and adequate' under the nine factors outlined in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc*., 209 F.3d 43 (2d Cir. 2000). The four factors identified in 2018 were not intended to displace the *Grinnell* factors, but to focus courts on the 'core concerns of procedure and substance.'" *Soler*, 2023 U.S. Dist. LEXIS 42647, at 5 n.3 (quoting Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment).

The Federal Rules require a court evaluating a class settlement to determine whether the class is adequately represented. Fed. R. Civ. P. 23(e)(2)(A). "Determination of adequacy typically 'entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced[,] and able to conduct the litigation.'" *Soler*, 2023 U.S. Dist. LEXIS 42647, at *6 (quoting *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019)) (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).

The Court found in its Order of September 19, 2022, that "Plaintiffs' interests do not conflict with those of the class or subclass" certified in that Order, primarily because "Plaintiffs are all FPIs subject to the identified City policies that are paid less than their BI comparators, see ECF 69, ¶¶ 183–189, and no named plaintiff advances any unique claims." ECF 98, at 34. The Court's January 16, 2024, Order did not alter that analysis with respect to the proposed Damages Class, which is identical to the certified class except that the class period extends about 11 months later, until August 30, 2023. *See* ECF No. 137, at 9 (commenting that Court "certified a class nearly identical to the Damages Class under Rule 23(a) and (b)(3)"). The litigation successes of the earlier approved class also reflects that the Damages Class is adequately represented: through Class Counsel's efforts, it defeated the motions to dismiss, prevailed on its class certification motion, largely prevailed on the cross-*Daubert* motions, and negotiated this settlement. ECF 62-13; *see Soler*, 2023 U.S. Dist. LEXIS 42647, at *6 (finding that plaintiffs' counsel "has demonstrated that it is qualified, experienced, and able to conduct the litigation" because it "did substantial work identifying, investigating, litigating, and settling Plaintiffs' and the class members' claims, has years of experience prosecuting and settling criminal history discrimination cases, and is well-versed in employment law and class action law").

But the Court concluded that the five original Plaintiffs and their counsel had a conflict in representing the Pay Adjustment Class. That issue has now been addressed. The Pay Adjustment Class is now represented by the two Pay Adjustment Plaintiffs, neither of whom is a Damages Class member. They have retained independent counsel who had no prior relationship with Damages Counsel and who have no interest in the outcome for the Damages Class. ECF 142, 143. Like Damages Counsel, Pay Adjustment Counsel are experienced in litigating employment discrimination class actions. ECF 142. *See* Harris Decl. ¶¶ 14-29. The Pay Adjustment Class is adequately represented, for purposes of both Fed. R. Civ. P. 23(a)(4) and the Court's analysis of whether the settlement is fair, reasonable, and adequate to members of each class.

2. The Parties Engaged in Arms'-Length Negotiations.

Pursuant to Rule 23(e)(2)(B), this Court considers whether the parties engaged in "arm's-length negotiations between experienced, capable counsel after meaningful discovery" and whether a respected mediator was involved in deciding whether to preliminarily approve a class settlement. *Soler*, 2023 U.S. Dist. LEXIS 42647, at *7 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) and *In re GSE Bonds*, 414 F. Supp. 3d at 693). A presumption of fairness arises when a settlement is reached after arms'-length negotiations between experienced, capable counsel. *Wal-Mart,* 396 F.3d at 116; *Flores v. Anjost Corp.,* No. 11 Civ. 1531 (AT), 2014 U.S. Dist. LEXIS 11026, at *11 (S.D.N.Y. Jan. 29, 2014) (quoting *Wal-Mart*). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Flores*, 2014 U.S. Dist. LEXIS 11026, at *12.

As in *Soler*, the following factors "weigh in favor of approval": in reaching the original settlement, the parties engaged in six full-day in-person mediations (compared to three in *Soler*) and many other mediated negotiation sessions via video and phone conferencing; the mediation

lasted over nine months (compared to five months in *Soler*); the mediation occurred before an experienced and respected JAMS mediator (as in *Soler*); and the parties engaged in meaningful factual and expert discovery (also similar to *Soler*); *see also Chen-Oster*, 2023 U.S. Dist. LEXIS 99669, at *6 (considering "the stage of the proceedings at which the Settlement was reached and the discovery that was conducted," among other factors, in granting preliminary approval); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2017 U.S. Dist. LEXIS 180292, at *8 (S.D.N.Y. Oct. 26, 2017) (granting preliminary approval partly because "[n]egotiations were conducted both directly between the parties' counsel and with the assistance of an experienced employment mediator, whom counsel met with on multiple occasions before reaching a settlement"); *Hernandez v. Anjost Corp.*, No. 11 Civ. 1531 (AT), 2013 U.S. Dist. LEXIS 116048, at *6-7 (S.D.N.Y. Aug. 14, 2013) (granting preliminary approval partly because the settlement is "the result of extensive, arms'-length negotiations by counsel well-versed in the prosecution of wage and hour class and collective actions" with "[t]he assistance of an experienced mediator").

After the Court declined to preliminarily approve the original settlement, Pay Adjustment Counsel undertook a detailed, independent review of the calculations on which the original settlement was based to assess its fairness, reasonableness, and adequacy. Upon completing its review, Pay Adjustment Counsel initiated negotiations with Damages Counsel and the City's Counsel. While Pay Adjustment Counsel concluded that the original settlement had been fair, reasonable, and adequate, they successfully negotiated a five-and-a-half month extension to the Pay Adjustment Period in light of the delay that the City and union representatives experienced in starting collective bargaining negotiations. They also negotiated a process for Pay Adjustment Class members to make individual objections to their awards. Harris Decl., ¶ 12. These additional negotiations included numerous audiovisual conference calls and several email exchanges with the

City's lawyer. Harris Decl., ¶ 12; Lieder Supp. Decl., ¶ 6. Pay Adjustment Counsel and Damages Counsel also had numerous audiovisual, telephonic, and email communications between themselves to reconcile their positions and to prepare and edit the revised Stipulation of Settlement. Harris Decl., ¶ 12; Lieder Supp. Decl., ¶ 7.

Although Pay Adjustment Counsel, like Damages Counsel during the mediation, was unable to persuade the City to include in the settlement a provision for equitable relief altering the compensation structure of FPIs into the future, Pay Adjustment Counsel concluded that, in light of the commencement of a new round of collective bargaining, it is far better to finalize this settlement with its provision for awards designed to level up Pay Adjustment Class members' earnings through mid-February 2025, than to continue the litigation with all the risks and delays that litigation always entails. Harris Decl. ¶11. Class Counsel anticipate that the very substantial monetary elements of this settlement will spur the bargaining parties to reach an accord that eliminates structural pay differences between BIs and FPIs going forward to avoid future litigation of these very same issues. *Id*.

3. The Relief Is More than Adequate; It is Extraordinary.

"Rule 23(e)(2)(C) requires a court to examine whether relief for the class is adequate, taking into account: '(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).'" *Soler*, 2023 U.S. Dist. LEXIS 42647, at *7-8 (quoting Fed. R. Civ. P. 23(e)(2)(C)).

Any evaluation of the adequacy of the settlement should begin with the extraordinary relief afforded to the classes. Very few employment discrimination class cases result in settlement funds

of about $50,000 gross and $35,000 net per class member, which is what Damages Class members will receive on average. *See, e.g., Soler,* 2023 U.S. Dist. LEXIS 42647, at *10 ("approximately $1,156 per class member"); *Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359, 364, 365 (E.D.N.Y. 2014) (granting final approval to settlement in gender discrimination class action creating settlement fund of $38,225,000 for 4,928 class members, an average of about $7,757 per class member); *Duling v. Gristede's Operating Corp*., No. 06 Civ. 10197 (LTS)(HBP), 2013 U.S. Dist. LEXIS 87126, at *4, 5 (S.D.N.Y. June 19, 2013) (granting final approval to settlement in gender discrimination class case creating settlement fund of $1,450,000 for which 666 class members submitted claims, an average of about $2,177 per claimant); *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM) 2010 U.S. Dist. LEXIS 125945, at *4, 14-15 (S.D.N.Y. Nov. 30, 2010) (granting final approval to settlement in gender discrimination class action creating settlement fund of $152,500,000 for class of 6,206 women, an average of about $24,573 per class member).[4]

The $50,000 gross and $35,000 net averages for the Damages Class members also are impressive when compared with settlements in the two cases that proceeded under a similar theory, *i.e.*, that employees in a job title primarily populated by women (or people of color) are paid less than employees in another job title performing substantially similar work but composed primarily of men (or white) employees. *See Andrews v. City of New York*, 118 F. Supp. 3d 630, 633 (S.D.N.Y. 2015) (paying class members "from $250 to $7,000 per plaintiff depending upon such factors as their dates and lengths of employment"); *Ebbert v. Nassau County*, No. CV 05-5445 (AKT), 2011 U.S. Dist. LEXIS 150080, at *17 (E.D.N.Y. Dec. 22, 2011) (creating settlement fund of $7,000,000 for 230-250 class members, an average of about $30,000 gross per class member).

[4] *Velez* settled after a well-publicized trial resulting in a huge victory for plaintiffs, and yet settled for about half the amount per class member as the settlement here.

Meanwhile, Pay Adjustment Class members will receive every dollar they reasonably could have recovered through litigation. Each Pay Adjustment Class member will receive a monetary award equal to a pay increase for 17.5 months of 100% of the difference between the average salary of FPIs at that employee's level and the average salary of BIs of the equivalent level,[5] with no discount for risk or any other factor. Harris Decl. ¶¶ 8-10; Lieder Supp. Decl., ¶ 14. Counsel anticipate that, on average, the Pay Adjustment awards will exceed $5,000. And, since most Pay Adjustment Class members are also members of the Damages Class, this will be on top of the $35,000 net awards, making average net awards to Settlement Class members roughly $40,000. Lieder Supp. Decl., ¶ 16.

In negotiating this settlement, Plaintiffs took account of the risks, costs, and delay of trial and appeal. Even after class certification, Plaintiffs still faced substantial merits challenges partly because their claims were so novel. An adverse decision could have resulted in no recovery at all. Plaintiffs would have had to prove that the FPI and BI job duties and requirements were indeed substantially similar. To prevail on their disparate treatment claims, they would have had to prove that the pay differences stemmed from racial biases rather than non-discriminatory factors such as market forces. To prevail on the disparate impact claims, they would have had to prove that they had correctly identified the City's practices that resulted in pay disparities. And even if Plaintiffs prevailed on liability, they would have faced substantial uncertainty about damages awardable under the NYCHRL's continuing violation doctrine. While case law establishes the doctrine's viability under the NYCHRL, no court has awarded damages under it in a pay discrimination case, let alone for 13 years prior to the limitations period. These types of risk make the proposed

[5] Since 2020, the City has used different nomenclature for the levels of FPIs and building inspectors, but the parties agreed on the comparisons that make the most statistical sense. They are the same comparisons that will be used for the Damages Class from FY 2020 through August 31, 2023. Lieder Supp. Decl., ¶ 15.

settlement fair, reasonable, and adequate. *See Soler*, 2023 U.S. Dist. LEXIS 42647, at *9-10 (finding relief to be adequate partly because "Plaintiffs' legal theory is novel and relatively untested by courts, and estimating damages for each class member would be challenging"); *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 180 (S.D.N.Y. 2014) (approving class settlement "that removes the uncertainty that litigation necessarily entails" when "Defendants presented several non-frivolous arguments … that might have reduced plaintiffs' eventual damages award or resulted in a verdict for defendants"); *Flores*, 2014 U.S. Dist. LEXIS 11026, at *16 (holding settlement to be adequate partly because "Plaintiffs faced numerous risks as to both liability and damages, including overcoming Defendant's defenses …).

The settlement also allows Plaintiffs to avoid substantial expenses. Without a settlement, for example, Plaintiffs would have to pay their expert to conduct expensive analyses about the similarity of FPI and BI jobs. *See Soler*, 2023 U.S. Dist. LEXIS 42647, at *9 (although sufficient discovery had already occurred for the parties to engage in meaningful settlement discussions, "assessing liability and damages would require significant more factual discovery").

Next, without a settlement, it would likely have taken many years for Plaintiffs' claims to be resolved through trial and appeal. *See In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 312 (S.D.N.Y. 2020) (granting final approval to settlement partly because it "provides the Class with immediate, substantial and definite relief without the delay, risk, and uncertainty of trial and continued litigation"); *Riedel v. Acqua Ancien Bath N.Y. LLC,* No. 14 Civ. 7238, 2016 U.S. Dist. LEXIS 68747, at *22 (S.D.N.Y. May 19, 2016) (finding that settlement would avoid expense and delay associated with motion practice and trial); *In re MatlinPatterson Global Opportunities Partners II L.P.*, 644 B.R. 418, 433 (Bankr. S.D.N.Y. 2022) ("the settlement eliminates not just a 'likelihood' but rather a certainty of complex and protracted litigation,

expense, inconvenience, and delay"). For example, the Second Circuit only last year ruled on an appeal from a jury verdict entered in 2019 -- four years before -- in favor of the other group of employees represented by Local 2507: emergency medical service employees. *Perry v. City of New York*, 78 F.4th 502 (2d Cir. 2023).

Finally, the Stipulation's provisions concerning service awards and attorneys' fees and expenses do not change the calculus. As will be set out in the memoranda in support of payment of service awards and payment of attorneys' fees and expenses, the awards are in line with those in other similar cases. Indeed, the requested attorneys' fees are $510,000 less than those requested in 2023 because Plaintiffs no longer seek fees for Damages Counsel attributable to the Pay Adjustment Class. This reduction is more than 50 times greater than the extra $10,000 in expenses incurred by Damages Counsel. And, of course, Settlement Class members will have a chance to object to any of the requests and, even without objections, the Court will decide whether they are fair, reasonable, and adequate.

4. The Settlement Treats Class Members Equitably.

The settlement also passes the final enumerated consideration in evaluating whether it is fair, reasonable, and adequate: it treats all class members equitably. The formulas for allocating awards among Damages Class members and among Pay Adjustment Class members give larger awards to class members with greater injuries. The formulas do this objectively; neither the Expert nor the Administrator will exercise any discretion. And the formulas do not favor the Plaintiffs over class members. The only distinction is that the Plaintiffs will receive service awards in the amounts that the Court deems fair and reasonable in addition to their class awards.

5. The Release Is Properly Limited

While not specifically mentioned in Rule 23(e)(2), the proposed settlement also is fair,

reasonable, and adequate in that the release is not overly broad. It is limited to the pay discrimination claims that were asserted or could have been asserted, it is limited to the time period for which each class member will obtain relief, and it releases only the City and its agents. *Cf. Mercado*, 2023 U.S. Dist. LEXIS 84303, at *6-8 (denying motion for preliminary approval without prejudice partly because release protected entities only tenuously connected to the litigation).

Thus, the Court should preliminarily rule that the proposed settlement is fair, reasonable, and adequate. *See* ECF 137, at 11 ("the Settlement likely satisfies the other requirements of Rule 23(e)(2)" except for adequacy of representation of the Pay Adjustment Class).

B. <u>It Is "Likely" the Court Will Certify Both Settlement Classes.</u>

"To preliminarily approve the Settlement, the Court must also find that it will likely be able to certify the class for purposes of judgment on the Settlement." *Soler*, 2023 U.S. Dist. LEXIS 42647, at *13 (citing *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019)). And, as in *Soler*, the defendant "has agreed not to oppose, for settlement purposes only, conditional certification" of the Settlement Classes. *Soler*, 2023 U.S. Dist. LEXIS 42647, at *13; *see* Stip., ¶ II.1.f, II.4. In its prior denial of preliminary approval, the Court indicated that approval of the Damages Class was likely. ECF No. 137, at 9 ("For the reasons stated [in its class certification decision (ECF No. 98)], the Damages Class likely satisfies the requirements of Rule 23(b)(3)"). While the Court reached the opposite conclusion as to the Pay Adjustment Class, the issues that the Court identified are addressed with the new Pay Adjustment Plaintiffs and Pay Adjustment Counsel and the change from a 23(b)(2) to a 23(b)(3) class.

1. The Prerequisites of Rule 23(a) Are Satisfied for Settlement Purposes.

To maintain a lawsuit as a class action, plaintiffs must show "(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). Each class now "likely" satisfies each of these four requirements.

a. *The Classes Are Sufficiently Numerous.*

Generally, the "numerosity" requirement of Rule 23(a)(1) "is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Numerosity is indisputable here. The Damages Class will have about 550 members and the Pay Adjustment Class 400 or more. ECF No. 98, at 26-27 (finding numerosity for the certified class based on 507 members and for the proposed subclass based on 365 members).

b. *The Claims Raise Common Questions of Law and Fact.*

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Court has already identified questions that were common to all class members through September 2022, including: (1) are the FPI and BI jobs similar? (2) does common evidence point toward discriminatory treatment of FPIs? and (3) have three City policies or practices had a disparate impact on FPIs of color? ECF No. 98, at 27-33. The claims of the Damages Class, which are identical to the certified class except for the end date, raise those same questions. So too do the claims of the Pay Adjustment Class, which covers the period from September 1, 2023, through February 14, 2025.[6]

c. *The Claims and Defenses Are Typical.*

Rule 23(a)(3) requires a representative's claims to be "typical" of those of other class members. The Court already has found that the five Damages Plaintiffs satisfy this requirement for the claims through September 2022. ECF No. 98, at 34. The extension of the class period

[6] The claims of the Damages Class raise one unique common question, namely, may class members assert claims prior to May 1, 2017, under the NYCHRL based on a continuing violation? The other common questions raised by the claims of the Pay Adjustment Class, however, more than suffice to satisfy the "commonality" requirement.

through August 31, 2023, does not change that analysis. Similarly, the claims of the two Pay Adjustment Claimants "arise[] from the same course of events" and will be supported by "similar legal arguments to prove the defendant's liability" as will the claims of all other Pay Adjustment Class members. *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir. 1992).

d. *Class Counsel and the Class Representatives Are Adequate.*

Nothing in the Court's prior denial of preliminary approval suggests that the Damages Plaintiffs and Damages Counsel cannot adequately represent the Damages Class, as required under Fed. R. Civ. P. 23(a)(4). And, as explained at page 16 above, the Pay Adjustment Plaintiffs and Pay Adjustment Counsel now adequately represent the Pay Adjustment Class.

2. The Classes "Likely" Satisfy the Prerequisites of Rule 23(b)(3).

Both groups of Plaintiffs seek to certify their classes under Rule 23(b)(3). A class action may be maintained under that rule if common questions of fact or law "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

The predominance requirement does not require that there be no individual issues. ECF No. 98, at 35-36 (quoting, among other decisions, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). The Court previously found that the common questions raised by the certified class's disparate impact and disparate treatment claims predominated over individual questions. ECF No. 98, at 37-40. And the Court stated that "the Damages Class likely satisfies the requirements of Rule 23(b)(3)," ECF No. 137, at 9, an unsurprising conclusion since the only difference is a few extra months in the class definition.

All the common questions discussed by the Court in 2022 for the certified class apply as well during the period from September 1, 2023, through February 14, 2025. It follows that the

claims of the Pay Adjustment Class "likely" raise predominantly common questions as well.

The two proposed classes also "likely" satisfy the superiority requirement. In assessing superiority, "courts analyze: (1) the interest of the class members in maintaining separate actions; (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the difficulties likely to be encountered in the management of a class action.'" ECF No. 98, at 40-41 (quoting *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (quoting Fed. R. Civ. P. 23(b)(3)). In the context of a settlement class, Plaintiffs need not show that a trial would be manageable. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 618-620 (1997). In 2022, the Court found that "disaggregating the claims into hundreds of individual proceedings would only waste 'time, effort, and expense' and increase the likelihood of conflicting outcomes," and that "[a]ll class members' interests are implicated by the present case, and it is more expedient to concentrate in one forum the litigation of all class members' claims based on differences in pay due to racial discrimination." ECF No 98, at 41. The same analysis applies to the Damages Class, and the fact that the Pay Adjustment Class' claims arise between September 2023 and February 2025 should not change that analysis one iota.

C. Appointment of Class Representatives and Class Counsel

For the reasons stated by the Court when appointing plaintiffs' counsel as Class Counsel for the certified class, ECF No. 98, at 43-44, and in section IV.A.1 above concerning the adequacy of the representation of the Settlement Classes, the Court should appoint (1) Plaintiffs Chalmers, Connors, Mendez, Nova, and Rosemond as representatives of the Damages Class, (2) Mehri & Skalet, PLLC and Valli Kane & Vagnini LLP as Class Counsel for the Damages Class, (3) Intervenor-Plaintiffs Bowman and Stack as representatives of the Pay Adjustment Class, and (4)

Gladstein, Reif & Meginniss, LLP as Class Counsel for the Pay Adjustment Class.[7]

D. The Notice and Notice Process Should Be Approved.

Under Fed. R. Civ. P. 23(e), settlement class members are entitled to notice of any proposed settlement before the Court decides whether to approve it. A settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). It must also be "understood by the average class member." *Wal-Mart*, 396 F.3d at 114 (internal citations omitted).

The Notice and process for providing notice in this case are reasonable and should be approved for the same reasons set out in *Soler.* As in *Soler,*

> [t]he Notice is written in plain language, organized clearly, and based on the Federal Judicial Center's model notices. The Notice fairly, plainly, accurately, and reasonably informs class members of: (1) appropriate information about the nature of this litigation, the settlement class[es] at issue, the identity of class counsel, and the essential terms of the Settlement; (2) appropriate information about [Class Counsel's] forthcoming application for attorney's fees and other payments that will be deducted from the settlement fund; (3) appropriate information about how to participate in the Settlement; (4) appropriate information about the Court's procedures for final approval of the Settlement; (5) appropriate information about how to challenge or opt-out of the Settlement, if they wish to do so; and (6) appropriate instructions as to how to obtain additional information regarding this litigation and the Settlement.

2023 U.S. Dist. LEXIS 42647, at *18-19. The Notice also informs each class member of the approximate amount of monetary relief they will receive and provides details on the date, time and place of the final approval hearing. *See* MANUAL FOURTH at § 21.312.

The Court's analysis in *Soler* also shows that the method for providing notice here is reasonable. "The settlement administrator will mail the Notice to class members [and] create and

[7] The qualifications of the Pay Adjustment Counsel and the reasons why Bowman and Stack are appropriate class representatives of the Pay Adjustment Class are set out more fully in the Harris declaration, ¶¶ 4, 14-29.

administer a website." 2023 U.S. Dist. LEXIS 42647, at *19. Whereas in *Soler* the administrator will "inform class members of the Settlement and website via text message," *id.*, here they will be informed by email communications from the administrator and Local 2507 as well as through the mailed notice. As in *Soler*, the administrator will "take reasonable steps to obtain correct addresses for class members whose notice is returned as undeliverable [and] attempt re-mailings for those class members. *Id.* at *19-20. In short, "the proposed plan for distributing the Notice will provide the best notice practicable under the circumstances, satisfies the notice requirements of Rule 23(e), and satisfies all other legal and due process requirements." *Id.* at *20.

E. A Process for the Final Approval Hearing Should Be Established.

Finally, as in *Soler*, the Court should set the date, time, and location for the final approval hearing at which it will decide whether to finally approve the Settlement Classes and proposed settlement, the motion for service awards, and the motions for attorneys' fees and expenses. The Court also should approve all the proposed intermediate dates, such as the deadline for submitting opt outs, comments, and objections. Except for the date of the hearing, the parties' proposed deadlines are set out in the Stipulation, the Notice, the Timeline, and the proposed Order. The parties ask the Court to schedule the final approval hearing at the earliest date available on its calendar that is at least 110 days after the Court preliminarily approves the settlement. Once the Court establishes those deadlines, the Administrator will insert all required dates into the Notice before sending by mail and email.

V. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Court approve the proposed settlement and enter the proposed Preliminary Approval Order, attached hereto as Exhibit 1.D, or a substantially similar Order.

Dated: July 22, 2024

Respectfully submitted,

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