UNITED STATES DISTRICT COURT
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,

Intervenor-Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

20 Civ. 3389 (AT)

ORDER

ANALISA TORRES, District Judge:

Plaintiffs, Darryl Chalmers, Darren Connors, Glenn Mendez, James Nova, and Fatima Q. Rosemond—fire protection inspectors ("FPIs") employed by the Fire Department of the City of New York ("FDNY")—and their representative union, AFSCME District Council 37 Local 2507 ("Local 2507"), together with Intervenor-Plaintiffs, Branden Bowman and Sebastian Stack—FPIs hired by FDNY after September 1, 2023—bring this class action against Defendant, the City of New York (the "City"), alleging employment discrimination on the basis of race in violation of 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*; and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq*. Am. Compl. ¶¶ 20, 22, 27–31, ECF No. 69; ECF Nos. 147–48.

Having reached a settlement (the "Settlement"), ECF No. 168-1, Plaintiffs and Intervenor-Plaintiffs (collectively, "Movants") jointly seek an order (1) preliminarily approving the Settlement; (2) conditionally certifying two proposed settlement classes under Federal Rules of Civil Procedure 23(a) and 23(b); (3) appointing Movants as representatives of, and their attorneys as class counsel to, the respective settlement classes; (4) approving and directing the distribution of the proposed notice of settlement and claim form (collectively, the "Notice"); (5) enjoining class members from pursuing released claims against the City; and (6) scheduling a fairness hearing to take place on a date 110 days from the date of an order preliminarily approving the Settlement or soon thereafter. Mem. at 3, 30, ECF No. 170; Settlement ¶ II.1. Movants represent that although the City "denies [their] allegations and contends that it complied with law," it "supports the motion for preliminary approval." Mem. at 2 (citing Settlement ¶ IX.3).

For the reasons stated below, the motion is GRANTED.

BACKGROUND

I. Procedural Background

FPIs are employed by the FDNY to inspect buildings, facilities, vehicles, and public activities in New York City and ensure compliance with safety codes and regulations. Am. Compl. ¶ 1. Roughly thirty percent of FPIs identify as white. *Id.* ¶ 2. Since at least fiscal year ("FY") 2008, the City has paid FPIs salaries, overtime, and other benefits that are substantially lower than those paid to the City's building inspectors ("BIs") employed by the Department of Buildings, where white employees comprise fifty percent of the workforce. *Id.* ¶¶ 6–8, 14. Plaintiffs allege that these compensation disparities persist even though FPIs and BIs have similar educational requirements, *id.* ¶¶ 39–41, take similar qualifying exams, *id.* ¶ 43, undergo

training that covers a "virtually identical" range of subjects, *id.* ¶ 46, and share the same principal duty of conducting field inspections to ensure compliance with the City's codes and regulations, *id.* ¶ 48. Based on publicly available salary data on City employees from FYs 2008–2019, Plaintiffs allege that the City pays FPIs lower salaries than BIs at comparable levels who work comparable hours. *Id.* ¶¶ 72–114.

On May 1, 2020, Plaintiffs filed the class action complaint. ECF No. 1. By order dated September 16, 2021, the Court granted in part the City's motion to dismiss, dismissing the Title VII and NYCHRL claims of the white named Plaintiff and putative class members. ECF No. 63. On October 12, 2021, Plaintiffs filed an amended complaint and renewed their NYCHRL claims as to the entire putative class of FPIs. *See* Am. Compl.; *id.* ¶¶ 229–33. The City again moved to dismiss Plaintiffs' claims as to the white FPIs. ECF No. 73. The Court denied the City's motion. ECF No. 93.

On September 19, 2022, the Court granted Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23(b)(3) and appointed the law firms Mehri & Skalet, PLLC, and Valli Kane & Vagnini LLP as class counsel (the "Certification Order"). *See generally* ECF No. 98. Specifically, the Court certified (1) "a class of persons who were employed as FPIs at any time between three years prior to the filing of the complaint and the date of class certification, . . . [asserting] disparate treatment claims under the NYCHRL;" and (2) a "subclass of persons . . . who do not self-identify as white, . . . [asserting] disparate treatment and disparate impact claims under Title VII and the NYCHRL." *Id.* at 25–26. The Court found that both the class and subclass' disparate treatment and disparate impact claims satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), and the predominance and superiority requirements of Rule 23(b)(3). *See id.* at 25–43. The Court also found that

"Plaintiffs' interests do not conflict with those of the class or subclass," primarily because "Plaintiffs are all FPIs subject to the identified City policies that are paid less than their BI comparators . . . and no named plaintiff advances any unique claims." *Id.* at 34.

After the Certification Order, Plaintiffs and the City engaged in mediation before Robin Gise of JAMS ADR Services. Mem. at 4. Over the course of nine months, Plaintiffs and the City conducted six in-person, full-day mediation sessions and over ten additional settlement meetings. *Id.* (citing ECF No. 124). In mid-August 2023, Plaintiffs and the City executed a settlement agreement. *Id.* at 5; ECF No. 124 ¶ 34. On August 30, 2023, Plaintiffs moved for preliminary approval of the settlement, conditional certification of two settlement classes, appointment of class counsel, and approval of notice to class members. ECF No. 118.

Plaintiffs sought conditional certification under Rule 23(b)(3) of a "Damages Class" comprised of "all persons whom the City has employed as an FPI at any time between May 1, 2017 and August 31, 2023." ECF No. 120 at 5–6. The Damages Class was "essentially the same class that the Court previously [had] certified, except that its end date ha[d] been moved" later in time and the class did not contain any subclasses. *Id.* at 11–12. Plaintiffs also sought conditional certification under Rule 23(b)(2) of a "Pay Adjustment Class" comprised of "all persons who serve as a[n FPI] or associate [FPI] in the FDNY at any time between September 1, 2023 and August 31, 2024." *Id.* at 6.

On January 16, 2024, the Court issued an order denying, without prejudice, Plaintiffs' motion for preliminary approval (the "Denial Order"). ECF No. 137; *see also* ECF No. 138 (terminating Plaintiffs' motion for service awards, fees, and expenses, with leave to refile if Plaintiffs renewed their motion for preliminary approval). The Court denied the motion on two grounds. First, the Court held that Plaintiffs and their counsel were inadequate to represent the

proposed classes due to a conflict between members of the Damages Class and those of the Pay Adjustment Class. Denial Order at 6–8. Specifically, FPIs employed by FDNY both before and after August 31, 2023, would be members of both proposed classes, while individuals who became FPIs on or after September 1, 2023, could be members of only the Pay Adjustment Class. *Id.* at 4. None of the Plaintiffs, however, were exclusively members of the Pay Adjustment Class. *Id.* at 8 (noting that Plaintiffs are either "former FPIs with only damages claims" or "FPIs with both damages *and* pay adjustment claims" (emphasis added)). Plaintiffs and their counsel were thus incentivized "to maximize [Plaintiffs'] overall recovery regardless of allotment across [class] categories, whereas class members with claims *only* in the [Pay Adjustment Class] would want to maximize the compensation for that [class] category in particular." *Id.* at 7 (emphasis added) (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 233 (2d Cir. 2016)). As the Court explained, "[w]ithout separate representation for FPIs with only pay adjustment claims, adequacy of representation [could not] be met." *Id.* at 8.

Second, the Court found that the Pay Adjustment Class did not meet the requirements of Rule 23(b)(2). *See id.* at 9. Rule 23(b)(2) provides for certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Pay Adjustment Class, however, sought "individualized award[s] of monetary damages" for each class member. Denial Order at 9–10 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011)); *see also id.* at 10 ("Only money damages that are, at best, incidental to the injunctive relief can be pursued in 23(b)(2) class actions." (cleaned up) (quotation omitted)). Because Pay Adjustment Class member awards were not incidental to any

equitable relief—indeed, the awards were the only relief contemplated by the settlement—Rule 23(b)(3) would have been a more appropriate basis for certification. *Id.* at 11.

Lastly, the Court acknowledged that the settlement "likely satisfie[d] the other requirements of Rule 23(e)(2)" for settlement approval. *Id.*

Following the Denial Order, Intervenor-Plaintiffs intervened in the action, represented by the law firm Gladstein, Reif & Meginniss, LLP ("Pay Adjustment Counsel"). Mem. at 1, 5. Intervenor-Plaintiffs are FPIs who were hired by FDNY after September 1, 2023. Bowman Decl. ¶ 4, ECF No. 173; Stack Decl. ¶ 4, ECF No. 174. Plaintiffs—those who originally filed this lawsuit—remain in the action represented by their counsel, Mehri & Skalet, PLLC, and Valli Kane & Vagnini LLP ("Damages Counsel"). Mem. at 1, 5. After Intervenor-Plaintiffs joined the action, all parties negotiated, over approximately four months, the terms of the Settlement now before the Court. *See* Lieder Decl. ¶¶ 6–8, ECF No. 171. On July 22, 2024, Movants filed the instant motion. ECF No. 168.

II. The Proposed Settlement Classes

Movants seek conditional certification under Rule 23(b)(3) of two proposed settlement classes. Mem. at 7. With slight but important differences described below, the two classes are similar to the two settlement classes for which Plaintiffs alone sought certification on August 30, 2023. For simplicity's sake, the Court adopts the parties' naming conventions and refers to the classes proposed here as the "Damages Class" and the "Pay Adjustment Class," although neither is identical to the proposed classes considered by the Court in its Denial Order.

First, Movants propose a Damages Class comprising "all persons whom the City has employed as an FPI at any time between May 1, 2017 and August 31, 2023." *Id.* This is the same Damages Class definition that the Court considered in its Denial Order, and it is therefore

"the same class that the Court previously certified" in its Certification Order, "except that the end date is about 11 months later." *Id.* The difference between the Damages Class that the Court previously considered in its Denial Order and the one proposed here is that Plaintiffs and their counsel now seek appointment to serve as representatives of the Damages Class only, rather than both the Damages Class and the Pay Adjustment Class. *Id.* at 1, 18. Movants represent that, as of March 25, 2023, the Damages Class contained 547 members. *Id.* at 7.

Second, Movants propose a Pay Adjustment Class comprising "all persons who have served as a [FPI] or associate [FPI] in the FDNY at any time between September 1, 2023, and February 14, 2025 [(the "Pay Adjustment Period")], except that persons who are attending the Fire Protection Academy during the Pay Adjustment Period must graduate before becoming a Pay Adjustment [C]lass member." *Id.* The Pay Adjustment Class differs from the one considered in the Denial Order in that the Pay Adjustment Period has been extended by five-and-a-half months, from August 31, 2024, to February 14, 2025. *Id.* at 1. Additionally, Intervenor-Plaintiffs, who are members of only the Pay Adjustment Class, move to be appointed as the sole representatives of the Class and for their attorneys, Pay Adjustment Counsel, to be appointed as class counsel. *See id.* at 1, 18. Movants represent that the number of Pay Adjustment Class members will be unknown until February 14, 2025, although they estimate that the class will comprise over 400 class members. *Id.* at 7.

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 23(e) requires judicial approval of any class action settlement. Settlement approval typically occurs in two stages: (1) preliminary approval, when "prior to notice to the class, a court makes a preliminary evaluation of fairness;" and (2) final

approval, when "notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (alteration in original) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Civ. 5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016)); *see also* Fed. R. Civ. P. 23(e). Even at the preliminary approval stage, the Court's role in reviewing the proposed settlement "is demanding because the adversariness of litigation is often lost after the agreement to settle." *Zink v. First Niagara Bank, N.A.*, 155 F. Supp. 3d 297, 308 (W.D.N.Y. 2016) (citation omitted). The Court must consider whether it will likely be able to (1) "approve the proposal under Rule 23(e)(2);" and (2) "certify the class for purposes of judgment on the proposal." *In re Payment Card*, 330 F.R.D. at 28 (quoting Fed. R. Civ. P. 23(e)(1)(B)(i)–(ii)).

II. Likelihood of Approval Under Rule 23(e)(2)

At the preliminary approval stage, the Court must assess "whether it is 'likely' [that] 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, the 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. Fed. R. Civ. P. 23(e)(2); *see In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).[1]

[1] Before the 2018 amendments to Rule 23, 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 Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The Advisory Committee Notes to the 2018 amendments to Rule 23 state that the new Rule 23 factors were not intended to displace the *Grinnell* factors but to focus the Court on the "core concerns of procedure and substance."

A. Adequacy of Representation

Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." Determining 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." *In re GSE Bonds*, 414 F. Supp. 3d at 692 (internal quotation marks omitted) (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).

With respect to the Damages Class, Plaintiffs' interests are not antagonistic to the interests of putative members of the Class. *See, e.g.*, *Capsolas v. Pasta Res. Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012). Plaintiffs seek to represent a class that is, in all material respects, the same as the class the Court previously certified and for which it appointed Plaintiffs to serve as representatives. The Court thus incorporates by reference the reasoning and conclusion in its Certification Order that Plaintiffs are adequate representatives of the Damages Class and that their counsel are qualified, experienced, and able to conduct the litigation. *See* Certification Order at 34–35, 43–44. Plaintiffs' experiences are substantially the same as that of all other Damages Class members, and Plaintiffs have the same interests in remedying the City's alleged discrimination. Additionally, Damages Counsel has done substantial work to identify, investigate, litigate, and settle Plaintiffs' and the class members' claims, has years of experience prosecuting and settling discrimination cases, and is well-versed in employment and class action law. *See generally* Lieder Decl.

As to the Pay Adjustment Class, the Settlement and proposed classes resolve the conflict previously identified by the Court in its Denial Order. FPIs with only pay adjustment claims now have separate representation by class members who are members of only the Pay

Adjustment Class. *See* Denial Order at 8. Those representatives, Intervenor-Plaintiffs and Pay Adjustment Counsel, are adequate to represent the Pay Adjustment Class. Intervenor-Plaintiffs' experiences are substantially the same as that of all other Pay Adjustment Class members, and Intervenor-Plaintiffs have the same interests in remedying the City's alleged discrimination. *See* Bowman Decl. ¶¶ 3–4, 7; Stack Decl. ¶¶ 3–4, 7. Intervenor-Plaintiffs understand their duties as class representatives, are "aware of the . . . risks attendant to [serving] as . . . class representative[s]," and have shown their commitment to the role by consulting with Pay Adjustment Counsel on the terms of the Settlement and reviewing documents related to the case over a period of many months. *See* Bowman Decl. ¶ 5; Stack Decl. ¶ 5. Pay Adjustment Counsel are highly experienced in employment discrimination class action cases. *See* Harris Decl. ¶¶ 13–28, ECF No. 172. Since joining the action earlier this year, Intervenor-Plaintiffs and Pay Adjustment Counsel have reviewed voluminous "records related to the earnings of FPIs and [BIs]," conducted extensive independent analysis of BI-FPI "comparators and compensation differences," analyzed Intervenor-Plaintiffs' legal claims and the propriety of certification under Rule 23, negotiated favorable changes to the Pay Adjustment Period, and finalized the instant Settlement in conjunction with Plaintiffs and the City. *Id.* ¶¶ 6–7, 12. Pay Adjustment Counsel's work demonstrates that they have committed sufficient resources to the litigation and are able to fairly and adequately represent the interests of the Pay Adjustment Class.

Accordingly, the adequacy of representation factor weighs in favor of approval.

B. Arm's-Length Negotiations

Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after

meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quotation marks and citation omitted). Additionally, "a mediator's involvement in settlement negotiations can help demonstrate their fairness." *In re GSE Bonds*, 414 F. Supp. 3d at 693.

This factor also weighs in favor of approval. Plaintiffs and the City engaged in six full-day, in-person mediation sessions before an experienced and respected JAMS mediator, in addition to many other mediated negotiation sessions by phone and videoconference, during a period lasting more than nine months. Mem. at 4, 18–19. The negotiations followed extensive discovery that included large amounts of payroll data, other written discovery, preparation of expert witness reports, and depositions of fact and expert witnesses. ECF No. 124 ¶¶ 14–15, 17. After Intervenor-Plaintiffs joined the action, Pay Adjustment Counsel conducted an independent analysis of their legal claims, reviewed the extensive discovery in this case, and participated in settlement negotiations with the City and Damages Counsel, resulting in changes to the original settlement agreement that are favorable to Pay Adjustment Class members. Mem. at 19–20 (citing Harris Decl. ¶ 12; Lieder Decl. ¶ 7). Damages Counsel had no role in identifying Intervenor-Plaintiffs or Pay Adjustment Counsel, *see* Lieder Decl. ¶ 4, and Damages Counsel participated in the post-intervention settlement negotiations solely "to protect the interests of Damages Class members," *id.* ¶ 6.

The Court finds, therefore, that the Settlement is the result of arm's-length, good faith negotiations involving a respected mediator and experienced and independent counsel for all parties.

C. Adequacy of Relief

Rule 23(e)(2)(C) requires the Court to consider 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)." This inquiry overlaps with the *Grinnell* factors, which the Court also considers. *See* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment.

First, the Settlement would avoid significant costs, risks, and delay, ensuring timely relief for class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(i); *Grinnell*, 495 F.2d at 463 (noting that the Court considers "the complexity, expense and likely duration of the litigation" and "the stage of the proceedings and the amount of discovery completed"); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). The parties have already engaged in substantial and meaningful discovery, *see* Mem. at 3 (citing ECF No. 124 ¶¶ 14–15, 17), are well equipped to evaluate the strengths and weaknesses of their arguments, and "had an adequate appreciation of the merits of the case before negotiating," *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (citation omitted). However, with approximately 900 or more class members, continued litigation would require further expert analysis and individualized assessment of damages, and could stretch on for multiple years. Mem. at 23; *see Soler v. Fresh Direct, LLC*, No. 20 Civ. 3431, 2023 WL 2492977, at *4 (S.D.N.Y. Mar. 14, 2023). Because of their relatively novel and untested legal theories, Movants would encounter risks to establishing liability. *See* Mem. at 22 (noting that Movants would need to prove that FPI and BI job duties

and requirements are substantially similar and that "[a]n adverse decision could [result] in no recovery at all"); *Grinnell*, 495 F.2d at 463 (noting that the Court considers "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial"). Movants would also likely encounter non-frivolous legal arguments by the City that could reduce their eventual damages award. *See* Mem. at 22 (contending that "no court has awarded damages under [the NYCHRL's continuing violation doctrine] in a pay discrimination case, let alone for 13 years prior to the limitations period"); *see Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361, 371–76 (1977).

Second, Plaintiffs' proposed method of relief distribution is effective, *see* Fed. R. Civ. P. 23(e)(2)(C)(ii), and would ensure "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund," *In re Credit Default Swaps Antitrust Litig.*, No. 13 Md. 2476, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016). The Settlement provides monetary compensation for every class member from a settlement fund of $29,907,500, which amounts, after fees, expenses, and individualized assessment of awards, to an estimated average award of approximately $35,000 for each Damages Class member and $5,000 for each Pay Adjustment Class member. Settlement ¶¶ I.41, III.3; Mem. at 1, 8–9, 21–22. Notice and claim forms, which are designed to facilitate participation by providing a website with information about the Settlement, will be mailed to all class members. Mem. at 14. Because class members are either current FPIs for the City or former FPIs participating in the City's pension plan, their addresses should be substantially up to date. *Id.* The Settlement's administrator will use its best efforts to reach class members, and Local 2507 will tell class members to anticipate communications from the administrator. *Id.*

Third, the Settlement's proposed award of attorney's fees is not unreasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Under the Settlement, Intervenor-Plaintiffs will apply for a lodestar award of Pay Adjustment Counsel's fees, to be paid outside of the Settlement fund, totaling no more than $115,000. Mem. at 12; Harris Decl. ¶ 12; Settlement ¶ V.2. Plaintiffs will seek Court approval for reimbursement of up to $250,000 in expenses and $8,250,000 in attorney's fees for Damages Counsel, amounting to 30% of the estimated $27,500,000 that will remain in the settlement fund after distribution of awards to Pay Adjustment Class members. Mem. at 11; Settlement ¶ V.2.[2] Courts in this district have approved similar attorney's fees representing approximately one-third of class settlement funds, which is "well within the applicable range of reasonable percentage fund awards." *In re DDAPV Direct Purchaser Antitrust Litig.*, No. 05 Civ. 2237, 2011 WL 12627961, at *4 (S.D.N.Y. Nov. 28, 2011). Accordingly, Pay Adjustment Counsel's request for an award outside of the Settlement fund and Damages Counsel's request for an award of less than one-third of the Settlement fund applicable to the Damages Class do not weigh against preliminary approval.

Fourth, the parties have not identified any "agreement required to be identified under Rule 23(e)(3)" that warrants the Court's consideration at this stage. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv).

Fifth, the Court considers the adequacy of relief. *See Grinnell*, 495 F.2d at 463 (noting that the Court considers "the ability of the defendants to withstand a greater judgment," "the range of reasonableness of the settlement fund in light of the best possible recovery," and "the

[2] The $8,250,000 award for Damages Counsel represents a $510,000 decrease from the award sought in Plaintiffs' initial motion for attorney's fees. Mem. at 11. Rather than seek fees based on 30% of the entire Settlement fund, Plaintiffs now seek an award of attorney's fees based on 30% of the fund that they estimate will remain after paying awards to Pay Adjustment Class members. Lieder Decl. ¶ 10.

range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation").[3] Although the Court finds that the City could withstand a greater judgment, that finding, "standing alone, does not suggest that the [S]ettlement is unfair." *In re Austrian & German Bank*, 80 F. Supp. 2d at 178 n.9. Considering Movants' best possible recovery in light of all attendant risks of litigation, the Settlement is fair and reasonable. *Cf. Times v. Target Corp.*, No. 18 Civ. 2993, 2019 WL 5616867, at *2 (S.D.N.Y. Oct. 29, 2019). Each Pay Adjustment Class member will receive "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, with no discount for risk or any other factor," covering an employment period of up to 17.5 months. Mem. at 22. These awards are estimated to average around $5,000 or more for each Pay Adjustment Class member. *Id.* Damages Class members, for their part, are expected to receive, on average, awards of $35,000 each—a substantial award for claims of this nature and novelty. *Id.* at 21–22 (citing comparison cases).[4] Although the Settlement will not require the City to implement a policy equalizing the compensation of comparable FPIs and BIs moving forward, it is reasonable to expect that the Settlement will incentivize the City to substantially eliminate the differential in pay through the collective bargaining process "in order to head off more litigation of the same issue in the future." Harris Decl. ¶ 11 n.1.

For the foregoing reasons, the Court finds that the adequacy-of-relief factor weighs in favor of preliminary approval.

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[3] The Court does not consider the second *Grinnell* factor, which requires the Court to evaluate the "reaction of the class to the settlement," *Grinnell*, 495 F.2d at 463, because consideration of this factor is premature at the preliminary approval stage, *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Since no notice has been sent, consideration of this factor is premature.").

[4] Some individuals are members of both classes and will receive both a Pay Adjustment Class award and a Damages Class award. Harris Decl. ¶ 11 n.2.

D. Equitable Treatment of Class Members

Lastly, Rule 23(e)(2)(C) requires the Court to consider whether "the proposal treats class members equitably relative to each other." Under the Settlement, class members with greater injuries will receive greater awards. Mem. at 24. The formulas for allocating awards among members of the respective classes turn on objective and ascertainable characteristics, such as class members' positions in FDNY and the length of their employment. *See* Settlement IV.B–C. The Settlement does not treat Plaintiffs and Intervenor-Plaintiffs differently from non-named class members. The Court therefore finds that the Settlement treats class members equitably relative to each other and, as such, the final Rule 23(e)(2)(C) factor also weighs in favor of preliminary approval.

For all of the reasons stated above, the Court finds that after notice, an objection period, and a fairness hearing, it will likely be able to approve the Settlement under Rule 23(e)(2).

III. Likelihood of Class Certification

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. *In re Payment Card*, 330 F.R.D. at 28. A court may certify a class for settlement purposes when the proposed settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b)—in this case, Rule 23(b)(3). *In re GSE Bonds*, 414 F. Supp. 3d at 700.

Rule 23(a) requires that a class satisfy (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy."

The Damages Class now presented in Plaintiff's renewed motion for settlement approval is nearly identical to the class which the Court previously certified. *See* Denial Order at 9 (citing Certification Order at 43). The only difference is that the class period runs approximately 11 months longer, until August 31, 2023, and the Class does not contain any subclasses. These distinctions do not alter the Court's prior findings of numerosity, commonality, typicality, adequacy, predominance, superiority, or ascertainability with respect to the Damages Class. Accordingly, the Court incorporates by reference its prior reasoning and conclusions with respect to Rules 23(a) and (b)(3) as applied to the now-proposed Damages Class. *See* Certification Order at 26–44. For the reasons stated in the Court's Certification Order, the Court will likely be able to certify the Damages Class for purposes of judgment on the Settlement.

A. Rule 23(a)

The Court reaches the same conclusion with respect to the Pay Adjustment Class, which raises the same disparate impact and disparate treatment claims as the Damages Class, albeit for FPIs employed by FDNY during a more recent period of time.

First, the Pay Adjustment Class will likely satisfy Rule 23(a)'s numerosity requirement. In the Second Circuit, courts presume numerosity at a level of forty or more class members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Although the parties cannot ascertain the total number of Pay Adjustment Class members until the conclusion of the Pay Adjustment Period, they reasonably anticipate that the class will comprise more than 400 members. Mem. at 7, 26.

Second, the Pay Adjustment Class likely satisfies the commonality requirement. Pay Adjustment Class Members are unified by the same general factual allegations and legal theories which the Court previously found to be satisfactory with respect to Damages Class members.

See Certification Order at 37–40; *Dukes*, 564 U.S. at 350.[5] Those allegations and legal claims raise common questions apt to generate uniform answers as to whether certain alleged policies applicable to all FPIs have resulted in, or are the product of, unlawful discrimination. *See* Certification Order at 37–40.

Third, the typicality requirement is likely satisfied because Intervenor-Plaintiffs' claims "arise[] from the same course of events" as the other class members and "each class member makes similar legal arguments to prove [the City's] liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Grp.*, *Inc*., 960 F.2d 285, 291 (2d Cir. 1992)). Intervenor-Plaintiffs and Pay Adjustment Class members are all subject to the same pay disparities which Intervenor-Plaintiffs challenge as unlawful. And any "minor variations in the fact patterns underlying individual claims" do not defeat typicality. *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993).

Fourth, Intervenor-Plaintiffs and Pay Adjustment Counsel are likely to satisfy the adequacy requirement for the reasons discussed above. *See supra* Section II.A.

B. Rule 23(b)(3)

The Pay Adjustment Class is also likely to meet the Rule 23(b)(3) predominance and superiority requirements for purposes of judgment on the Settlement.

As is the case with the Damages Class, liability with respect to Pay Adjustment Class members "can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir.

[5] The fact that Pay Adjustment Class members do not seek damages prior to May 1, 2017, based on the continuing violation doctrine of the NYCHRL does not undermine commonality or predominance. *See* Mem. at 26 n.6. Their disparate impact and disparate treatment claims based on alleged pay disparities between comparably situated FPIs and BIs arise from the same factual context as those of the Damages Class and raise the same fundamental common questions of law and fact.

2001), *abrogated on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Pay Adjustment Class members are "unified by a common legal theory" of liability that is tied to common facts of City policy, purpose, and effect. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). Accordingly, the Court concludes that, like the Damages Class, "common, aggregation-enabling[] issues in the case [likely] are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted).

The Court also finds that "the class action device [is likely] superior to other methods available for a fair and efficient adjudication of th[is] controversy," *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), due to the large size of the class and the desirability of concentrating litigation in a single forum, *see* Fed. R. Civ. P. 23(b)(3). Because the class certification request is made in the context of settlement only, the Court need not address the issue of manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

For all of the reasons stated, the Court conditionally certifies the Damages Class and the Pay Adjustment Class for the purposes of settlement, notice, and award distribution pursuant to Rules 23(c) and 23(e). In the event that the Court does not approve the Settlement after a fairness hearing, the Settlement is overturned on appeal, or the Settlement is otherwise not consummated, the class certification granted herein shall be dissolved immediately upon notice to the parties, and this certification shall have no further effect in this case or in any other action. Movants will retain the right to seek class certification in the course of litigation, and the City will retain the right to oppose class certification.

IV. Appointment of Class Representatives and Class Counsel

Plaintiffs Chalmers, Connors, Mendez, Nova, and Rosemond are provisionally appointed as representatives of the Damages Class, and law firms Mehri & Skalet, PLLC, and Valli Kane & Vagnini LLP are provisionally appointed as class counsel for the Damages Class. Intervenor-Plaintiffs Bowman and Stack are provisionally appointed as representatives of the Pay Adjustment Class, and law firm Gladstein, Reif & Meginniss LLP is provisionally appointed as class counsel for the Pay Adjustment Class. *See supra* Section II.A; *see also* Certification Order at 43–44.

V. Notice Approval

Because the Court will likely approve the Settlement and certify the settlement classes under Rule 23(e), "the [C]ourt must direct notice in a reasonable manner to all class members who would be bound by the [Settlement]." Fed. R. Civ. P. 23(e)(1)(B). When, as here, notice is to be provided to a settlement class that is proposed to be certified under Rule 23(b)(3), the Court "must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Notice may be made by "United States mail, electronic means, or other appropriate means." *Id.* "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc.*, 396 F.3d at 113–14. The 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." *Id.* at 114 (quoting *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir. 1982)).

Having reviewed the Notice, the Court concludes that it satisfies the reasonableness standard and complies with due process and Rule 23(c)(2)(B). *See* Notice, ECF No. 168-1 Ex.

A. The Notice is written in plain language, organized clearly, and based on the Federal Judicial Center's model notices. Mem. at 29; *see Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2010 WL 5508296, at *2 (S.D.N.Y. Dec. 22, 2010). The Notice fairly, plainly, accurately, and reasonably informs class members of: (1) appropriate information about the nature of this litigation, the settlement class at issue, the identity of class counsel, the essential terms of the Settlement, and the class member's estimated award, Notice at 1–6; (2) appropriate information about Damages Counsel and Pay Adjustment Counsel's forthcoming applications for attorney's fees and other payments, including the extent to which any such applications will propose fees that will be deducted from the settlement fund, *id.* at 7; (3) appropriate information about Movants' forthcoming applications for service awards for class representatives, *id.* at 8; (4) how to participate in, opt out of, or challenge or object to the Settlement, *id.* at 2, 8–10; (5) appropriate information about the Court's procedures for final approval of the Settlement, *id.* at 9; and (6) appropriate instructions as to how to obtain additional information regarding this litigation and the Settlement, *id.* at 10.

Further, the proposed plan for distributing the Notice appears to be reasonably calculated to reach all class members who would be bound by the Settlement. The settlement administrator will mail the Notice to class members, create and administer a website, inform class members of the Settlement and website via email, take reasonable steps to obtain correct addresses for class members whose notice is returned as undeliverable, and attempt re-mailings for those class members. Mem. at 29–30. Additionally, Local 2507 will alert class members of the Settlement and any anticipated communications from the settlement administrator. *Id.* The Court concludes, therefore, that 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.

Accordingly, the Notice is approved, the parties are authorized to retain a settlement administrator to implement the terms of the Settlement, and said settlement administrator is directed to distribute the Notice pursuant to the procedures outlined in the Settlement.

VI. Injunction Against Future Claims

Should the Court approve the Settlement as it currently stands at or after the fairness hearing, the Court shall enjoin all class members from filing, commencing, prosecuting, intervening, or participating in any lawsuit in any jurisdiction asserting released class claims against the City on behalf of themselves or any other class member. Settlement § IX. *See, e.g.*, *Swetz v. GSK Consumer Health, Inc.*, No. 20 Civ. 4731, 2021 WL 5449932, at *5 (S.D.N.Y. Nov. 22, 2021).

VII. Procedures for Final Approval of the Settlement

The Court hereby schedules, for **March 17, 2025**, at **10:00 a.m.**, a hearing to determine whether to grant final certification of the settlement class and final approval of the Settlement and the plan of allocation. The hearing will take place in Courtroom 15D of the United States Courthouse, 500 Pearl Street, New York, New York 10007. The procedures for class members to appear at the fairness hearing are set forth in the Notice.

Not later than fourteen days before the fairness hearing, Plaintiffs and Intervenor-Plaintiffs shall jointly file a motion for final approval of the Settlement and one or more supporting memoranda addressing any comments or objections to the Stipulation of Settlement and to the applications for Plaintiffs and Intervenor-Plaintiffs' service awards and Damages Counsel and Pay Adjustment Counsel's fees and expenses.

Damages Counsel and Pay Adjustment Counsel shall file their applications for an award

of attorney's fees and reimbursement of costs and expenses and the petition for an award of service payments, either jointly or separately, fourteen days prior to the fairness hearing. The briefing on the applications for service awards and for attorney's fees and expenses, like the preliminary approval briefing, shall be made available to the settlement classes and the public via the website the administrator will set up at www.fpisettlement.com. At the fairness hearing, the Court will consider any application that may be filed for the payment of attorney's fees and costs and expenses to Damages Counsel and Pay Adjustment Counsel and service payments to Plaintiffs and Intervenor-Plaintiffs.

The Notice sets forth the procedures pursuant to which settlement class members may exclude themselves ("opt out") under the Settlement. Settlement class members may exclude themselves from one class or both. To be effective, any statement of exclusion must be delivered to the settlement administrator by a date certain to be specified on the Notice, which will be sixty calendar days after the settlement administrator makes the initial mailing of the Notice. Within five calendar days after the end of the opt-out period, the settlement administrator (or counsel for any of the parties) shall file with the Clerk of Court copies of any timely submitted opt-out statements with addresses, phone numbers, and email addresses redacted. The settlement administrator shall retain the originals of all opt-out statements and, for any statements sent by mail, originals of all envelopes accompanying opt-out statements, in its files until such time as the settlement administrator is relieved of its duties and responsibilities under the Settlement.

The Notice also sets forth the procedures pursuant to which settlement class members may comment on or object to the terms of the Settlement. To be timely, any comment or objection must be submitted to the settlement administrator by U.S. mail or email by a date certain, to be specified on the Notice, which shall be sixty calendar days after the initial mailing

by the settlement administrator of such Notice. The settlement administrator (or counsel for any of the parties) shall file with the Clerk of Court copies (in the case of emailed submissions) and originals (in the case of mailed submissions) of any timely comments and/or objections with addresses, phone numbers, and email addresses redacted within ten calendar days after the deadline for timely comments and objections.

Pending the outcome of the fairness hearing, all class members are temporarily enjoined from commencing, prosecuting, or maintaining any claim already asserted in, and encompassed by, this lawsuit, and all class members (including those who request exclusion from the Settlement) are temporarily enjoined from commencing, prosecuting, or maintaining in any court or forum other than this Court any claim, action, or other proceeding that challenges or seeks review or relief from any order, judgment, act, decision, or ruling of the Court in connection with the Settlement or otherwise in connection with this lawsuit. No statute of limitations shall run against any such claims during the pendency of this temporary injunction.

If, at the fairness hearing, the Court grants final approval to the Settlement, Plaintiffs, Intervenor-Plaintiffs, and each individual class member who does not timely opt out will release claims, by operation of this Court's entry of the judgment and final approval, as described in the Settlement.

CONCLUSION

For the foregoing reasons, the motion at ECF No. 168 is GRANTED.

SO ORDERED.

Dated: November 26, 2024
New York, New York

ANALISA TORRES
United States District Judge