UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN GRAYSON, DOREEN MAZZANTI, DANIEL LEVY, DAVID MEQUET and LAUREN HARRIS, individually and on behalf of themselves and all others similarly situated, Plaintiffs, v. GENERAL ELECTRIC COMPANY, Defendant.	No. 3:13-cv-01799-WWE (Consolidated Docket No.) APRIL 30, 2020

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CERTIFICATION OF THE SETTLEMENT CLASS AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Glen Grayson, Doreen Mazzanti, Daniel Levy, David Mequet, and Lauren Harris (collectively, "Plaintiffs"), individually and on behalf of the Settlement Class (as defined in the Settlement Agreement),[1] respectfully submit this memorandum of law in support of their Motion for Certification of Settlement Class and Final Approval of Class Action Settlement.[2]

I. INTRODUCTION

Plaintiffs' claim against the General Electric Company ("GE" or "Defendant") in their Amended Consolidated Class Action Complaint [ECF No. 157] (the operative "Complaint") is straightforward. Plaintiffs allege that GE's 1090/1095 microwave ovens ("MWOs") all have a uniform defect that causes the metal spring door hinge to rub against the glass surface over time, eventually causing the glass door to spontaneously shatter. *See* Complaint at ¶¶ 25-50. Defendant denies the existence of a design defect.[3]

This case has been extensively litigated in the six years since it was filed in December 2013. As detailed below, the parties have litigated motions to dismiss, to certify and de-certify the class, and for summary judgment, and Defendants filed a Rule 23(f) petition in the Second Circuit. The parties have also engaged in extensive briefing of discovery disputes and disputes concerning the sealing of produced information (including an interlocutory appeal to the Second Circuit). Both parties submitted multiple expert reports, rebuttal reports, and supplemental

[1] Capitalized terms used herein are defined in the Settlement Agreement [Dkt. No. 358-1]. For the Court's convenience, another copy of the Settlement Agreement is attached as Exhibit A to the Declaration of Seth R. Klein submitted herewith.

[2] In conjunction with the present motion for approval of the Settlement and this memorandum of law in support thereof, Plaintiffs are also filing a separate Motion for Award of Attorneys' Fees and Expenses and for Case Contribution Award and a separate memorandum of law in support of that motion. A copy of both Motions and Memoranda are being posted to the Settlement website upon filing.

3 All subsequent references to ¶__ and ¶¶__ herein are to the FAC unless otherwise specified.

reports, as well as extensive briefing concerning motions to strike those reports. Defendant produced and Plaintiffs reviewed nearly 70,000 pages of internal GE documents, and the parties conducted depositions of 30 individuals (sometimes more than once), including senior GE personnel, third parties (including a representative of the third-party manufacturer of the subject microwaves), the Class Representatives, and multiple individual Class Members. In short, this case has been thoroughly litigated.

Although Plaintiffs continue to believe Defendant's liability is clear, Plaintiffs also understand that there is substantial risk associated with continued litigation, as detailed below. Accordingly, given that these microwaves are no longer being manufactured by GE (indeed, they were last manufactured in 2007) and in light of the continued costs of litigation and appeal, Plaintiffs believe that the proposed Settlement, which was reached after extensive negotiations lasting nearly one year (followed by many months of work finalizing the formal Settlement and then retaining a Settlement Administrator and devising a suitable notice plan) is in the best interests of the Class.

Under the terms of the Settlement, any consumer whose 1090/1095 microwave oven door spontaneously shattered prior to the date of settlement (or that shatters up to 90 days after the date of final approval) may file a claim to receive $300 in compensation. Settlement Agreement at ¶ 39.a. For microwaves that are at least twelve, and up to twenty-four, years old, this is an outstanding result. Other Class Members who still own their covered MWOs but whose microwaves have ***not*** experienced door shattering may file a claim to receive a $5 payment, which Plaintiffs believe is fair given the age of the affected microwave units and the lack of manifestation of the alleged defect. *Id.* at ¶ 39.b. Finally, even consumers who purchased or owned a 1090/1095 MWO and did not experience glass door shattering, and ***who no longer have***

the MWO (and thus are no longer in a position to suffer a glass shattering incident) may file a claim for a $5 rebate on the purchase of another GE microwave oven. *Id.* at ¶ 39.c. In addition, GE has agreed to pay separately the costs of the Settlement Administrator, attorneys' fees and expenses of Settlement Class Counsel (within certain limitations, as specified in the Settlement Agreement) and Service Awards for the named Plaintiffs (within certain limitations, as specified in the Settlement Agreement), as described in further detail below.

Plaintiffs moved for preliminary approval on December 5, 2019. [ECF Nos. 356-58.] Following a hearing on January 5, 2020 [ECF No. 362], this Court granted preliminary approval to the Settlement on January 15, 2020 [ECF No. 364]. Plaintiffs now request that the Court certify the proposed Settlement Class and grant final approval to the proposed Settlement. As explained in detail below, the Settlement is fair, reasonable and adequate. It successfully resolves a challenging case and allows thousands of class members to receive a very substantive recovery. Accordingly, Plaintiff moves the Court for entry of an order:

(1) Approving the Settlement as set forth in the Settlement Agreement;

(2) Certifying the Settlement Class;

(3) Appointing Plaintiffs Glen Grayson, Doreen Mazzanti, Daniel Levy, David Mequet, and Lauren Harris as the Settlement Class Representatives; and

(4) Appointing Hassan A. Zavareei, Esq. and Anna C. Haac, Esq. of Tycko & Zavareei LLP and Robert A. Izard, Jr., Esq., Seth R. Klein, Esq., and Mark P. Kindall, Esq. of Izard Kindall & Raabe LLP as Settlement Class Counsel.

II. BACKGROUND[4]

A. Summary of Claims and Defenses

Plaintiffs, on behalf of themselves and all others similarly situated, brought this consumer protection class action to remedy dangerous defects in certain GE-branded microwave oven models manufactured between 1995 and 2007 (specifically, model numbers JEB 1090, JEB 1095, ZMC 1090 and ZMC 1095). *See* Complaint at ¶ 2. Plaintiffs alleged that these models were defectively designed and/or manufactured such that the glass on the MWO doors can suddenly and spontaneously shatter (including when the microwave is not in use). *Id.* at ¶¶ 25-34; *see generally id.* at ¶¶ 35-50. Plaintiffs further allege that GE knew that these MWO models were defective since at least 2002, specifically identifying the root cause of the defect as being interference between the inside surface of the glass and the hinge spring inside the door assembly. *Id.* at ¶ 53. Plaintiffs allege, however, that despite this knowledge, Defendant actively and intentionally concealed these defects from Plaintiffs and the putative class. *See generally id.* at ¶¶ 51-61.

Defendant denies and disputes these allegations. *See generally* Defendant's Answer [ECF No. 109]. Moreover, Defendant has raised several substantive defenses that could undermine Plaintiffs' ability to establish liability and/or damages, including, among others, that the MWOs have already outlived their reasonable useful life (*see, e.g.*, [ECF No. 265] at 3); that Plaintiffs have failed to adduce sufficient evidence of a design defect (*see, e.g., id* at 36-46); and that even under Plaintiffs' own argument, only 1% to 2% of MWOs are expected ever to

[4] The same background information is relevant both to Plaintiffs' motion for final approval of the Settlement and to Plaintiffs' motion to attorneys' fees, expenses and lead plaintiff awards, which motions are being filed simultaneously. Accordingly, the same "Background" section appears in both supporting memoranda of law.

manifest the alleged defect (*i.e.*, have a glass shattering incident), which at most constitutes a reasonable manufacturing variance (*see, e.g.*, [ECF No. 351] at 25-28).

B. Procedural History and Discovery

1. *This Case Has Been Extensively Litigated*

Since Plaintiffs filed their initial Complaint on December 4, 2013 (*see* [ECF No. 1]), every aspect of this case has been thoroughly litigated.[5] Plaintiffs filed their First Amended Complaint on January 7, 2014. Defendant filed a motion to dismiss that complaint on February 28, 2014 [ECF No. 14], Plaintiffs filed their opposition on April 18, 2014 [ECF No. 26], and Defendant filed its reply on May 2, 2014 [ECF No. 27]. Plaintiffs then voluntarily filed a Second Amended Complaint on July 14, 2014 [ECF No. 99], which Defendant moved to dismiss on July 28, 2014 [ECF No. 38]. Plaintiffs filed their opposition on August 21, 2014 [ECF No. 55], and GE filed its reply on September 3, 2014 [ECF No. 66]. The Court issued its order granting in part and denying in part Defendant's motion on April 30, 2015, while granting Plaintiffs leave to file an amended complaint [ECF No. 103].

Plaintiffs thereafter filed a Third Amended Complaint on May 21, 2015 [ECF No. 106], which Defendant moved to dismiss on August 17, 2015 [ECF No. 119]. Plaintiffs filed their opposition on September 8, 2015 [ECF No. 123], and GE filed its reply memorandum on September 22, 2015 [ECF No. 124]. The Court granted in part and denied in part Defendant's renewed motion on November 30, 2015, and granted leave for Plaintiffs to file another amended

[5] The initial complaint in this litigation was filed by Betty Harkey. *See* [ECF No. 1]. Ms. Harkey voluntarily withdrew her personal action on June 17, 2014. *See* [ECF No. 32]. At that time and thereafter, various of the current Plaintiffs joined this litigation, either directly or through consolidation of their claims. For the sake of simplicity and clarity, this memo simply refers to "Plaintiffs" throughout when discussing the procedural history of this matter.

complaint [ECF No. 150]. Plaintiffs thereafter filed the operative Amended Consolidated Complaint [ECF No. 157] on December 21, 2015.

On April 1, 2016, Plaintiffs filed their Motion to Certify Class [ECF No. 162]. GE filed its opposition on June 1, 2016 [ECF No. 177], Plaintiffs filed their reply on August 19, 2016 [ECF No. 212], Defendant filed its surreply on December 30, 2016 [ECF No. 243], and, by direction of the Court, Plaintiffs filed their response to certain issues raised in Defendant's surreply on February 2, 2017 [ECF No. 248].[6] The Court issued its ruling on February 7, 2017 [ECF No. 257]. The Court found that Plaintiffs had standing to assert their Class claims and certified a multistate ***liability*** consumer protection law class under Rule 23(c)(4). However, the Court also raised concerns that class damages could raise individualized damages issues and thus declined to certify a ***damages*** class at that time, without prejudice to Plaintiffs renewing their request later in the proceedings. *Id.* at 12, 16-17.[7] On July 28, 2017, the parties submitted competing proposals for Class Notice [ECF Nos. 302, 303], which motions remained pending at the time of Settlement.

On October 4, 2017, GE filed a motion for summary judgment [ECF No. 310]. Plaintiffs filed their opposition on November 1, 2017 [ECF No. 318], and GE filed its reply on December 8, 2017 [ECF No. 331]. In its memorandum in support of its motion, GE raised several potentially dispositive issues, including the argument that several of Plaintiffs' claims were time

[6] Defendant moved to strike and otherwise objected to portions of Plaintiff's Reply memorandum on September 1, 2016 [ECF Nos. 215, 216], Plaintiffs responded on September 26, 2019 [ECF Nos. 227, 228], and the Court denied GE's motions on November 30, 2016 [ECF No. 237].

[7] Based on the specific classes advanced in Plaintiffs' motion, the Court also held "in abeyance" certification related to the Class' warranty claims. *See* [ECF No. 257] at 2 n.2.

barred. [ECF No. 311] at 13-32. This motion remained pending at the time of Settlement.

On April 20, 2018, GE filed a Motion to Vacate the Court's class certification order [ECF No. 350], arguing, *inter alia,* that insofar as Plaintiffs' own expert had concluded that at most only 1% to 2% of 1090/1095 MWOs would experience actual glass shattering (*i.e.*, a manifestation of the alleged defect), certification was improper. [ECF No. 351] at 25-28. GE's motion to vacate also remained pending at the time of Settlement.

During much of the above litigation process, and as discussed further below, the parties engaged in continued settlement discussions. On May 11, 2018, the parties jointly moved for a stay pending a mediation of certain unresolved issues. *See* [ECF No. 354]. The Court thereafter closed this case administratively, directing the parties to file appropriate papers with the Court if the matter were successfully settled or refiling the various pending motions discussed above if the mediation was unsuccessful. *See* [ECF No. 355]. As discussed below, the parties managed to agree upon the outstanding terms of the Settlement with the assistance of the mediator, although it took additional months to finalize the complete Settlement Agreement, to devise a notice plan, and to retain a Settlement Administrator.

2. *Discovery Has Been Extensive*

Throughout the foregoing proceedings, both parties have conducted extensive discovery in order to thoroughly understand the strengths and weaknesses of their respective claims and defenses. For example, Defendant produced nearly 70,000 pages of documents, many of which are complex, multi-tab spreadsheets. Counsel for Plaintiffs carefully reviewed and analyzed each of these documents. Declaration of Seth R. Klein ("Klein Decl.") at ¶ 3.

In addition, the parties conducted extensive expert discovery. Both parties retained glass experts to jointly examine several MWO units, including both unused exemplars and some units

where the glass had shattered. On October 15, 2015, Plaintiff served Defendant with three expert reports, including from experts on glass breakage analysis, statistics, and damages. On January 5, 2016, Defendant served plaintiff with three expert reports on the same topics. On March 9 and 23, 2016, Plaintiffs served rebuttal reports by their statistics and damages experts. Defendant moved to strike each of Plaintiffs' expert reports [*see* ECF Nos. 180, 183, 186], which motions the Court denied in all material aspects [ECF No. 258]. Many of these experts also sat for depositions. Klein Decl. at ¶ 4.

In conjunction with the Class Member depositions discussed below, the parties' respective glass experts again examined several additional Class Member microwaves in 2017. On November 15, 2017, Plaintiffs served three additional expert reports, including from their glass and statistics experts and by a regulatory expert. On December 14, 2017, Defendant moved to strike Plaintiffs' regulatory expert [ECF No. 338] (which motion was still pending at the time of the Settlement; *see* [ECF No. 355]). On March 1 and 2, 2018, Defendant served its own additional expert reports on glass analysis and statistics. As in the earlier round of expert disclosures, several of the experts also sat for depositions. Klein Decl. at ¶ 5.

Indeed, the parties engaged in the depositions of ***30*** individuals (some of whom, including experts, were deposed more than once). The deponents included:

- several senior GE officers;
- a representative of Underwriters Laboratories, Inc., a global independent safety company that certified that the subject MWOs met certain safety standards;
- a representative of Samsung Electronics America, the American affiliate of the Korean company that manufactured the MWOs;
- Plaintiffs' glass, statistics, and damages experts;

- Defendant's glass and statistics experts;
- each of the Plaintiffs; and
- several additional individual Class Members.

Klein Decl. at ¶ 6.

Not only was the discovery in this case very extensive, but it was aggressively litigated by both sides from the beginning of the case. The parties engaged in numerous discovery conferences and negotiations throughout the pendency of the action, and also engaged in extensive discovery motion practice before this Court. *See, e.g.,* [ECF No. 45] (Plaintiffs' Motion to Compel General Electric Company to Produce Additional Microwave Safety Database Documents), [ECF No. 128] (Motion to Compel or Exclude Evidence).[8] Accordingly, the parties have mutually conducted full discovery in this case.

3. *The Parties Engaged in Extensive Arms'-Length Mediations and Negotiations*

From the inception of the litigation, Plaintiffs repeatedly reached out to Defendant to attempt to negotiate a fair settlement. As discovery proceeded and following many months of preliminary discussions, the parties agreed to a mediation before Judge William I. Garfinkel, which was held on February 22, 2016. Although the parties continued discussions following the mediation, the parties were unable to reach agreement at that time. Klein Decl. at ¶ 7.

Following the Court's certification of a Rule 23(c)(4) liability class, the parties resumed direct negotiations. The parties engaged in protracted settlement negotiations over the following

[8] Moreover, Plaintiffs worked hard to ensure that evidence of Defendant's alleged wrongdoing remained public, filing multiple oppositions to Defendants' Motions to Seal the evidence set forth in briefs and affidavits. *See, e.g.* [ECF Nos. 61, 64, 79, 96, 107, 172, 191-94, 222-26, 239, 255, 277].

months regarding substantive relief to the Class. However, the parties did not negotiate attorneys' fees until the Class relief had been finalized. The parties ultimately reached agreement on all material monetary terms with respect to class relief on or about January 22, 2018, as discussed above and embodied in the present Settlement Agreement at ¶ 39. Klein Decl. at ¶ 8.

The parties thereafter commenced negotiating attorneys' fees. On May 11, 2018, the parties agreed to proceed with a mediation on attorneys' fees before David Brodsky, an experienced mediator of complex litigation matters. The mediation took place on July 26, 2018, and, with Mr. Brodsky's assistance and pursuant to a "mediator's proposal," the parties agreed that GE would pay $1,350,000 total for attorneys' fees, expenses and Service Awards for the Settlement Class Representatives, which amount is separate from, and does not reduce, the awards to Class Members. *See* Settlement Agreement at ¶ 46; Klein Decl. at ¶ 9.

Although the parties had agreed on the core terms of the Settlement, they spent the next several months in painstaking negotiations of the full Settlement Agreement, including the form of the Settlement Notice to Class Members. Klein Decl. at ¶ 10. The parties signed the Settlement Agreement in August 2019, and following several additional months of work with the selected Settlement Administrator, moved for preliminary approval on December 5, 2019. *See* [ECF Nos. 356 through 358]. Following a hearing on January 5, 2020 [ECF No. 362], this Court granted preliminary approval on January 15, 2020, and, *inter alia*, appointed Epiq Class Actions & Claims Solutions, Inc. ("Epiq") as Claims Administrator [ECF No. 364]. Pursuant to the preliminary approval Order, Epiq on April 15, 2020, mailed, emailed and otherwise distributed the Settlement Notice to Class Members, began the internet / social media notice campaign, and

launched the Settlement website.[9] Although the deadline for filing a claim, objecting or opting out has not yet passed, as of the date of this filing, ***no*** Class Members have filed or otherwise communicated an intent to file an objection or a request to be excluded.

III. OVERVIEW OF THE SETTLEMENT AGREEMENT

The terms and conditions of the Settlement are set forth in the Settlement Agreement (Exhibit A to Klein Declaration). Below is a summary of the Settlement Agreement's terms.

A. The Settlement Class

The Settlement Agreement defines Class Members as "all persons (other than retailers, resellers, or wholesalers) residing in the United States of America who purchased or owned a Covered Microwave at any time during the Settlement Class Period." *See* Settlement Agreement at ¶ 4. Accordingly, and substituting in all defined terms, the Settlement Class is defined as

> All persons (other than retailers, resellers, or wholesalers) residing in the United States of America who purchased or owned a microwave oven bearing the GE Profile or GE Monogram brand, and bearing a model number beginning with JEB1090, JEB1095, ZMC1090, or ZMC1095, at any time during the period from January 1, 1995 through the date of the entry of the Preliminary Approval Order.

See generally Settlement Agreement at Article I.

B. The Settlement Relief

Under the Settlement Agreement, Settlement Class Members whose 1090/1095 microwave oven door spontaneously broke or shattered are entitled to receive $300 in compensation. Settlement Agreement at ¶ 39.a. Moreover, this amount is solely for the damage

[9] The Court originally set March 15, 2020, as the Notice deadline, but due to a hacking and security breach issue at Epiq, the parties moved jointly moved that the Notice deadline and all subsequent deadlines be extended by approximately one month, which motion the Court granted on March 12, 2020. *See* [ECF Nos. 365 (motion), 366 (order granting motion)].

to the microwave unit; the Settlement and Release expressly ***excludes*** claims for personal injury, leaving class members who were injured (if any) free to pursue such claims ***in addition*** to the Class award. *Id.* at ¶¶ 19-21.

Class Members who still own their covered MWOs but whose microwaves have ***not*** experienced door shattering may file a claim to receive a $5 payment as compensation for having paid for MWOs with a design defect (even if that defect has not manifested in the 12 to 24 years since the microwaves were manufactured). *Id.* at ¶ 39.b. Similarly, Class Members who purchased or owned a 1090/1095 MWO and did not experience glass door shattering, and ***who no longer have the MWO*** (and thus are no longer in a position to suffer a glass shattering incident at all) may still file a claim for a $5 rebate on the purchase of another GE microwave oven. *Id.* at ¶ 39.c.

Plaintiffs do not believe injunctive relief is necessary in addition to the relief set forth above given the age of the microwaves and that they were last manufactured over 12 years ago.[10]

C. Released Claims

Plaintiffs and Class Members will provide a release to Defendants and the other Released Entities covering the claims that were or could have been asserted in the operative Complaint. *See* Settlement Agreement at ¶¶ 19, 20, and 21. Specifically excluded from the release are claims for personal injury. *Id.* at ¶ 19.

[10] Samsung Electronics Co, Ltd. ("Samsung"), the manufacturer of the MWOs at issue in this litigation, has agreed to pay the benefits due to Settlement Class Members (as well as, *inter alia,* any fees and expenses awarded to Settlement Class Counsel) on Defendant's behalf pursuant to an "Agreement for Payment of Settlement-Related Payments" between Defendant, Samsung, and Haier US Appliance Solutions, Inc. d/b/a GE Appliances, a Haier Company (which purchased GE's appliance business subsequent to the manufacture of the relevant MWOs). This agreement is formally "acknowledged and consented to" by Settlement Class Counsel. A copy of this agreement is filed at [ECF No. 358-2].

D. Notice of the Settlement to Class Members

Notice has been given to the Class pursuant to the Notice Plan approved by this Court in its preliminary approval order ([ECF No. 364]). *See generally* Declaration of Cameron Azari (Director of Legal Notice for Hilsoft Notifications, a business unit of Epiq) ("Azari Decl."); *see also* Klein Decl. at ¶ 12. Epiq has sent individualized postcard notice in the form approved by the Court to every Class Member who either (i) submitted a warranty form to Defendant following purchase of a 1090/1095 MWO and so was entered into GE's Product Registration Database, or (ii) contacted GE regarding their 1090/1095 MWO for a variety of potential reasons (including but not limited to a glass breakage incident) and so were entered into Defendant's Product Safety Database, Factory Service Database, or Oracle Service Cloud). Azari Decl. at ¶ 9. In addition, pursuant to the Court's preliminary approval order, Epiq has also sent every Class Member who registered an email address with GE in one of these databases an email notice of the Settlement in the form approved by the Court. *Id.* at ¶¶ 13-14. For Class Members who never registered their U.S. Mail or email addresses with GE, Epiq devised an internet campaign that, taking into account the size of the settlement and the age of the relevant MWOs and in combination with the direct mail and email notice discussed above, reasonably targets and provides notice to at least 70% of Class Members. *Id.* at ¶¶ 7, 17. In addition, Epiq sent notice to the ten largest distributors of the covered MWOs in that the United States requesting that the distributor post a Distributor Notice in a public place. *Id*. at ¶ 9. Each of the foregoing notices includes the web address of the Settlement website established by the Settlement Administrator and a toll-free number that Class Members can call with their questions. *See id*. at ¶ 19.

The Settlement website established by Settlement Administrator includes a link to download the Long Form Notice (in the form approved by the Court) as well as links to key

documents in the case, and a Frequently Asked Questions page. *Id*. at ¶ 18. Claim Forms are available on the website tailored to each category of relief available to claimants. *Id.* at ¶¶ 12, 18. Class Members who previously submitted a complaint about shattering glass (and so who are listed in the Safety Database) received unique claimant identifiers on their postcard notices that will automatically provide the appropriate claim form (*i.e.*, the $300 claim form for people who experienced shattered glass). *Id.* at ¶¶ 12, 18-19. All Class Members can file their claim forms either electronically on the website or by paper. *Id.*

E. Notice of Attorneys' Fees and Costs and Settlement Class Representative Service Awards

The Settlement Agreement provides that Settlement Class Counsel may seek an award of attorneys' fees and expenses and Service Awards for the Settlement Class Representatives not to exceed a total of $1,350,000. Settlement Agreement at ¶ 46. This sum, if approved by the Court, will be paid by GE separate from the benefits payable to Settlement Class Members and so will not reduce Settlement Class Member payments. *Id.* Plaintiffs will ask the Court to approve Service Awards (included in the overall $1,350,000 cap) of $5,000 each. The Settlement is not contingent on the Court granting Settlement Class Counsel's request for fees or expenses or Plaintiffs' requests for service awards. *Id.*

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

For settlement purposes only, Plaintiffs seek certification of the following Settlement Class: [11]

[11] Although this Court (Eginton, J.) previously certified a class in this case (*see* [ECF No. 257]), the Settlement Class, as observed by this Court at the preliminary approval hearing, is "a much larger, much more expansive class." *See* [ECF No. 362] at 19:25-20:11. Accordingly, Plaintiffs do ***not*** rely on that earlier decision in this motion for final approval of the Settlement, except to

> All persons (other than retailers, resellers, or wholesalers) residing in the United States of America who purchased or owned a microwave oven bearing the GE Profile or GE Monogram brand, and bearing a model number beginning with JEB1090, JEB1095, ZMC1090, or ZMC1095, at any time during the period from January 1, 1995 through January 15, 2020.

Accordingly, the proposed Settlement Class is comprised of ***all*** persons who purchased or owned a relevant-model microwave, ***regardless*** of whether that person's microwave suffered a glass shattering incident, because all purchasers suffered "benefit of the bargain" damages. Plaintiffs, like all Class members, have standing to sue because they all paid too much for a microwave that they believed to be defect-free, but that in fact had a design defect that could result in spontaneous shattering (which defect reduced the microwave's fair value). Although the Court inquired during the preliminary approval hearing as to consumer standing and whether a class can properly be certified based upon "benefit of the bargain" damages (*see* [ECF No. 362] at 8:20-9:8), Plaintiffs respectfully note that Circuit courts throughout the country have routinely held that consumers ***do*** have standing to pursue such "benefit of the bargain" class claims.[12]

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the extent that, as discussed below, the earlier decision is expressly incorporated into the Court's recent Order granting preliminary approval to the Settlement.

[12] As the Court indicated regarding its own research ([ECF No. 362] at 9:2-3), Plaintiffs have not located any directly applicable decisions from within the Second Circuit. However, in light of the overwhelming precedent from sister Circuits as set forth below, Plaintiffs respectfully submit that the Second Circuit likely would follow suit. *See, e.g., Nguyen v. Nissan North America, Inc.,* 932 F.3d 811, 819-22 (9th Cir. 2019) (plaintiff pled cognizable class claim where alleged that "the ***defect*** exists – and must be remedied – whether or not the ***symptoms*** have manifested yet") (emphasis in original); *Carlsen v. Gamestop, Inc.,* 833 F.3d 903, 909-10 (8th Cir. 2016) (class plaintiff had standing to pursue claim for difference in value between subscription to online magazine that promised certain privacy protections and "the value of the subscription that he received, *i.e.*, a subscription with compromised privacy protections"); *In re Whirlpool Corp. Front-Loading Washer Prod. Liability Litig.,* 722 F.3d 838, 855 (6th Cir. 2013) (rejecting argument that class cannot include people "who have not experienced a mold problem and are pleased with the performance of their" clothes dryer "[b]ecause ***all*** [dryer] owners were injured at the point of sale upon paying a premium price for the [dryer] as designed, even those owners who have not experienced a mold problem" and so "are properly included within the certified

Fed. R. Civ. P. 23(a) sets forth four prerequisites to class certification referred to in the short-hand as: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. In addition, a class must meet one of the three requirements of Fed. R. Civ. P. 23(b).

A. Numerosity, Commonality and Typicality

The Class meets the numerosity, commonality, and typicality standards of Fed. R. Civ. P. 23(a)(1)-(3). First, the number of proposed Class Members is such that it is impractical to join all of the Class Members in one lawsuit. *See Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333 (MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (certifying where the number of persons in the class logically exceeded 100). Here, approximately 68,000 covered 1090/1095 MWOs were sold to Class Members. *See* Klein Decl. at ¶ 11.

Second, there are substantial questions of law and fact common to all Class Members. Plaintiffs' claims all revolve around a core factual allegation: Defendant's 1090/1095 microwaves had a design defect that could cause the glass door to spontaneously shatter. Indeed, this Court in its preliminary approval ruling expressly "adopt[ed] and incorporate[d]" the portion of Judge Eginton's earlier Class certification ruling which held that common issues exist because "this case hinges largely upon whether the 1090/1095 microwaves all contained a defect that could cause glass shattering regardless of consumer conduct" and also "concerns the common

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class"); *In re Aqua Dots*, 654 F.3d 748 (7th Cir. 2011) (class plaintiffs had suffered "[a] financial injury that creates standing" where the "members of the class did not suffer physical injury" from alleged defect but "they paid more for the toys than they would have, had they known of the risks the beads posed to children"); *Cole v. General Motors Corp.*, 484 F.3d 717, 721-23 (5th Cir. 2007) (class plaintiffs "have established a concrete injury in fact and have standing to pursue this class action" even where airbags with alleged design defect never misfired, because "each plaintiff suffered economic injury at the moment she purchased a DeVille because each DeVille was defective").

issue of whether defendant knew about the defect but failed to disclose it." *See* Preliminary Approval Order [ECF No. 364] at ¶ 3 (adopting and incorporating [ECF No. 257] at 12-13).

Finally, Plaintiffs' claims are "typical" of other Class Members' claims because they were subjected to a uniform alleged design defect. All of the microwaves at issue are alleged to have the same defect that caused the glass shattering, and all Plaintiffs and Class Members are proceeding under the same fundamental "benefit of the bargain" legal theory. The defect did not manifest, and so the glass did not shatter, in every Class Members' microwave as it did in the Plaintiffs' units. But ***every*** Class Member, including Plaintiffs, paid too much for a microwave with an alleged inherent design defect, rendering Plaintiffs' claims typical across the Class.

B. Adequacy of Representation

The adequacy requirement in Fed. R. Civ. P. 23(a)(4) requires Plaintiffs to demonstrate that: (1) there is no conflict of interest between Plaintiffs and the other Class Members; and (2) Class Counsel are qualified, experienced, and capable of conducting the action. *See In re AOL Time Warner ERISA Litigation*, No. 02-8853, 2006 WL 2789862, at *3 (S.D.N.Y. Sept. 27, 2006).

Plaintiffs do not have any claims antagonistic to or in conflict with those of the other Class Members, as Plaintiffs are pursuing the same legal theories as the rest of the Class relating to the same course of GE's conduct. Moreover, named plaintiffs in a class action can settle claims on behalf of Class Members from states where no named plaintiff resides as long as notice is sufficient. *Langan v. Johnson & Johnson Consumer Companies, Inc.* 897 F.3d 88, 92-96 (2d Cir. 2018); *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 472 U.S. 797, 806-14 (1985).

During the preliminary approval hearing, this Court inquired as to whether the named

Plaintiffs, each of whom suffered a glass-shattering incident, were adequate to represent Class Members who did not experience glass breakage. *See, e.g.* [ECF No. 362] at 3:19-23, 5:8-19. In response, Plaintiffs respectfully submit that they discharged their duty to represent ***all*** members of the Class with great diligence. Plaintiffs Grayson,[13] Mazzanti,[14] Levy,[15] Mequet[16] and Harris[17] each testified at deposition under questioning from defense counsel that they understood their responsibility was to the entire class, and explained that their personal outrage at GE provided ample motivation to pursue the lawsuit as aggressively as possible. Although the benefit available to Class Members whose microwave glass shattered is, as the Court observed,

[13] *See* extracts from Grayson deposition (Klein Decl., Ex. B) at 116:18-25 ("I have a fiduciary responsibility to the class… to advance the cause of the class"); 117:6-118:15 ("I hope that there will be financial remediation to the class. I hope that there will be a change in GE in how they address complaints and being honest and forthright, and not misrepresenting product defects. And I feel that people that have been forced to pay for repairs for defective products should be remediated").

[14] *See* extracts from Mazzanti deposition (Klein Decl., Ex. C) at 95:14-96:2424 (testifying that she wanted to bring action "[b]ecause I believe it was a product that was dangerous and should not have been on the market" and that her duties as class representative were "[t]o represent the class of people that may have been affected by this product"); 97:6-98:1 (explaining that she wanted to be a class representative because "this is an important issue for me...I believe the product should not be on the market" and "[t]he consumer should be informed that there is a danger with this microwave").

[15] *See* extracts from Levy deposition (Klein Decl., Ex. D) at 108:7-18 ("I think there has to be some corporate responsibility for the products, and so I feel quite strongly that GE needs to be responsible"); 109:19-23 (testifying that he represents "[a]nybody that still has these microwaves installed in their homes").

[16] *See* extracts from Mequet deposition (Klein Decl., Ex. E) at 124:1-125:3 ("I mean something has got to be done about the issue. That's what this is about to me. This isn't personal enrichment or getting all new appliances"); 126:21-127:11 (acknowledging responsibility to "[r]epresent a class of consumers who have been" affected).

[17] *See* extracts from Harris deposition (Klein Decl., Ex. F) at 60:25-61:6 (testifying that she decided to become a class representative because "[i]t was a pretty terrifying experience, and I just think it was kind of like the mom in me just wanted to protect other families out there and just, again, have that voice to prevent this experience from happening to other people").

substantially greater than the benefit available to those whose glass did not, that differential is based upon the strength of the respective Class Members' potential claims had this matter proceeded to trial, as discussed in Part V.B.2 below. Indeed, each Plaintiff was specifically consulted about the ultimate terms of the Settlement, and agreed to those terms based upon counsel's recommendation and an understanding of the strengths and weaknesses of various Class Members' claims at trial. *See* Declaration of Hassan Zavareei submitted herewith ("Zavareei Decl.") at ¶ 29; Klein Decl. at ¶ 17. Under these circumstances, Plaintiffs easily satisfy Rule 23(a)(4)'s adequacy threshold to represent the entire Class. *See In re Pet Food Products Liability Litigation*, 629 F.3d 333 (3rd Cir. 2010).[18]

With regard to Class Counsel's qualifications, both Class Counsel firms have extensive backgrounds in litigating complex litigation and consumer class actions, have been appointed class counsel in prior cases, and have the resources necessary to prosecute this action to its conclusion. *See, e.g.*, Klein Decl. at Exhibit G (Firm Resume of Izard Kindall & Raabe LLP); Zavareei Decl. at Ex. A (Firm Resume of Tycko & Zavareei LLP).

In sum, nothing in this regard has changed since the Court appointed Lead Plaintiffs as "Settlement Class Representatives for settlement purposes," and Izard Kindall & Raabe and Tycko & Zavareei as "Settlement Class Counsel for settlement purposes," in the preliminary

[18] In *Pet Food*, settlement objectors argued that there was intraclass conflict between class members whose damages were limited to purchase claims and those whose pets became ill or died, and that the class representatives were inadequate under Rule 23(a)(4) because they all had injury claims in addition to purchase claims. *Id.* at 340-41, 344-45 ("[o]bjectors contend the class representatives had no incentive to maximize the Purchase Claims because the value of the Injury Claims was much greater"). The court overruled the objection, holding that all claims were claims for economic damages, and that "such differences in settlement value" between injury claimants (such as the lead plaintiffs) and purchase-only claimants "do not, without more, demonstrate conflicting or antagonistic interests within the class." *Id.* at 344-46.

approval Order ([ECF No. 364] at ¶¶ 5, 7). Accordingly, this Court should give final approval to those prior determinations.

C. Predominance of Common Issues and Superiority

Fed. R. Civ. P. 23(b)(3) authorizes class actions to proceed where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [] a class action is superior to other available methods for fair and efficient adjudication of the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id*. The "predominance" and "superiority" provisions were intended "to cover cases 'in which a class action would achieve the economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Lupron Mktg. and Sales Prac. Litig.*, 228 F.R.D. 75, 92 (D. Mass. 2005) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)).

As this Court noted in its preliminary approval Order ([ECF No. 364] at ¶ 3), where a court is deciding on the certification question ***in the context of a proposed settlement class***, questions regarding the manageability of the case for trial purposes do ***not*** have to be considered. *Amchem*, 521 U.S. at 619.[19] Moreover, predominance "does not require that ***all*** questions of law or fact be common; it only requires that the common questions *predominate* over individual

[19] The remaining elements of Rule 23(b)(3), however, continue to apply in settlement-only certification situations. *Id.* at 619.

questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981) (emphasis added); *see Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010) (predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."). In addition, predominance focuses on "the conduct of the defendant rather than that of individual plaintiffs, making it particularly susceptible to common, generalized proof." *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1115 (E.D.N.Y. 2006).

Moreover, it is well-established that in determining whether common questions predominate, the Court's inquiry should be directed primarily toward the issue of liability. *See McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). As the Second Circuit held in *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70 (2d Cir. 2015), "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 81; *see also Mahon v. Chicago Title Ins. Co.*, 296 F.R.D. 63, 75 (D. Conn. 2013) ("In particular, courts should 'focus on the liability issue ... and if the liability issue is common to the class, common questions are held to predominate over individual ones.'") (citation omitted).

Plaintiffs' theory in this case is that Defendant breached its warranties and various consumer protection statutes by selling microwaves with alleged design defects. Complaint at ¶¶ 62-230 (Counts I through XVI).[20] Either GE did engage in such misconduct or it did not. In

[20] As discussed above, in its order certifying a consumer protection class, this Court held "in abeyance certification related to" the Class' warranty claims. *See* [ECF No. 257] at 2 n.2. Accordingly, those warranty claims remain pending in this litigation.

either event, the question predominates over any individual issues. Moreover, any state law distinctions in warranty or consumer protections claims between states "do not defeat the commonality and predominance requirements in the settlement context because the state-law distinctions impact trial manageability, which is relevant principally with respect to litigation at trial." *Elkind v. Revlon Cons. Prod. Corp.*, No. 14-2484 (JS)(AKT), 2017 WL 9480894, at *15 n.3 (E.D.N.Y. March 9, 2017) (magistrate report and recommendation), *adopted in full by Elkind v. Revlon Cons. Prod. Corp.*, No. 14-2484 (JS)(AKT), 2017 WL 1169552, at *2 (E.D.N.Y. March 29, 2017); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 303–04 (3d Cir. 2011) ("variations [in state laws] are irrelevant to certification of a settlement class since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws") (quotations and citations omitted).[21] Even if state law differences were relevant, common questions of fact predominate related to Plaintiffs' claim that the microwaves are defectively designed and whether defendant concealed the allegedly known defect. To the extent that the Court previously ruled that damages issues required an individualized inquiry, the proposed Settlement Agreement adequately addresses the Court's concerns by enabling individual Class Members to make their own individual claims for damages, which will be evaluated individually in the settlement process, with disputes to be resolved by the Neutral Evaluator.

Indeed, the Second Circuit has long acknowledged the propriety of certifying classes solely for settlement purposes. *See Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982). Further, any concerns about variations in state law should be assuaged by the fact that Settlement

[21] *See also Simerlein v. Toyota Motor Corp.*, No. 17-cv-1091 (VAB), 2019 WL 1435055, at *6, 7, 12 (D. Conn. Jan. 14, 2019) (granting preliminary approval to nationwide class where only nationwide claim was breach of warranty claim).

Class members can opt out of the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985). Accordingly, this Court should find the predominance requirement is satisfied.

The superiority requirement of Fed. R. Civ. P. 23(b)(3) is also satisfied. Under this requirement, "maintaining the present action as a class action must be deemed by the court to be superior to other available methods of adjudication. A case will often meet this standard when 'common questions of law or fact permit the court to consolidate otherwise identical actions into a single efficient unit.'" *Bynum v. Dist. Of Columbia*, 217 F.R.D. 43, 49 (D.D.C. 2003) (citations omitted); *see also Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 12 (D.D.C. 2002) (class actions favored "where common questions of law or fact permit the court to 'consolidate otherwise identical actions into a single efficient unit.'").

A class action is not only the most desirable, efficient, and convenient mechanism to resolve Class Members' claims, but it is almost certainly the only fair and efficient means available to adjudicate such claims. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available"). Individual Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Defendant given the age of the 1090/1095 microwaves and the comparatively small size of each individual Class member's claims (especially for Class Members whose microwaves have not experienced spontaneous shattering). Thus, it is desirable to adjudicate this matter as a class action.

In light of the foregoing, all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied, and the Court should certify this Class for Settlement purposes.

V. THE SETTLEMENT SHOULD BE APPROVED

Plaintiff and Class Counsel respectfully submit that the Settlement is fair and reasonable in light of the risks of continued litigation and should be approved by this Court.

A. The Standard for Approval

Public policy strongly favors the pretrial settlement of class action lawsuits. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003); *see also In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *1 (S.D.N.Y. Nov. 20, 2008) ("The settlement of complex class action litigation is favored by the Courts.") (citations omitted).

Courts traditionally consider nine factors in deciding whether to grant final approval of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted). In addition, on December 1, 2018, amendments to Fed. R. Civ. P. 23 took effect. The new Rule directs courts to consider the following factors in determining whether a proposed settlement is "fair, reasonable and adequate:"

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided 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); and
(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). A review of the above factors supports approval of the Settlement.

B. The Settlement Merits Approval

1. The Proposed Settlement Was the Product of Serious, Informed Non-Collusive Negotiations Including Substantial Discovery

Where a settlement is reached only after extensive arm's-length negotiations by competent counsel who had more than adequate information regarding the circumstances of the action and the strengths and weaknesses of their respective positions, it is entitled to a "strong initial presumption of fairness." *In re PaineWebber Ltd., P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The opinion of experienced counsel supporting the Settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Edwards v. North American Power & Gas LLC*, No. 14-cv-01714 (VAB), 2018 WL 1582509, at * (D. Conn. March 30, 2018) (granting preliminary approval to class settlement where [t]he parties engaged in extensive settlement discussions" over several years "includ[ing] multiple mediation attempts and private settlement attempts").

Here, Plaintiffs have engaged in extensive litigation, discovery and arms'-length negotiation with Defendant to arrive at the Settlement. As set forth above, this case has been vigorously litigated over the course of several years. The parties engaged in thorough fact and expert discovery (including depositions of GE officers, the parties' respective experts, third parties, and each named Plaintiff); extensive motion practice (including motions to dismiss, for class certification, for summary judgment, to strike expert reports, and other discovery matters); and a multi-year negotiation process, including mediations conducted by both Judge Garfinkel

and another respected third-party mediator. Plaintiffs and GE have aggressively represented their interests, and even a cursory review of the over 350 entries in the docket reveals a thoroughly-litigated process. Accordingly, Plaintiffs respectfully submit that there can be no question that this Settlement resulted from serious, informed negotiations.

Moreover, in approving class action settlements, courts often defer to the judgment of experienced counsel who have engaged in arm's-length negotiations. *See In re Aggrenox Antitrust Litig.*, No. 14 Civ. 02516, 2017 WL 4278788, at *3 (D. Conn. Sept. 19, 2017) ("The Court finds that the proposed settlement, which . . . was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation, falls within the range of possibly approvable settlements . . . ."). Here, Class Counsel believe that the Settlement is fair and achieves an excellent result for Class Members. Class Counsel have substantial experience in consumer protection class actions and other complex litigation, have been appointed class counsel in numerous prior cases, including cases against independent energy companies. *See, e.g.*, Klein Decl., Ex. G (Firm Resume of Izard Kindall & Raabe LLP); Zavareei Decl., Ex. A (Firm Resume of Tycko & Zavareei LLP). Further, Class Counsel have vigorously represented the interests of the Class throughout all phases of this three-year, multi-jurisdictional litigation.

2. The Relief Provided is Adequate in Light of the Costs, Risks and Delay of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987). Moreover, the Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171

F.R.D. at 130 (citation omitted).

Here, as discussed above, the Settlement awards $300 to claimants if the glass in their MWOs has spontaneously shattered.[22] As Class Counsel explained at the preliminary approval hearing in response to the Court's question (*see* [ECF No. 362] at 11:22-12:13), this $300 is not based upon a set percentage of the original sale value of the microwaves at issue, which started at approximately $800. Rather, it was a vigorously negotiated sum based upon the maximum Class Counsel expected they could obtain at trial and that Defendant was willing to pay. As discussed above, the 1090/1095 MWOs were manufactured between 1995 and 2007 and so, at a minimum, are over twelve years old. GE has argued vigorously, and undoubtedly would continue to argue at any trial, that the relevant microwaves have already well exceeded their useful life. *See e.g.* [ECF No. 265] at 3. Plaintiffs respectfully submit that a $300 recovery for a microwave between 12 and 24 years old is an outstanding result, especially insofar as any claims for personal injury are, as discussed above, specifically ***excluded*** from the release.

The Court also inquired at the preliminary approval hearing concerning the heightened evidence required of $300 claimants who had ***not*** previously complained to GE about a shattering incident and so who are ***not*** already listed in the GE "Safety Database." *See* [ECF No. 362] at 11:14-21, 13:16-15:21. Plaintiffs acknowledge that the threshold for non-Safety Database breakage claimants to substantiate their claims is nontrivial. However, Plaintiffs also

[22] All awards under the Settlement are paid on a claims-made basis. Courts in this District have routinely approved "claims made" settlements like this one, where the award is based upon a set or formulaic per-person recovery rather than division of an overarching settlement fund. *See, e.g.*, final approval orders in *Sanborn v. Viridian Energy Inc.*, No. 14-cv-01731 (SRU) (D. Conn. June 27, 2018) ([ECF No. 186] on the *Sanborn* docket); *Edwards v. North American Power & Gas, LLC*, No. 14-01714 (VAB) (D. Conn. August 3, 2018) ([ECF No. 133] on *Edwards* docket).

believe it is necessary and warranted. One would expect that someone whose microwave spontaneously shattered would have contacted GE immediately about the rather unusual situation, and so would be listed in the Database. Indeed, approximately 880 people did so. But if someone chose ***not*** to contact GE, Plaintiffs believe it is reasonable for GE to require that person now to provide sufficient evidence of harm before claiming a sizable $300 payment from the company. Otherwise, there is a genuine, if unfortunate, risk of claim fraud.[23] Plaintiffs respectfully submit that the level of proof required (including a serial number, receipt, and/or photograph proving ownership) is appropriate.

Although, as the Court observed at the preliminary approval hearing, Class Members who have not suffered a glass shattering incident receive a substantially lower award ($5 payment or rebate), Plaintiffs respectfully submit that this amount is adequate and fair in light of the harm suffered. Absent a glass shattering incident, the only harm suffered by these Class Members is that they paid marginally too much for a product with an alleged design defect that, for them, has remained latent and never manifested. Given, again, the age of the relevant microwaves (between 12 and 24 years old), and thus the extended period of time these Class Members had use of their microwaves without incident (which GE has maintained was in excess of the expected useful life of the product), the award to these claimants is proper and reasonable. Absent the Settlement, they very likely would receive nothing.

In assessing the proposed Settlement, the Court should also balance the benefits afforded the Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of

[23] For example, Class Counsel are aware of several websites that implicitly facilitate claim fraud. *See, e.g.*, https://www.hustlermoneyblog.com/no-proof-required-class-action-lawsuit-settlements/ (last visited April 28, 2020) ("In this post, we will list out all of the Best Class Action Lawsuit Settlements that require no proof of purchase, receipts, etc.").

litigation. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Although Class Counsel believe that Plaintiffs' claims are meritorious, Class Counsel are both experienced and realistic and understand that the resolution of liability issues, the results at trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y 1997) ("Litigation inherently involves risks."). Indeed, "the primary purpose of settlement is to avoid the uncertainty of a trial on the merits." *Siler v. Landry's Seafood House–North Carolina, Inc.*, No. 13 Civ. 587, 2014 WL 2945796, at *6 (S.D.N.Y. June 30, 2014).

Here, Plaintiffs and the Class faced a significant risk that they would receive no recovery ***at all*** but for the settlement. As an overarching matter, this Court previously certified a liability-only class, and expressly declined to certify a damages class. *See* [ECF No. 257]. Although this Court entered its ruling without prejudice to Plaintiffs renewing their motion for a damages class at a later time, Plaintiffs plainly faced a substantial risk that the Court would continue to decline to certify a damages class, leaving Class Members at most with a liability judgment regarding 12 to 24 year-old microwaves that they would have to try to enforce on their own.[24]

Even as to the liability-only class certified by the Court, Plaintiff faced substantial hurdles. In addition to GE's "reasonable useful life" argument (based on the age of the affected units), GE has several arguments that, if successful, could foreclose liability altogether (or, if Plaintiffs eventually succeeded in certifying a damages class, could greatly reduce damages).

[24] The Settlement addresses the Court's concern in its Class Certification Order that a damages class may not be feasible due to possible individualized damages issues by enabling individual Class Members to make their own individual claims for damages, which will be evaluated individually in the settlement process, with disputes to be resolved by the Neutral Evaluator. *See* Settlement Agreement at ¶¶ 38-40.

For example, Plaintiffs' ability to prevail on their liability claims will largely come down to a "battle of the experts" between the parties' respective glass analysis experts. Although Plaintiffs are confident in their expert's analysis of the design defect in the 1090/1095 MWO glass door assemblies, GE has submitted its own expert counter-analysis. *See, e.g.,* [ECF No. 180]. Absent the settlement, Plaintiffs run the substantial risk that the factfinder would credit GE's expert over Plaintiffs' expert at trial. *See, e.g., Edwards,* 2018 WL 1582509, at *8 (granting preliminary approval to class settlement where "there is no guarantee that the jury would accept any, much less all, of Plaintiff's expert's analysis") (internal quotation marks and edits omitted).

Likewise, as discussed above, GE has argued that Plaintiff's own statistical expert had concluded that only 1% to 2% of 1090/1095 MWOs would likely manifest the defect and experience glass shattering. *See* [ECF No. 351] at 25-28. Although Plaintiffs' expert believes this fact is consistent with the existence of a design defect (that does not always manifest), GE vehemently disagrees (*see, e.g.,* [ECF No. 183]) and has submitted its own expert report to the contrary. Again, absent the Settlement, the factfinder at trial could agree with Defendant's expert.

Moreover, even if the factfinder accepted the existence of a design defect, and even if the Court ultimately certified a damages class, the Court or jury could conclude that Class Members for whom the defect remained latent (and thus who did not experience a shattered-glass incident) did not suffer damages. Plaintiffs' damages expert has opined that even a latent defect causes damages (because a Class Member who paid for a product with a defect paid too much, as compared to a defect-free product). But the factfinder could agree with Defendant's damages expert and conclude, for example, that a latent defect does not give rise to money damages at all.

In addition to the foregoing substantive risks that Plaintiffs would be unable to prove liability at trial (and would never get certification of a damages class at all), "[t]he expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). The costs and risks associated with maintaining this litigation to a verdict, not to mention through the inevitable appeals, will be high. Further, even in the event that the Class could recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any recovery for many years, thus reducing any additional sums potentially recoverable on behalf of the Class. *Edwards*, 2018 WL 1582509, at *8 (granting preliminary approval where "absent settlement, the resulting fact intensive trials will also result in significant expenses to all parties" because "[a]ny judgment will likely be appealed, extending the costs and duration of the litigation"); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

3. The Settlement Provides an Effective Means of Distributing Relief to Class Members

The amended Fed. R. Civ. P. 23(e)(2)(C)(ii) requires the Court to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of

processing class-member claims." Here, every Class Member who filled out a warranty card for a 1090/1095 microwave or who submitted a report to GE that their MWO glass had spontaneously shattered was sent direct mail notice (and, in addition, direct email notice where email addresses are available). The parties worked with Epiq, a nationally recognized Settlement Administrator, to develop a plan to provide notice to other Class Members (who chose not to submit warranty cards and did not file any complaints or obtain service through GE) through an internet advertising campaign. Azari Decl. at ¶¶ 7, 17. In the event that there is any dispute about whether a particular claimant is entitled to relief, the Settlement Agreement includes an arbitration process (which GE will pay for) under which any such dispute will be decided by the Honorable Antonio C. Robaina (Ret.), a retired Connecticut Superior Court judge. *See* Settlement Agreement at ¶¶ 15, 40. Accordingly, Plaintiffs respectfully submit that the parties have developed a reasonable and effective means of distributing Settlement proceeds to individual Class Members.

4. The Provisions of the Settlement Related to Attorneys' Fees are Reasonable

The amended Rule 23(e)(2)(C)(iii) requires the Court to consider "the terms of any proposed award of attorney's fees, including timing of payment." Here, Plaintiffs respectfully submit that that the requested attorney's fees are fair and reasonable, as set forth in greater detail in Plaintiffs' Motion for Award of Attorneys' Fees, Expenses and Service Awards, filed simultaneously herewith.

Specifically, GE has agreed not to oppose any request by Plaintiffs for an award of up to $1,350,000.00 that includes all attorneys' fees and expenses and Lead Plaintiff service awards. *See* Settlement Agreement at ¶ 46. As discussed above, Plaintiffs and their counsel negotiated

this amount under the oversight of an experienced mediator, and these negotiations occurred only ***after*** the substantive amounts to be paid to Class Members had been finalized. Klein Decl. at ¶ 9. The $1,350,000 cap is already only 36% of the approximately $3,756,089.25 million in current aggregate lodestar of Class Counsel. *See* Klein Decl. at ¶ 22. As set forth in the accompanying motion for award of attorneys' fees and expenses and Plaintiff service awards, once unreimbursed litigation expenses and service awards are deducted from the cap, only $927,066.13 remains for attorneys fees, resulting in a ***negative*** fee multiplier of ***0.25***.[25] Moreover, Class Counsel anticipate needing to spend significant additional time on this litigation responding to Class Member inquiries and seeking Final Approval for the Settlement, beyond the time already incorporated into the preset lodestar figure.

Nor are Class Members adversely affected by the fees that Class Counsel intend to seek. Pursuant to the Settlement Agreement (at ¶ 46), GE has agreed to pay a maximum of $1,350,000 in fees, expenses and lead plaintiff awards using its own resources, which means that these payments will ***not*** reduce the benefits provided to Class Members. Where, as here, "the parties agree to a fee that is to be paid separately by the Defendant[] rather than one that comes from, and therefore reduces, the Settlement Fund available to the class, the Court's fiduciary role in overseeing the award is greatly reduced because the danger of conflicts of interest between attorneys and class members is diminished." *Kemp-DeLisser v. St. Francis Hospital and*

[25] Class Counsel's combined current expenses are $397,933.87. Klein Decl. at ¶ 25. As with Class Counsel's fees, these expenses will only increase as this litigation moves through the final approval process. Class Counsel are also seeking a $5,000 Lead Plaintiff service awards for each of the five Lead Plaintiffs, in light of their extensive efforts in this litigation (including sitting for individual depositions). Both expenses and Lead Plaintiffs award will be covered by the $1,350,000 cap and so reduce the amount actually available for Class Counsel fees. Settlement Agreement at ¶ 46.

Medical Center Fin. Committee, No. 15-cv-1113 (VAB), 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (internal quotation marks and citation omitted).

Moreover, the Settlement is not contingent upon approval of attorneys' fees or any Service Award. Settlement Agreement at ¶ 46. Rather, the Court will separately and independently determine the appropriate amount of fees, costs, and expenses to award to Class Counsel and the appropriate amount of any awards to the Plaintiffs. *Id.*

Accordingly, Plaintiffs respectfully submit that the $1,350,000 amount that GE has agreed to pay for fees, expenses, and lead plaintiff service awards, is fair and reasonable

5. The Settlement Treats Class Members Equitably Relative to Each Other

The Proposed Settlement treats class members equitably relative to each other, as required by Federal Rule 23(e)(2)(D). As discussed in Part V.B.2 above, the differing amounts awarded to different Class Members is directly related to the harm they suffered (*i.e.,* whether they experienced a spontaneous glass shattering incident) and, if the Class Member did ***not*** suffer glass breakage, whether they still possess a 1090/1095 MWO. Thus, the three tiers of Class Member awards are justified by Class Members' different situations. *See Collins v. Olin Corp.*, 248 F.R.D. 95, 105 (D. Conn. 2008) ("It is very common" for class actions "to involve differing damage awards for different class members") (quotation marks and citation omitted).

As discussed above, Plaintiffs also are requesting (by separate motion) named Plaintiff Service Awards not to exceed $5,000 each for their work prosecuting the case on behalf of the Class. Providing named plaintiff case contribution awards to consumers who come forward to represent a class is a necessary and important component of class action practice. *See Hall v. ProSource Technologies, LLC*, No. 14 Civ. 2502 (SIL), 2016 WL 1555128, at *9 (E.D.N.Y. Apr.

11, 2016) ("Courts regularly grant requests for service awards in class actions to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.") (internal quotations and citations omitted); *Viafara v. MCIZ Corp.*, No. 12 Civ. 7452 (RLE), 2014 WL 1777438, at *16 (S.D.N.Y. May 1, 2014); *Elliot v. Leatherstocking Corp.*, No. 10 Civ. 0934 (MAD) (DEP), 2012 WL 6024572, at *7 (N.D.N.Y. Dec. 4, 2012). Accordingly, awarding Plaintiffs an additional sum for personally extending themselves to benefit the Class as a whole is fair, reasonable and equitable.

6. The Reaction of the Settlement Class Supports the Settlement

The deadline for filing objections and opt-outs is June 15, 2020, while claims are not due until October 14, 2020. To date no Class Members have objected or opted out. Klein Decl. at ¶ 14. Plaintiff will update the Court by June 29, 2020 (the date set by the Court for Plaintiff to respond to any objections) as to the number of objections and opt-outs received by the Claims Administrator or filed with the Court, as well as the number of claims filed through that date.

VI. CONCLUSION

WHEREFORE, based on foregoing, Plaintiff respectfully requests that the Court enter an Order:

(1) Approving the Settlement as set forth in the Settlement Agreement;

(2) Certifying the Settlement Class;

(3) Appointing Plaintiffs Glen Grayson, Doreen Mazzanti, Daniel Levy, David Mequet, and Lauren Harris as the Settlement Class Representatives; and

(4) Appointing Hassan A. Zavareei, Esq. and Anna C. Haac, Esq. of Tycko & Zavareei LLP and Robert A. Izard, Jr., Esq., Seth R. Klein, Esq., and Mark P. Kindall, Esq. of Izard Kindall & Raabe LLP as Settlement Class Counsel.

Plaintiffs will submit a [Proposed] Order and Final Judgment for the Court's consideration no later than June 29, 2020 (the date set by the Court for Plaintiff to respond to any objections), in anticipation of the Final Approval Hearing scheduled for July 16, 2020.[26]

Dated: April 30, 2020

Respectfully submitted,

PLAINTFFS

By: /s/ Seth R. Klein _____

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[26] To the extent that COVID-19 prevents an in-person hearing on the scheduled date, Plaintiffs respectfully request that, pursuant to ¶ 2 of the "Superseding General Order Re: Court Operations" issued in this District on April 27, 2020, the hearing be held by telephone or videoconference. Indeed, multiple courts have decided to hold such hearings by telephone or videoconference due to the current pandemic. *See, e.g., Isolde v. Trinity Industries, Inc.*, No. 15-cv-02093-K, slip op. at 1 (N.D. Tex. Mar. 24, 2020), ECF No. 174 (ordering that final settlement hearing in securities class action should proceed at date and time scheduled in the notice but be conducted telephonically); *City of Sunrise Gen. Emp. Ret. Plan v. FleetCor Techs., Inc.*, No. 17-cv-02207-LMM, slip op. at 1 (N.D. Ga. Mar. 24, 2020), ECF No. 104 (same); *In re Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-md-02752-LHK (N.D. Cal. Mar. 23, 2020), ECF No. 448 (ordering that final approval hearing for class action settlement be held telephonically); *In re McKesson Corp Derivative Litig.*, No. 17-cv-01850-CW, Communication from Court (N.D. Cal. Mar. 19, 2020) (ordering that final settlement hearing in shareholder derivative litigation should go forward as scheduled, but be conducted by teleconference); *Joshi Living Trust v. Akorn, Inc.*, Case No. 18-cv-0171, slip op. at 1 (N.D. Ill. Mar. 12, 2020), ECF No. 183 (ordering that final settlement hearing in class action should proceed as scheduled in the notice, but allowing counsel to participate by phone rather than attend in-person).

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