

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

DUANE AND KERRY AUSTIN, Individually and on  
Behalf of all Others Similarly Situated,

Plaintiffs,

v.

KIWI ENERGY NY, LLC,

Defendant.

**ORDER WITH  
NOTICE OF ENTRY**

Index No.: 515350/2017

PLEASE TAKE NOTICE that the attached document is an accurate and true copy of the **Order Granting Final Certification of the Settlement Class, Final Approval of the Class Action Settlement, Service Award, Attorneys' Fees and Expenses, and Entering Final Judgment and Dismissing Action with Prejudice** of the Kings County Supreme Court in this proceeding, duly signed by the Hon. Leon Ruchelsman, on October 23, 2019 and entered in the Kings County Clerk's Office on October 24, 2019.

Dated: October 29, 2019  
Albany, New York

HARRIS BEACH, PLLC

By: /s/ Elliot A. Hallak

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

<p>DUANE AND KERRY AUSTIN, Individually and on Behalf of all Others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>KIWI ENERGY NY, LLC,</p> <p style="text-align: center;">Defendant.</p>
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Index No.: 515350/2017

**ORDER GRANTING FINAL  
CERTIFICATION OF THE  
SETTLEMENT CLASS, FINAL  
APPROVAL OF THE CLASS  
ACTION SETTLEMENT,  
SERVICE AWARD,  
ATTORNEYS' FEES AND  
EXPENSES, AND ENTERING  
FINAL JUDGMENT AND  
DISMISSING ACTION WITH  
PREJUDICE**

**THIS CAUSE** is before the Court on Plaintiffs' Unopposed Motion for final certification of the Settlement Class and final approval of the class action settlement, and approving Service Award, and attorneys' fees and expenses. Having considered the motion, the Settlement Agreement and all exhibits attached thereto, the complete record in this case, and oral argument presented at the Final Approval Hearing, and for good cause shown:

**IT IS HEREBY ORDERED AND ADJUDGED THAT:**

**Settlement Class Certification**

1. For purposes of effectuating the settlement described in the Class Action Settlement Agreement (NYSCEF #66) ("Settlement Agreement")<sup>1</sup>, the Court reaffirms its prior findings, pursuant to New York Civil Practice Law and Rules ("CPLR") 901, certifying the following settlement classes (the "Class"):

- 1) All Persons or Entities who were Kiwi customers in New York or Ohio from August 8, 2011 to the Preliminary Approval Date, and;

<sup>1</sup> Unless otherwise stated, capitalized terms in this Order shall have the same meaning as set forth in the Settlement Agreement.

2) All Persons or Entities who were Spring customers in Pennsylvania, Maryland, and New Jersey from August 8, 2011 to the Preliminary Approval Date.

See Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. Entered June 26, 2019 (NYSCEF #69) ("Preliminary Approval Order"). Kiwi is defined as Defendant Kiwi Energy NY, LLC, ("Defendant" or "Kiwi") and Spring is defined as Spring Energy RRH, LLC d/b/a Spring Power & Gas ("Spring"). The Class Period is defined as August 8, 2011 through the Preliminary Approval Date. The Preliminary Approval Date shall be June 26, 2019. Excluded from the Settlement Class are: Kiwi; Spring; any of their parents, subsidiaries, or affiliates; any entity controlled by either of them; any officer, director, employee, legal representative, predecessor, successor, or assignee of Kiwi or Spring; federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof) and the judge to whom this action is assigned and any member of his immediate family. See Preliminary Approval Order. Nothing has occurred since the entry of that Order which causes this Court to alter the findings it made in that Order in support of class certification for settlement purposes. *Id.* at ¶¶ 2-3.

2. For purposes of effectuating the settlement, the Court also reaffirms its prior decision appointing Jonathan Shub and Kevin Laukaitis of Kohn, Swift & Graf, P.C. and Troy Frederick and Beth Frederick of Frederick Law Group, PLLC as Class Counsel, and Plaintiffs Duane and Kerry Austin as Class Representatives. *Id.* at ¶¶ 4-5.

**Notice to Class Members**

3. The Court finds, based on the Affidavits of the Claims Administrator Jonathan P. Shaffer dated September 12, 2019 (NYSCEF #77) and October 15, 2019 (NYSCEF #83)("Shaffer Aff."), that the Court-approved Settlement Notice and Claim Form ("Notice"), attached as Exhibit A to the Shaffer Aff., has been provided to the members of the Class in

accordance with the Court's Preliminary Approval Order. That notice to the Class constituted the best notice practicable under the circumstances as well as valid, due, and sufficient notice to all those entitled thereto and complies fully with the requirements of due process and CPLR 904 and 908. As such, this Court has jurisdiction over all Class Members.

**Final Approval of the Settlement**

4. In accordance with the Preliminary Approval Order and the Notice, the Court held a Final Approval Hearing on October 23, 2019 to determine whether to finally approve the terms of the Settlement Agreement.

5. The terms of the Settlement Agreement are incorporated by reference herein.

6. The Court grants final approval of the Settlement set forth in the Settlement Agreement, finding it fair, reasonable and adequate, and in the best interests of the Class given, *inter alia*, the likelihood that plaintiffs will succeed on the merits; the extent of support from the parties, including the lack of any objections by any Class Members to the Settlement; the judgment of counsel; the presence of good faith bargaining with the assistance of an experienced mediator; and the complexity and nature of the issues of law and fact.

7. The Court further determines that the Settlement is binding on all Class Members other than the two persons who have timely opted out of this action pursuant to paragraph 6.1 of the Settlement Agreement as reported in the Shaffer Aff. These opt-outs may not make any claim against or receive any benefit from the Settlement and may not pursue any Released Claims on behalf of those who are bound by this Order and Final Judgment. All Class Members other than the opt-outs described in the Shaffer Affidavits are forever bound by this Order and Final Judgment and are permanently enjoined and barred

from asserting, instituting, commencing, or prosecuting any Released Claims, which are set forth in ¶¶ 10.1-10.4 of the Settlement Agreement, in any action or proceeding, either directly, individually, representatively, derivatively, or in any other capacity.

8. Once this Settlement becomes effective as defined in the Settlement Agreement, the Court directs that payments be made pursuant to the Settlement Agreement to all Class Members who have submitted a timely and valid Claim Form pursuant to the Settlement Agreement. The Settlement Administrator shall use reasonable efforts to obtain any necessary W-9 Forms.

**Service Award, Attorneys' Fees and Expenses**

9. The Court hereby awards \$5,000 in total to the Named Plaintiffs Duane and Kerry Austin for their integral roles in the prosecution and settlement of this action, in addition to their respective allocated shares of the Settlement. The Court finds that this Service Award is warranted to reward them for their respective efforts and time consulting with counsel over the years this case has been prosecuted and for participating in discovery. This Service Award shall be paid separate from the attorneys' fee and expense award set forth in paragraph 10, below.

10. The Court has considered, *inter alia*, the fact that Class Counsel have worked for more than two years without pay or any guarantee of obtaining a recovery for Defendant's current and former customers, the risks of this litigation, the significant standing at the bar of Class Counsel for the Plaintiffs' and Defendant's counsel, the fact that this fee and expense request was negotiated by the parties only after the consideration on behalf of the Class had been negotiated, the magnitude and complexity of the litigation, the serious responsibility

undertaken, the excellent work done by Class Counsel, the history of this action, that Class Counsel did not have the benefit of any prior judgment, and the considerable amount made available, lodestar multipliers awarded in other significant settlements, and the lack of any objection by any Class Member to any aspect of the settlement or the requested attorneys' fee and expense award. The Court finds that based on the superior result in this class action, it would have been reasonable and customary for Class Counsel to receive a lodestar multiplier of 2.95. Accordingly, the Court hereby determines that Plaintiffs' Counsel's requested application for an amount \$975,000 shall be awarded to Class Counsel for payment of their attorneys' fees and expenses (other than Claims Administration Expenses, which under the Settlement Agreement are paid directly by the Parties separate and apart from the amount made available for Class Members' claims, the Fee Award, and the Named Plaintiff Enhancement Award), and paid pursuant to the terms of the Settlement Agreement in section VIII, and that payment of a Service Award of \$5,000 to Plaintiffs is fair and reasonable, and paid pursuant to the terms of the Settlement Agreement in section 7.7.

**Entry of Judgment**

11. The Court hereby enters Final Judgment in accordance with the terms of this Order, dismisses this action with prejudice, with each party to bear their own costs, except as provided in this Order or in the Settlement Agreement.

**Reservation of Jurisdiction**

12. If for any reason the Settlement does not become effective, this Order shall be null and void and be vacated. In that event nothing contained in this Order, the Settlement

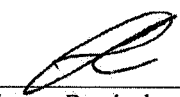
Agreement, and any documents in connection with the settlement of this matter shall be used or referred for any purpose in this action or any other proceeding.

13. This Order, the Settlement Agreement, and any documents in connection with the settlement of this matter shall not be construed as an admission of any fault, liability, or wrongdoing on the part of Kiwi or Spring, which Kiwi and Spring expressly denied. This Order, the Settlement Agreement, and any documents in connection with the settlement of this matter shall not be offered against Kiwi or Spring in any other action or proceeding of any kind. Kiwi, Spring, and any Released Parties shall be permitted to utilize this Order and the Settlement Agreement for purposes of enforcing this Order and the Settlement Agreement and to support any claims and defenses Kiwi, Spring, and the Released Parties may have.

14. Without affecting the finality of this Order and Final Judgment, the Court hereby reserves exclusive jurisdiction to consider any matters that may arise concerning the administration, interpretation, consummation, and enforcement of the Settlement Agreement and this Order.

Dated: October 23, 2019

SO ORDERED:

  
\_\_\_\_\_  
Hon. Leon Ruchelsman  
HON. LEON RUCHELSMAN

*NY*  
2019 OCT 24 AM 8:45  
KINGS COUNTY CLERK  
FILED



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

DUANE AND KERRY AUSTIN, Individually and on  
Behalf of all Others Similarly Situated,

Plaintiffs,

v.

KIWI ENERGY NY, LLC,

Defendant.

**AFFIDAVIT OF  
SERVICE**

Index No.: 515350/2017

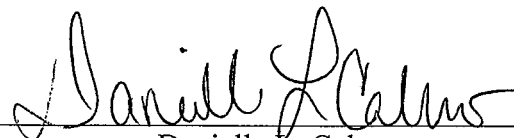
STATE OF NEW YORK )  
 )ss.:  
COUNTY OF ALBANY )

Danielle L. Calvo, being duly sworn, deposes and says that she resides in the Town of Rotterdam, State of New York, that she is over the age of eighteen years and is an Administrative Assistant in the law firm of Harris Beach PLLC, attorneys for Defendant Kiwi Energy NY, LLC. That on the 29<sup>th</sup> day of October, 2019 before 7:00 p.m., at the City of Albany, County of Albany and State of New York, deponent served via FedEx overnight delivery a copy of the **Order with Notice of Entry and Order Granting Final Certification of the Settlement Class, Final Approval of the Class Action Settlement, Service Award, Attorneys' Fees and Expenses, and Entering Final Judgment and Dismissing Action with Prejudice** signed by the Hon. Leon Ruchelsman, on October 23, 2019 and entered in the Kings County Clerk's Office on October 24, 2019, addressed to the addresses designated by the attorney for that purpose, upon the offices below:

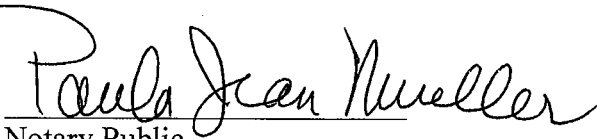
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by depositing true copies thereof, properly and securely enclosed in a sealed wrapper and deposited in a depository maintained under the exclusive care and custody of overnight delivery service, FedEx Corporation.

  
Danielle L. Calvo

Sworn to before me this  
29<sup>th</sup> day of October, 2019

  
Notary Public

**PAULA JEAN MUELLER**  
Notary Public, State of New York  
No. 01MU6332060  
Qualified in Greene County  
Commission Expires 10/28/ 23