NORTH CAROLINA

FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 2801

FILED
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FORSYTH CO., C.S.C.
BY

EDWARD R. FASANO and DEBRA L. FASANO, on behalf of a class of those similarly situated,

Plaintiffs,

v.

TOWN OF KERNERSVILLE and WINSTON-SALEM – FORSYTH COUNTY CITY/COUNTY UTILITIES COMMISSION,

Defendants.

FINAL APPROVAL ORDER

THIS MATTER is before the Court on Plaintiffs' Unopposed Motion for Final Approval of Class Settlement and Unopposed Motion for Attorneys' Fees and Costs. The Court conducted a final approval hearing (also called a "fairness hearing") on 27 July 2018 at the Kernersville courthouse. At that hearing, Class Counsel Alan W. Duncan, Stephen M. Russell, Jr., H. Brent Helms, and Franklin Scott Templeton were present on behalf of the Class and the Class Representatives. The Class Representatives, Edward and Debra Fasano, were also present. Defendants were represented at the hearing by John G. Wolfe, III, and Jodi D. Hildebran. Class Members were provided an opportunity to request to appear and address the Court at the hearing, but no Class Members submitted such a request. After hearing the arguments of counsel at the final approval hearing, reviewing the pending motions and other materials submitted to the Court, and considering the case as a whole and applicable law, including the requirements of Rule 23 of the North Carolina Rules of Civil Procedure and of due process, the Court hereby makes the following findings of fact and conclusions of law:

COPY

1. This Order adopts and incorporates the definitions used in the Order on Plaintiffs' Motion for Preliminary Approval of Class Settlement, Appointment of Class Administrator, and Class Notice Plan (the "Preliminary Approval Order").

2. The Court has considered each of the factors identified in *Ehrenhaus v. Baker*, 216 N.C. App. 59, 74, 717 S.E.2d 9, 20 (2011), related to whether the Proposed Settlement should receive final approval, with a particular focus on "the likelihood that the class will prevail should litigation go forward and the potential spoils of victory, balanced against the benefits to the class offered in the settlement," and "the class's reaction to the settlement." *See also In re Progress Energy S'holder Litig.*, 2011 WL 5967183, *7, 2011 NCBC 44, ¶ 38 (N.C. Super. Ct. Nov. 29, 2011) (discussing factors to consider when evaluating a class settlement under *Ehrenhaus*). The Court concurs with, and adopts, Plaintiffs' contentions as set forth in the Final Approval Motion, which is unopposed, with respect to the *Ehrenhaus* factors, and finds that the Proposed Settlement satisfies each of those factors. For the sake of clarity, some of the specific factors are discussed further below.

3. Notice has been given to the Class pursuant to and in the manner directed by the Preliminary Approval Order, proof of the mailing of the Notice and publication of the Summary Notice has been filed with the Court, and a full opportunity to be heard (including by written comment/objection, or by appearing at the final approval hearing) and to opt-out has been offered to all parties, to Class Members, and to persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with the requirements of Rule 23 of the North Carolina Rules of Civil Procedure and due process, and it is further determined that all members of the Class are bound by this Order.

4. The initial Notice reported in Question 4 that the estimated interest rate for each Class Member was 0.6%. On 7 May 2018, Class Counsel notified the Court that the expected rate of interest had been recalculated at approximately 6%. Class Counsel and the Class Administrator promptly revised the Notice for future mailings and posted the revised Notice on the website. As discussed below, upon full calculation of individual refunds, the rate of interest to be paid to Class Members will be 9%. The Court notes that at either 6% or 9%, the total recovery for each Class Member is higher, and thus more favorable, than what was stated in the original version of the Notice.

5. The Court has been advised by Class Counsel and the Class Administrator that it has received no requests to opt-out of the Class, nor has it received any written objections or comments with respect to the Proposed Settlement. The Court finds in these circumstances that "silence may be construed as assent," and that because there has been adequate notice of the terms of the Proposed Settlement and the procedure for submitting objections, the "dearth of objections" can be construed to "indicate [the Proposed Settlement] is fair." *Ehrenhaus*, 216 N.C. App. at 92, 717 S.E.2d at 31.

6. The Court has scrutinized the record and finds no evidence to suggest any collusion or a "sweetheart deal" between Plaintiffs and Defendants. All parties vigorously contested the issues related to Defendants' liability, and the Proposed Settlement was only reached after the Court held that Defendants were liable for breach of contract and unconstitutional takings without just compensation, and after the Court had certified the Class. The Proposed Settlement allows for a full recovery of the Class's principal compensatory damages plus interest. It is apparent to the Court, and the Court so finds, that the Proposed Settlement is the result of an arm's-length negotiation between the parties. The Court commends

Mr. and Mrs. Fasano, the governing boards of Kernersville and the CCUC, and their counsel for the thoughtful manner in which they have approached this litigation and for reaching agreement on the Proposed Settlement.

7. Class Counsel and the Class Administrator have proposed a plan for allocating and distributing refunds and interest to Class Members that is fair and reasonable.

8. The release agreed to by the parties is narrow and does not extend beyond the issues litigated in this case related to the excess sewer rates charged to users of the Kernersville sanitary sewer system from mid-2012 to mid-2016.

9. Class Counsel are experienced in a wide variety of litigation, including class action litigation, and are well-informed with respect to the legal and factual issues of this case. Class Counsel, on behalf of Plaintiffs, have fully litigated the liability issues in this case, had their legal and factual positions tested by Defendants at the Rule 12 stage, and have conducted extensive written and document discovery as to liability and damages. Accordingly, the Court gives "considerable weight" to the endorsement of the Proposed Settlement by Class Counsel. *Ehrenhaus*, 216 N.C. App. at 93, 717 S.E.2d at 31.

10. The Court further notes that Defendants have the ability to pay the amount of the Proposed Settlement. Defendants have been reserving funds equaling the sewer fee overcharges in a reserve fund, as stated in Defendants' Stipulation, and those funds are available for payment towards the Proposed Settlement.

11. The Proposed Settlement eliminates any risk to the Class that an appellate court may reverse the Court's Liability Order and prevents any further delay in reimbursing the Class. Furthermore, the value of the Proposed Settlement is more than $2 million more than the Class'

principal compensatory damages, and therefore secures for the Class the ability to recover some amount of interest, costs, and attorneys' fees.

12. For these and the other reasons set forth in the Motion for Final Approval, the Court finds and concludes that the Proposed Settlement is fair, reasonable, adequate, and in the best interests of the Class.

13. Under the Proposed Settlement, the class of persons benefitting from this litigation and the Proposed Settlement is relatively small and easily identifiable, the benefits due to each Class Member can be traced accurately, and the costs can be shifted to those benefitting from the recovery with precision. The Proposed Settlement therefore creates a common fund in the amount of $12.3 million. *See, e.g., Bailey v. State*, 348 N.C. 130, 161-62, 500 S.E.2d 54, 72-73 (1998); *In re Synergy, Inc.*, 1999 WL 33563728, *5, 1999 NCBC 7, ¶ 17 (N.C. Super. Ct. July 14, 1999) (holding that class action settlement resulted in creation of common fund under North Carolina law).

14. Under the common-fund doctrine, the Court has the authority to award attorneys' fees and costs out of a common fund to prevent the unjust enrichment of the benefitting, but otherwise non-participating, members of a class. *Id.* The Court finds that it is equitable and appropriate to award Plaintiffs' and Class Counsel their attorneys' fees and costs out of the Common Fund. The Court also takes note that the Proposed Settlement provided that Defendants would not contest an award of attorneys' fees of up to 15% of the Common Fund to satisfy Plaintiffs' attorneys' fees and costs. Having determined that the Court has the authority to award attorneys' fees and costs, the Court will now determine whether the requested fees and costs are reasonable.

15. Class Counsel have incurred a total of $57,665.03 in costs and expenses.[1] The affidavits of H. Brent Helms and Alan W. Duncan identify and itemize the expenses and costs incurred by their respective firms in the prosecution of this matter on behalf of the Class. The Court finds that the costs and expenses advanced by Class Counsel are reasonable in amount and were necessarily incurred for the prosecution of the litigation and should be awarded to Class Counsel out of the 15% portion of the Common Fund.

16. Class Counsel have also requested that the Court award the Class Representatives, Edward and Debra Fasano, an incentive award for their service as Class Representatives. Class Counsel have proposed that each Class Representative receive $11,000.00 from the 15% portion of the Common Fund. In that regard, the Court notes that the Class Representatives were the named plaintiffs in this litigation, were subject to media scrutiny, and had the responsibility to participate in the litigation as needed and to protect the interests of the Class. In addition, this litigation, and the resulting settlement, would not have been possible without the Class Representatives electing to file the instant lawsuit. As a result of the lawsuit and settlement, thousands of Mr. and Mrs. Fasano's current and former neighbors and fellow residents of Kernersville will receive significant cash refunds. It is sometimes said that "you can't fight city hall," but the actions of Mr. and Mrs. Fasano in this case demonstrate that citizens in this state, appropriately utilizing the legal system, can respectfully challenge what they believe to be improper actions by local governments – and can bring positive change through such efforts. Mr. and Mrs. Fasano are to be commended for their willingness to step up and serve their

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[1] The Court acknowledges that Defendants have already made a $75,000.00 payment to Class Counsel pursuant to the Preliminary Approval Order, to provide funding for costs associated with class administration. The award approved herein includes the $75,000.00 that was already paid to Class Counsel.

community in this way. Accordingly, the Court finds that an award of $11,000.00 per Class Representative is fair, reasonable, and otherwise appropriate.

17. Plaintiffs have requested a total award of attorneys' fees in the amount of $1,765,334.97, which is 14.35% of the Common Fund. As described below, the Court finds that the award of attorneys' fees in this amount is appropriate and reasonable under the circumstances.

a. The Court of Appeals in *Ehrenhaus*, 216 N.C. App. at 96-98, 717 S.E.2d at 33-34, held that prior to a court awarding attorneys' fees, the court must determine whether the fees are reasonable pursuant to the factors listed in Rule 1.5 of the Revised Rules of Professional Conduct. Each of the factors listed in Rule 1.5 has been addressed in the Motion for Attorneys' Fees and Costs, and the Court agrees with Plaintiffs' analysis of the factors and therefore adopts Plaintiffs' analysis of the factors under Rule 1.5.

b. The Court has reviewed the Affidavit of G. Gray Wilson, which was submitted with the Motion for Attorneys' Fees and Costs. Mr. Wilson is an experienced and highly regarded litigator throughout North Carolina, who bases his practice in Forsyth County, where this case originated. In the affidavit, Mr. Wilson opines that, after reviewing relevant records regarding the litigation and Class Counsels' work on the case, that the hours worked, the hourly rates requested by Class Counsel, the costs to be reimbursed, and the total request for attorneys' fees are reasonable. The Court finds that Mr. Wilson is qualified to opine on issues related to the appropriateness of the fee request in this case, and the Court finds

Mr. Wilson's opinions on these issues to be helpful to the Court's review of the pending motion.

c. The Court finds, using the factors listed in Rule 1.5, that the total attorneys' fees award of $1,765,334.97 is reasonable and appropriate under the circumstances. The Court further finds that this conclusion is warranted by cross-checking the requested attorneys' fees award using the percentage of recovery and the lodestar method.

d. Under the percentage of recovery method, courts and commentators have found that the typical benchmark for a percentage of the recovery is at least 25% of the common fund. *Manual for Complex Litigation, Fourth* § 14.121 (2004); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases."); *Carl v. State*, No. 06 CVS 13617, 2009 WL 8561911 (N.C. Super. Ct. Dec. 15, 2009) (Eagles, J.) (citing the *Manual for Complex Litigation* and finding that an award of 19% of the common fund was well within the range of reasonableness). Here, the requested attorneys' fees constitute 14.35% of the Common Fund; this percentage is well below the typical award for a contingency fee case and is reasonable.

e. Under the lodestar method, courts take the reasonable amount of hours worked multiplied by a reasonable hourly rate and then apply a rate multiplier to determine the appropriate award of attorneys' fees. *Senergy*, 1999 WL 33563728, at *8, 1999 NCBC 7, at ¶ 30. As set forth in the

Motion for Attorneys' Fees and Costs, Class Counsel have expended over 2,335.75 hours on this litigation through 30 June 2018, and it is expected that Class Counsel will expend additional hours going forward to address issues that arise over the next year during class administration, to provide reports to the Court, and to seek appropriate relief with respect to undistributed funds at the conclusion of the refund period. Based on the Court's knowledge of this case, the materials presented, and the affidavits of H. Brent Helms, Alan W. Duncan, and G. Gray Wilson, the Court finds that the total number of hours expended on this case is reasonable. The Court acknowledges that this litigation has been a significant undertaking and has required a significant amount of time from the attorneys to litigate. The Court also finds, based on the affidavits of H. Brent Helms, Alan W. Duncan, and G. Gray Wilson, and the Court's own knowledge, that the hourly rates charged by Class Counsel are reasonable and are commensurate with the attorneys' respective skill levels and experience, and those rates comport with what others in the legal industry would charge for similar services. Finally, the Court finds that a rate multiplier of 2.41 is appropriate in this case to, among other things, account for the extraordinary result achieved by Class Counsel, the risk undertaken by Class Counsel in bringing the case, and to compensate Class Counsel for the time delay in recovering payment in this case. Courts in this State have previously recognized that rate multipliers between 2 to 4 may be appropriate. *Byers v. Carpenter*, No. 94 CVS 04489, 1998 WL 34031740,

at * 11 (N.C. Super. Ct. Jan. 30, 1998); *see also Jones v. Dominion Resources Servs., Inc.*, 601 F. Supp. 2d 756, 766 (S.D.W.V. 2009) (noting that courts typically find rate multipliers between 2 and 4.5 as reasonable and citing cases).

f. Accordingly, for the above-discussed reasons and the additional reasons set forth in the Motion for Attorneys' Fees and Costs and the affidavits submitted with that motion, the Court finds that an award of $1,765,334.97 in attorneys' fees is reasonable and is appropriate under the circumstances.

18. For purposes of N.C. Gen. Stat. § 1-267.10, the Court finds that the total amount payable to Class Members is $10,455,000.00, inclusive of the reserve fund of $37,525.89. The parties shall report to the Court the total amount that was actually paid to Class Members within 30 days of the end of the refund period, as part of the final report discussed below.

19. On 18 June 2018, the Class Administrator, GCG, announced that it had been acquired by EPIQ Class Action & Claims Solutions, Inc. ("Epiq"), as discussed in more detail in the Affidavit of Eric Kierkegaard, Assistant Director of Operations at GCG. GCG and Epiq anticipate that they may transition to using only the Epiq brand name, but the Class Administrator has confirmed that this corporate transition will not impact the Class Administrator's services to Class Members and the Court in this case. All obligations placed on GCG in this Order and the Preliminary Approval Order shall continue to apply to Epiq following the branding transition. Furthermore, all references to "Garden City Group," "GCG," or the "Class Administrator" in this Order, the Notice, the Summary Notice, and the Preliminary Approval Order, shall be construed to also reference Epiq as appropriate.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs' Unopposed Motion for Final Approval of Class Settlement is GRANTED, and the Proposed Settlement is APPROVED pursuant to Rule 23(c) of the North Carolina Rules of Civil Procedure.

2. Plaintiffs' Unopposed Motion for Attorneys' Fees and Costs is GRANTED.

3. Within five business days of the entry of this Order, Defendants shall pay or cause to be paid the sum of $10,455,000.00 to Garden City Group, LLC in its capacity as Class Administrator via wire transfer.

4. Within five business days of the entry of this Order, Defendants shall pay or cause to be paid the sum of $1,770,000.00 to the trust account of Mullins Duncan Harrell & Russell PLLC via wire transfer.

5. The following release of claims by each Class Member shall become effective upon Defendants' payment of $12,300,000.00 into the common fund:

> In consideration of the payment of $12.3 million pursuant to the terms of the Proposed Settlement (subject to approval by the Court), the Class, and each Member thereof, on behalf of himself, herself, or itself, and his/her/its heirs, executors, administrators, personal representatives, collectors, parents, subsidiaries, affiliates, successors, and assigns, do hereby fully release, remise, and forever discharge the Town of Kernersville and the Winston-Salem – Forsyth County City/County Utilities Commission, including their current and former attorneys, agents, employees, officials, officers, servants, representatives, predecessors, successors, parents (including the City of Winston-Salem and the County of Forsyth, as the participating units of the joint agency of the Winston-Salem – Forsyth County City/County Utilities Commission), subsidiaries, affiliates, insurers, and assigns, from any and all claims, liabilities, demands, damages, actions, or causes of action for breach of contract or unconstitutional takings without just compensation, or other claims which could have been raised, arising from, connected with, or in any way, related to the charging of a sewer fee rate multiplier to users of the Kernersville sanitary sewer system in excess of 1.2x during the period of time from 1 July 2012 to 1 August 2016.

6. The refund period shall last for one year from the date of entry of this Order, or until all funds are distributed to Class Members, whichever occurs sooner.

7. Class Counsel and the Class Administrator shall make payments of principal refunds and interest to Class Members following the plan set out in the Motion for Final Approval, which the Court approves. Specifically with respect to those payments:

a. Class Counsel and the Class Administrator shall follow these principles when calculating individual refunds based on CCUC's billing data, which are intended to guide the analysis of the billing data used to calculate individual refunds, but may vary from a strict application of these principles when necessary to fairly and accurately calculate the refund due for a particular entry in the billing data:

1. Refund calculations should be based on CCUC's billing data, pursuant to Defendants' Stipulation that the billing data provides an appropriate basis for determining Class Members' actual damages in this case.

2. Each instance when a Class Member was billed for services received during the damages period, at a rate that included an excessive rate multiplier, should result in an appropriate refund of the excessive portion of the rate charged to the Class Member.

3. Generally, but with some exceptions, 51.7% of billed amounts for services received between 7-1-12 and 9-13-15 should be refunded (the difference between the 2.487x and 1.2x multipliers).

4. Generally, but with some exceptions, 25% of billed amounts for services received between 9-14-15 and 8-1-16 should be refunded (the difference between the 1.6x and 1.2x multipliers).

5. Billings for services received either before 7-1-12 or after 8-1-16 should not be refunded.

6. When a billing entry includes time that is inside the damages period and time that is outside the damages period, an appropriate proration should be made to that entry, based on the information in

the billing data file, to reasonably estimate the amount billed for services received during the damages period.

7. For flat-rate customers, 51.7% of all billings for services received during the damages period should be refunded.

b. Class Counsel shall reserve the amount of $37,525.89, to be held for use in paying any valid claims that may be made during the course of class administration.

c. The amount of interest to be awarded to the Class shall be $860,158.42, which is the difference between $10,455,000 and the total amount of principal refunds ($9,557,315.69) plus the reserve amount ($37,525.89), to be awarded as pro rata simple interest based on the amount of principal refunds due to each Class Member. This equals 9% simple interest to be awarded to each Class Member.

d. The Court recognizes and agrees with Class Counsel that, as the refund process moves forward, updated data and/or revised calculations may require adjustments to the amount of principal refunds due to particular Class Members. That would in turn mean that the actual refunds of principal and interest would differ from the amounts set forth in the preceding paragraphs. In such circumstances, Class Counsel and the Class Administrator shall use the reserved amount to pay any additional principal and 9% simple interest due to any impacted Class Members. To the extent that any additional calculations shall cause a reduction in the amount estimated to be refunded to a Class Member, the additional funds shall be added to the reserved fund. Such adjustments and use of the reserve fund will ensure that a reasonably accurate refund of principal and

9% simple interest can be made to each Class Member, and the amount of actual principal and interest to be refunded plus the reserved funds will total $10,455,000.00. Class Counsel and the Class Administrator are authorized to make such adjustments as they deem appropriate in a manner that is consistent with the general principles set out in Paragraph 7(a). No additional order of the Court shall be needed with respect to such adjustments so long as the balance of the reserved amount is sufficient to satisfy the adjusted amount(s).

e. One check shall be issued for each account held by a Class Member, unless the Class Administrator, in its discretion, determines that multiple checks are appropriate.

f. Each check shall be payable to the name of the account holder as reflected in CCUC's records, unless the Class Administrator has received information that it deems, in its discretion, sufficient regarding a name change or valid successor in interest.

g. In instances when the Class Administrator does not believe it has a valid address for a Class Member, it may delay issuing a check to that Class Member and may take such steps as it deems appropriate to attempt to locate the Class Member.

h. In instances when a Class Member will receive $600 or more in interest, the Class Administrator may delay issuing a check to that Class Member until such time as the Class Administrator has all needed tax reporting information (e.g., the Class Member's taxpayer identification number),

and shall take such reasonable steps as it deems appropriate to attempt to determine the needed information (e.g., from Defendants' records, or through communications with the Class Member). The Class Administrator may also issue refund checks to impacted Class Members with appropriate withholding from the amount otherwise due. These procedures do not constitute advice (from the Court, Class Counsel, or the Class Administrator) to Class Members with respect to the appropriate tax treatment of any particular refund/interest amount, and Class Members are encouraged to consult a tax professional if they have any questions about such issues. By establishing these procedures, the Court is not ruling on the appropriate characterization or treatment for tax purposes of any refund/interest received by any Class Member.

8. The schedule for class administration shall be as follows:

   a. The Class Administrator shall begin issuing checks to Class Members as soon as practical, and no later than 60 days following entry of this Order.

   b. Class Counsel shall provide interim reports to the Court about the status of class administration. These reports shall be filed with the Clerk of Court. The first such interim report is due no later than 90 days from the date of entry of this Order, and two subsequent interim reports shall be filed no later than 90 days from the filing of each preceding report.

   c. No later than 30 days after the end of the refund period, Plaintiffs shall submit a final report regarding the refund process, which report shall

include without limitation the information required by N.C. Gen. Stat. § 1-267.10(b).

d. No later than 30 days after the end of the refund period, Plaintiffs shall file a motion seeking the Court's approval of any necessary steps to conclude the administration of the Class, including without limitation the transfer of any undistributed funds to the unclaimed property fund to the extent required by North Carolina law and the *cy pres* distribution of any eligible funds.

9. In the event that any issues arise during class administration that may require the Court to examine facts and circumstances related to a specific Class Member, Class Counsel are authorized to provisionally file under seal any necessary financial or identifying information about the affected Class Member.

10. Class Counsel are awarded reimbursement for their unreimbursed expenses as follows, from the funds to be paid by Defendants to the Mullins Duncan Harrell & Russell PLLC trust account:

a. Robinson & Lawing LLP – $ 5,547.59

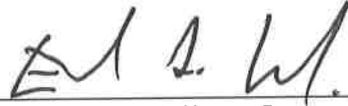
b. Mullins Duncan Harrell & Russell PLLC – $3,117.44

11. Class Counsel are collectively awarded attorneys' fees in the amount of $1,765,334.97, from the funds to be paid by Defendants to the Mullins Duncan Harrell & Russell PLLC trust account. This award shall be divided evenly by Robinson & Lawing LLP and Mullins Duncan Harrell & Russell PLLC.

12. Plaintiffs Edward and Debra Fasano are each awarded $11,000.00 in recognition of their service as the lead plaintiffs and Class Representatives in this matter, from the funds to

be paid by Defendants to the Mullins Duncan Harrell & Russell PLLC trust account. These awards are in addition to the refund of principal and interest due to Mr. and Mrs. Fasano as Class Members.

SO ORDERED, this the 27 day of July, 2018.



Hon. Edwin G. Wilson, Jr.
Superior Court Judge Presiding