NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FORSYTH COUNTY	16 CVS 2801

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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 AS TO ANNEXED CLASS MEMBERS**

THIS MATTER is before the Court on Plaintiffs' Unopposed Motion for Final Approval of Supplemental Class Settlement and Unopposed Motion for Attorneys' Fees and Costs for Supplemental Class Settlement. The Court has reviewed the motions and related matters without conducting a formal hearing, in light of the procedural posture of this case and the fact that the Court has previously conducted a fairness hearing on the initial settlement and the terms of the Proposed Settlement are substantially similar in all material respects. After 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:

1. This Order adopts and incorporates the definitions used in the 27 July 2018 Final Approval Order and the 28 September 2018 Order on Plaintiffs' Unopposed Motion for Preliminary Approval of Supplemental Class Settlement and Class Notice Plan for Annexed

Class Members (the "Preliminary Approval Order"). The "Proposed Settlement" as used herein refers to the proposed settlement for Annexed Class Members.

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, at *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, some of which are discussed further below. Furthermore, the Court finds that the Proposed Settlement treats Annexed Class Members in substantially the same manner as other Class Members were treated under the original settlement.

3. Notice has been given to the Annexed Class Members pursuant to and in the manner directed by the Preliminary Approval Order, proof of the mailing of the Notice has been filed with the Court, and a full opportunity to be heard and to opt-out has been offered to all parties, to Annexed 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 Annexed Class Members are bound by this Order.

4. The Court has been advised by Class Counsel and the Class Administrator that it has received no requests to opt-out from Annexed Class Members, 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.

5. 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, after the Court had certified the Class, and after the Court had given final approval to the original settlement. The Proposed Settlement allows for a full recovery of Annexed Class Members' 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.

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

7. 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. It is appropriate for this release to cover the Annexed Class Members, and in turn for Annexed Class Members to receive full refunds of

overcharges and interest so that they are treated in substantially the same manner as other Class Members.

8. 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.

9. The Court finds that Defendants have the ability to pay the amount of the Proposed Settlement.

10. 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 Annexed Class Members and the Class as a whole.

11. 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 Annexed 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 supplement to the existing Common Fund in the amount of $172,269.25. *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).

12. 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 $27,687.29 (approximately 16.1% of the supplement to the existing Common Fund) to offset Plaintiffs' additional 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.

13. Class Counsel have incurred a total of $6,516.97 in costs and expenses after 1 July 2018, which costs were not included or addressed in the Final Approval Order entered 28 July 2018. 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 Annexed Class Members, after the Court's final approval of the original settlement. 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 16.1% portion of the supplement to the Common Fund.

14. Plaintiffs have requested an additional award of attorneys' fees in the amount of $21,170.32, which is 12.3% of the supplement to 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 original Motion for Attorneys' Fees and Costs or the Unopposed Motion for Attorneys' Fees and Costs for Supplemental Class Settlement, 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 finds, using the factors listed in Rule 1.5, that the additional attorneys' fees award of $21,170.32 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 method.

c. 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 only 12.3% of the supplement to the Common Fund; this percentage is well below the typical award for a

contingency fee case and is lower than the 14.35% previously awarded by the Court in the Final Approval Order.

d. The Court acknowledges that the fee requested by Class Counsel is well below the level that is typically considered reasonable in class action litigation, especially in light of the results achieved by Class Counsel. 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 $21,170.32 in additional attorneys' fees is reasonable and is appropriate under these unique circumstances.

15. For purposes of N.C. Gen. Stat. § 1-267.10, the Court finds that the total amount payable to Class Members is $144,581.96.[1] 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.

16. 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 have begun the 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 Supplemental Preliminary Approval Order shall continue to apply to Epiq following the branding

[1] When combined with the original amount of the common fund under the original Final Approval Order, the total amount payable to Class Members is $10,600,581.96 (including the reserve fund).

transition. Furthermore, all references to "Garden City Group," "GCG," or the "Class Administrator" in this Order, the Notice, and the Supplemental 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 Supplemental 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 $144,581.96 to Epiq 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 $27,687.29 to the trust account of Mullins Duncan Harrell & Russell PLLC via wire transfer.

5. The following release of claims by each Annexed Class Member shall become effective upon Defendants' payment of $172,269.25 into the common fund:

> In consideration of the payment of $172,269.25 pursuant to the terms of the Proposed Settlement (subject to approval by the Court), each Annexed Class Member, 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 the original Final Approval 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 Annexed 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 an Annexed 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 Annexed Class Member.

3. Generally, but with potential exceptions, 20% of billed amounts for services received between 7-1-12 and 8-1-16 should be refunded (the difference between the 1.5x and 1.2x multipliers).

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

5. 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.

b. The amount of interest to be awarded to the Annexed Class Members shall be $11,937.96, which is 9% simple interest on the principal refund amount of $132,644.00.

c. 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 Annexed 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 (established by the original Final Approval Order) to pay any additional principal and 9% simple interest due to any impacted Annexed Class Members. To the extent that any additional calculations shall cause a reduction in the amount estimated to be refunded to an Annexed 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 Annexed Class Member, and the amount of actual principal and interest to be refunded plus any addition to the reserved funds will total $144,581.96. 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).

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

e. 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.

f. In instances when the Class Administrator does not believe it has a valid address for an Annexed 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.

g. In instances when an Annexed Class Member will receive $600 or more in interest, if any, the Class Administrator may delay issuing a check to that Annexed Class Member until such time as the Class Administrator has all needed tax reporting information (e.g., the Annexed 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 Annexed

Class Member). The Class Administrator may also issue refund checks to impacted Annexed 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 Annexed Class Members with respect to the appropriate tax treatment of any particular refund/interest amount, and Annexed 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 Annexed Class Member.

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

a. The Class Administrator shall begin issuing checks to Annexed Class Members as soon as practical, and no later than 30 days following entry of this Order.

b. The schedule previously ordered by the Court in the original Final Approval Order, with respect to the submission of interim reports, a final report (including the information required by N.C. Gen. Stat. § 1-267.10(b)), and a motion seeking the Court's approval of any necessary steps to conclude the administration of the Class, shall continue to apply, and shall be construed to also cover issues related to Annexed Class Members.

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 Annexed Class Member, Class

Counsel are authorized to provisionally file under seal any necessary financial or identifying information about the affected Annexed Class Member.

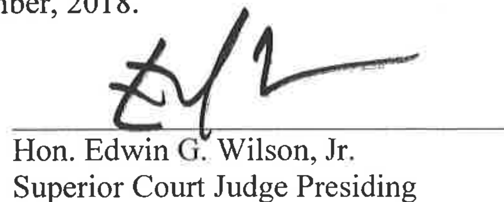
10. Class Counsel are awarded reimbursement for their unreimbursed expenses as follows, from the funds to be paid by Defendants to the Mullins Duncan Harrell & Russell PLLC trust account:

a. Robinson & Lawing LLP – $304.50

b. Mullins Duncan Harrell & Russell PLLC – $212.47

11. Class Counsel are collectively awarded additional attorneys' fees in the amount of $21,170.32, from the funds to be paid by Defendants to the Mullins Duncan Harrell & Russell PLLC trust account. This award shall be divided evenly between Robinson & Lawing LLP and Mullins Duncan Harrell & Russell PLLC.

SO ORDERED, this the 19 day of November, 2018.



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

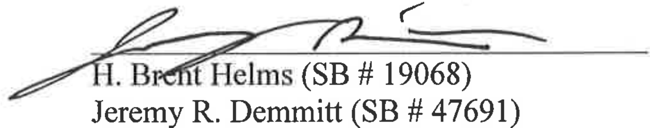
CERTIFICATE OF SERVICE

The undersigned, as counsel of record for Plaintiffs, hereby certifies that, on this date, he served a copy of the foregoing document upon Defendants by placing same in the United States Mail in Winston-Salem, North Carolina, with sufficient postage affixed, and addressed to:

Mr. John G. Wolfe, III
JOHN G. WOLFE, III & ASSOCIATES, PLLC
101 South Main St.
Kernersville, NC 27284

Ms. Jodi D. Hildebran
ALLMAN SPRY DAVIS LEGGETT & CRUMPLER, PA
380 Knollwood St., Ste. 700
Winston-Salem, NC 27103

This the 26th day of November, 2018.



H. Brent Helms (SB # 19068)
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