



thirty-three and one-third percent (33.33%) of the Settlement Benefit, plus reimbursement of litigation expenses incurred. *See* Settlement Agreement at ¶ 6.01a. Likewise, Defendant agreed that it would not oppose an application for an Incentive Award of ten thousand dollars (\$10,000), provided it is paid from the Settlement Benefit. *Id.* at ¶ 6.01b.

For the reasons set forth herein, Class Counsel request that this Court order the payment of reasonable attorneys' fees to Class Counsel, to be paid from the Settlement Benefit, in the amount of \$4,166,666.67.<sup>1</sup> Class Counsel also request that this Court order the reimbursement of costs and expenses incurred in the amount of \$46,584.14 to be paid from the Settlement Benefit. Class Counsel further request that this Court order an Incentive Award, in the amount of \$10,000, be paid to the Representative Plaintiff, George M. Hearn Jr., from the Settlement Benefit.

**A. The Requested Award of Attorneys' Fees and Costs is Supported by South Carolina Law.**

An award of attorneys' fees and reimbursement of costs is warranted in this case under South Carolina common law, which holds that attorneys' fees may be awarded from a common fund created by counsel. *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941) (“[A] court exercising equitable jurisdiction may make an allowance of a reasonable fee out of the common fund . . . for an attorney representing a party who, at his own expense, has maintained a suit for the recovery . . . of a common fund . . . in which others are entitled to share.”); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); *Laymen v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). “The justification for awarding attorneys' fees in this manner is based on the principle that ‘one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of

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<sup>1</sup> \$4,166,666.67 (rounded to the nearest one hundredth) amounts to one-third of the total \$12,500,000 Settlement Benefit.

the expenses.” *Laymen*, 376 S.C. at 452, 658 S.E.2d at 329 (2008) (quoting *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)).<sup>2</sup>

Before attorneys’ fees can be charged to a fund in which others are entitled to share, the following elements must be met:

- (1) the attorney must preserve or protect a common fund;
- (2) the attorney’s services must have aided in creating . . . the fund, and the services must prove fruitful to the general class; and
- (3) there must be a principle of representation or agency *as in a class suit*, that is, . . . there must be a contract of employment, either expressly made or superinduced by the law upon the facts.

*First Union Nat’l Bank*, 333 S.C. at 573-74, 511 S.E.2d at 382 (emphasis added) (citations omitted). Class Counsel have met each of these elements.

First, Class Counsel have created a common fund represented by the monies to be paid by Defendant in accordance with the terms of the Settlement Agreement. Second, Class Counsel’s services clearly aided in creating the fund, and their services have proved fruitful to the Class, because each Class member will derive a benefit from the settlement. Third, this is a class action and the Class Representative and Class Counsel, by virtue of Rule 23, SCRCP, and by order of this Court, have been appointed representatives of the Class. Accordingly, based upon the common law of this State, Class Counsel are entitled to a reasonable award of attorneys’ fees.

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<sup>2</sup> Similarly, there is “consensus among [federal] courts [in the Fourth Circuit] that the percentage method is the superior method for calculating attorneys’ fees from the common-fund . . . .” *Jones v. Dominion Resources Servs., Inc.*, 601 F. Supp. 2d 756, 760 (S.D. W.Va. 2009); *see also Muhammad v. Nat’l City Mortgage, Inc.*, No. 2:07-0423, 2008 U.S. Dist. LEXIS 103534, at \*17 (S.D. W.Va. Dec. 19, 2008) (“Awarding attorneys’ fees as a percentage of the benefit to the class is the preferable and prevailing method of determining fee awards in class actions that establish common-funds for the benefit of the class.”); *Edmonds v. United States*, 658 F. Supp. 1126, 1129 (D.S.C. 1987) (percentage of the fund method employed to determine a reasonable fee).

In *Jackson v. Speed*, the South Carolina Supreme Court set forth factors to be considered when awarding attorneys' fees. 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). These factors were not issued in the context of a class action, but when applied to this case the *Jackson* factors demonstrate that the amount of attorneys' fees and costs requested is reasonable here.

i. *The nature, extent, and difficulty of the case.* The case involved numerous complex factual and legal issues. In discovery, nearly 200,000 pages of material were reviewed and analyzed by Class Counsel, including over 160,000 pages produced by Defendant and an additional 27,000 received in response to FOIA requests. In addition to the quantity of the documents, their substance was complex, relating to energy production, construction of a coal fired energy facility, and rate creation to support the planned construction. Moreover, Class Counsel faced, and ultimately defeated, Defendant's Motion to Dismiss that included nine separate arguments ranging from statute of limitations violations to the filed rate doctrine. The breadth and scope of fact and expert discovery, coupled with the complex legal issues, demonstrates that the requested fee is justified by the nature, extent, and difficulty of the case.

ii. *The time necessarily devoted to the case.* Over the three years of the pendency of this case, Class Counsel have spent significant time on the litigation and settlement of this case. To date, Class Counsel have expended over 2,200 attorney hours representing the class. These hours do not include the time incurred by Class Counsel's support staff as their time was not maintained, nor do they include the significant time that Class Counsel will continue to expend while the settlement is implemented.

iii. *Professional standing of counsel.* Class Counsel are experienced in civil litigation and have particular expertise in class actions. Further, Class Counsel enjoy excellent reputations in the legal community. Finally, Class Counsel have consistently demonstrated their competence, preparedness, tenacity, skill, and perseverance to the Court over the course of this litigation.

iv. *Contingency of compensation.* The fee agreement between the named Plaintiff and Class Counsel provides for a contingency fee of one-third of the recovery, if any.<sup>3</sup> The Court is well aware of the risk inherent in contingency fee litigation, where neither recovery for the plaintiff nor compensation for the attorneys who undertake the risk is guaranteed. Additionally, Class Counsel advanced expenses with no assurance of reimbursement.

v. *Beneficial results obtained.* Class Counsel have secured a real, valuable benefit for the Class totaling a \$12.5 million common fund (including the award of attorneys' fees and costs), and all Class members will receive a cash payment unless they choose to exclude themselves. These payments will be made automatically to active Class members without the necessity of a claim form.

vi. *Customary legal fees for similar services.* The attorneys' fee request is consistent with the fees customarily awarded in similar cases. "When awarding attorneys' fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's 'success.'" *Laymen*, 376 S.C. at 453, 658 S.E.2d at 330 (2008). Consequently, courts customarily base the award of attorneys' fees on a percentage of the common fund created. *Id.* The South Carolina Supreme Court has acknowledged that this percentage-of-the-recovery approach "may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys' fees among a benefited group of litigants." *Id.* at 453-54, 658 S.E.2d at 330; *see also Ex parte Condon*, 354 S.C. 634, 636-37, 583 S.E.2d 430, 431 (2003) (approving a circuit court's award of attorneys' fees based on a percentage-of-the-recovery approach where the parties' agreement stipulating that the circuit court would calculate and award

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<sup>3</sup> See Exhibit A, Aff. of Michael Spears.

attorneys' fees clearly contemplated an award based on a percentage of the common fund recovered).

The attorneys' fees requested here are one-third (33.33%) of the total common fund. The percentage is within the range of reasonableness for attorneys' fees in class actions. *See Fairey v. Exxon Corp.*, No. 94-CP-38-118, Order filed October 9, 2003 (First Judicial Circuit) (J. Goodstein) (approving attorneys' fees and costs representing 40% of recovery); *Dewitt v. Darlington Cty.*, S.C., 2013 WL 6408371, \*9 (D.S.C. Dec. 6, 2013) (noting that "in common fund cases attorney's fee awards generally range anywhere from nineteen percent (19%) to forty-five (45%) of the settlement fund.") (quoting *Bredbermer v. Liberty Travel, Inc.*, 2011 WL 1344745, \*21 (D.N.J. Apr. 8, 2011)); Alba Conte & Herbert Newberg, *NEWBERG ON CLASS ACTIONS* § 14:6 (4th ed. 2002) ("Empirical studies show that . . . fee awards in class actions average around one-third of the recovery.").

**B. The Requested Award of Attorneys' Fees and Costs is Also Supported by the *Barber* Factors.**

The more-stringent factors utilized to determine attorneys' fees in federal class actions are set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). Those factors include:

(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

*Id.* at 226 n. 28 (4th Cir. 1978). The application of the *Barber* factors further demonstrates that the requested attorneys' fees are reasonable.

**1. Time and labor required.**

Over the nearly four years that this case has been pending, Class Counsel have incurred over \$46,000 in out-of-pocket expenses and have expended more than 2,200 hours in prosecuting this matter. This case required coordination among numerous law firms to maximize the skills each firm could bring to pursuit of the litigation against a well-funded and formidable Defendant and its counsel. Importantly, the hours expended do not count paralegal time, time spent on fee petition matters, or future time that will necessarily be dedicated to administering this settlement.

**2. Novelty and difficulty of the questions involved.**

This litigation involved complex and novel issues that have been skillfully handled by Class Counsel. *See supra* § I.A.i. The claims were zealously contested from the inception of the case through merits discovery and until reaching the settlement embodied in the Settlement Agreement.

**3. The skill that is required to perform the legal services properly.**

The prosecution of a class action of this kind requires skilled counsel. Few law firms have the experience and resources to pursue such litigation. Given the stakes in this litigation, the complex factual and legal issues involved, and the results obtained for the Class, it is evident that Class Counsel handled this case with an exceptional level of skill.

**4. The attorneys' opportunity costs in pressing the litigation.**

Class Counsel have expended significant time litigating this case on a contingency fee basis over the past three years. Naturally, the unpaid time spent on this case precluded paid time from being spent on other cases. Moreover, Class Counsel have incurred over \$46,000 in costs and expenses that could not be invested in other cases.

**5. Customary fee.**

As discussed more fully below, courts in similar cases have routinely awarded attorneys' fees of at least one-third of the common fund.

**6. The contingent nature of the matter/the attorneys' expectations at the outset of the litigation.**

Class Counsel understood from the outset of this litigation that there would be no attorneys' fee if there was no recovery. Class Counsel worked for years with no payment at great risk of ultimately receiving no payment at all. Moreover, Class Counsel put at risk their investment of over \$46,000 in out-of-pocket expenses.

**7. The time limitations imposed by the client or circumstances.**

The class action necessitated extensive efforts in briefing, discovery, and protracted settlement negotiations. Class Counsel have obtained a favorable result for the Class in a reasonable period of time despite the difficulty imposed by novel issues, complex negotiations, and the eroding insurance policy that provided the only form of payment for the Class.

**8. The amount in controversy and the amount obtained.**

There were numerous obstacles to recovery in this case. As already noted, this class litigation required evaluation, litigation and negotiation of complex legal issues against the backdrop of Defendant's financial position with an "eroding limits" insurance policy that acted as the source of payment for Defendant's legal counsel. Despite these obstacles, Class Counsel obtained a settlement that provides for a minimum award of \$5.00 per Class member plus an additional *pro rata* award based on the amount that each Class member paid to fund Defendant's debt service during the class period. Class Counsel undertook significant obligations and responsibilities in this litigation and produced a result that provides tangible relief to the Class. Without these efforts, it is unlikely that the Class could have obtained any relief whatsoever.



**9. The experience, reputation, and ability of counsel.**

Counsel consist of firms with expertise in complex litigation and with a history of success in difficult, high stakes cases. Richardson, Thomas, Haltiwanger, Moore & Lewis, LLC and Rogers, Patrick, Westbrook & Brickman, LLC each have extensive backgrounds in class actions and other complex litigation in jurisdictions nationwide. Class Counsel submit that their reputation and experience in litigating complex cases assisted the Class in achieving the settlement.

**10. The undesirability of the case.**

Prior to and during the pendency of this action, no other law firms filed individual or competing class actions against Defendant alleging that Defendant's decision to increase Class members' electricity rates to fund its purchase of the Pee Dee Power Plant, which it later abandoned, was improper. By way of comparison, in the litigation surrounding the failed V.C. Summer Nuclear Plant multiple competing cases were filed before being consolidated. And although this case bears similarity to the V.C. Summer Litigation, of the eight firms representing the plaintiff class there, only two of the firms (*i.e.* Rogers, Patrick, Westbrook and Brickman, LLC and Richardson, Thomas, Haltiwanger, Moore and Lewis, LLC) joined in this litigation. This fact alone makes the undesirability of the case apparent.

**11. Nature and length of the professional relationship between attorney and the client.**

Including the pre-suit investigation and continuing to date across many years of activity, the Class representative has ably assisted Class Counsel in the pursuit of the litigation, understood the risks attendant to the case, reviewed documents, provided input, and ultimately recommended the proposed resolution to Class members.

## 12. Attorneys' fees awarded in similar cases.

As discussed more fully below, courts in similar cases have routinely awarded attorneys' fees of at least one-third of the common fund.

Consequently, analysis of each of the 12 *Barber* factors supports the award of attorneys' fees and costs requested here.

### C. This Court Should Find Class Counsel's Request for a Fee of One-Third (33.33%) of the Settlement Benefit to Be Reasonable.

Class Counsel request a fee of one-third (33.33%) of the Settlement Benefit. Circuit courts in this State often award fees of one-third, or more, of the fund created. *See Global Protection Corp. v. Halbersberg*, 332 S.C. 149 (Ct. App. 1998) (stating, "contingent fee arrangements were common in complex cases and found that the typical range of such contingency fees was one-third to one-half the recovery.").

In *Anderson Memorial Hosp. v. W.R. Grace*, No. 92-CP-25-279 (Hampton Cty. Ct. Com. Pl. Dec. 10, 2008), Judge Hayes noted that the customary South Carolina fee for a complex contingent fee case "ranges from **one-third to one-half** of the gross recovery." Slip op. at 7 (emphasis added). He ultimately awarded a one-third contingent fee on a \$57 million recovery, stating, "Class Counsel has requested one-third of the settlement fund created. This request is well within the range of fees routinely approved by courts in class actions." *Id.* The Court further noted that the fee was at the lower end of the range of common fund fees approved in South Carolina courts. *Id.* Indeed, a higher percentage was approved in *Fairey v. Exxon Corp.*, C.A. No. 94-CP-38-118 (Orangeburg Cty. Ct. Com. Pl. Oct. 9, 2003) (approving an attorney fee award of 40% of the total \$30 million settlement).<sup>4</sup>

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<sup>4</sup> Other South Carolina cases agree that a one-third common fund fee is within the range of appropriate fees. *See e.g., Edwards v. SunCom*, 2008 WL 4897935 (S.C. Ct. Com. Pl. May 5, 2008) (approving attorney fee award of one-third of settlement fund created); *Littlejohn v. State*,

Like South Carolina circuit courts, decisions from South Carolina federal district courts also find that fee awards of one-third of the fund created are reasonable. In *Montague v. Dixie Nat'l Life Ins. Co.*, Judge Joseph Anderson awarded a 33% fee in a common fund case, citing numerous decisions supporting that percentage:

A total fee of 33 percent for all work performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in the range of 33% of the fund for work performed in the creation of a settlement fund has been held to be reasonable by many federal courts.

2011 WL 3626541 at \*2 (D.S.C. Aug. 17, 2011); *See also, Ward v. Dixie Nat'l Life Ins. Co.*, C.A. No. 3:03-cv-03239-JFA, slip op. at 2 (D.S.C. Dec. 15, 2008) (approving 33% fee in common fund case); *Temp. Servs. Inc. v. Am. Int'l Grp., Inc.*, 2012 WL 4061537, at \*8 (D.S.C. Sept. 14, 2012) (approving one-third fee award); and *DeWitt v. Darlington Cty., S.C.*, 2013 WL 6408371, at \*9 (D.S.C. Dec. 6, 2013) (approving one-third fee award).

Notwithstanding the supporting South Carolina state and federal court decisions cited above, the beneficial result obtained for the Class, particularly in the face of the complex factual and legal issues presented in this litigation, support the reasonableness of Class Counsel's fee request of one-third of the Settlement Benefit.

**D. The Court Should Approve an Incentive Award of \$10,000 to the Class Representative.**

The class representative in this case, George M. Hearn, Jr., has ably assisted Class Counsel in the investigation and litigation of this class action. In the two years leading up to the filing of this action, Mr. Hearn spent significant time investigating the potential claims in the case,

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No. 00-CP-40-2666, 2002 WL 34454074 (S.C. Ct. Com. Pl. Apr. 23, 2002) (approving 33.33% award on a settlement of \$7.5 million); *Preisendorf v. JK Harris Co., LLC*, No. 05-CP-10-317, 2007 WL 5844105 (S.C. Ct. Com. Pl. July 10, 2007) (approving 33.33% award on a settlement of \$6 million); *Lackey v. Green Tree Fin. Corp.*, C.A. No. 96-CP-06-073, slip op. at 24 (S.C. Ct. Com. Pl. July 24, 2000) (approving fees equal to one-third of the common fund created); and *Bazzle v. Green Tree Fin. Corp.*, C.A. No. 97-CP-18-258 (S.C. Ct. Com. Pl. July 24, 2000) (same).

conferring with Class Counsel regarding the same, and participating in pre-suit mediation. After the action was filed, Mr. Hearn continued to assist Class Counsel in the litigation by providing documents requested in discovery, regularly communicating with Class Counsel, aiding in counsels' preparation for mediation, and reviewing the format for settlement. As stated in *Reed v. Big Water Resort, LLC*, “[s]erving as a class representative is a burdensome task, and, without class representatives, the entire class would receive nothing.” No. 2:14-CV-01583-DCN, 2016 WL 7438449, at \*12 (D.S.C. May 26, 2016). Mr. Hearn’s service to the Class over the last six years is evidenced by the result obtained for the Class. Moreover, Defendant agreed not to oppose an incentive award up to \$10,000 for Mr. Hearn. Therefore, Class Counsel request that such award be approved by the Court for his service and cooperation.

### **CONCLUSION**

For the reasons set forth herein, Plaintiff respectfully requests that the Court enter an Order awarding reasonable attorneys’ fees of one-third of the Settlement Benefit plus expense reimbursement, and approving a Class Representative incentive award of \$10,000. Defendant does not oppose these requests.

Respectfully Submitted,

Dated: September 15, 2021

s/ Daniel S. Haltiwanger

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ATTORNEYS FOR PLAINTIFFS

# Exhibit A

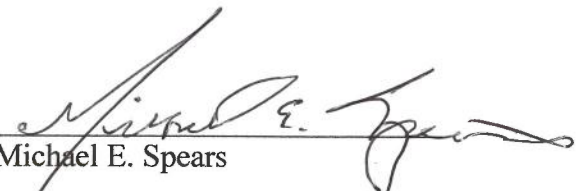
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	<b><u>BUSINESS COURT</u></b>
	)	
George M. Hearn, Jr., on Behalf of Himself and	)	Civil Action No. 2017-CP-26-05256
All Others Similarly Situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
South Carolina Public Service Authority d/b/a	)	
Santee Cooper,	)	
	)	
Defendant.	)	

**AFFIDAVIT OF MICHAEL E. SPEARS, ESQ.**

I, Michael E. Spears, affirm and state as follows:

1. I am an attorney with Parnham Smith & Archenhold, LLC and one of the attorneys working on behalf of the Plaintiff class in the above litigation.
2. My firm, along with Hall Booth Smith, P.C., Schmutz and Schmutz, P.A., and the Law Offices of L. Morgan Martin, P.A. signed up Plaintiff, George M. Hearn as a client in 2015.
3. The executed contingent fee contract with Mr. Hearn provides for attorney fees in the amount of 33 1/3% of any recovery.
4. Further affiant sayeth not.

I declare under penalty of perjury that the foregoing is true, accurate, and complete to the best of my knowledge.

  
 Michael E. Spears

Sworn to before me this 30 day of August 2021.

  
 Notary Public for South Carolina  
 My Commission Expires 