STATE OF SOUTH CAROLINA COUNTY OF HORRY George M. Hearn, Jr., on Behalf of Himself and All Others Similarly Situated, Plaintiffs, v. South Carolina Public Service Authority d/b/a Santee Cooper, Defendant.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT **BUSINESS COURT** Civil Action No. 2017-CP-26-05256 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff George M. Hearn, Jr., on behalf of himself and all others similarly situated (collectively "Plaintiffs"), and by and through his undersigned counsel, hereby submits the following memorandum in support of his motion for entry of an Order granting final approval of the class action settlement.

I. STATUS OF THE SETTLEMENT

On June 7, 2021, the Plaintiffs, through counsel, filed a Motion and Supporting Memorandum for Certification of a Settlement Class, Preliminary Approval of Class Action Settlement, and Approval of Notice. On July 1, 2021, the Court held a hearing on Plaintiffs' Motion for Certification of a Settlement Class, Preliminary Approval of Class Action Settlement, and Approval of Notice ("Motion for Preliminary Approval"). That same day, the Court certified the Settlement Class[1] and preliminarily approved the settlement, including the proposed notice, opt-out and claim documents.

[1] Capitalized terms have the same meaning as set forth in the Settlement Agreement.

In accordance with the notice obligations outlined in the Settlement Agreement, RG/2 Claims Administration ("RG2") timely e-mailed or mailed[2] the notice to all Settlement Class Members, initiated Publication Notice in seven (7) South Carolina newspapers, and launched a website that provided all relevant Settlement documents and information. *See* Affidavit of Jessie Montague, attached as Ex. A. RG2 e-mailed or mailed approximately 323,000 individual notices. As of September 10, 2021, three (3) requests for exclusion from the settlement have been received from Settlement Class Members. No objections to settlement have been raised to date. Plaintiff now requests that this Court again find that the requirements for class certification have been met and grant final approval to this Settlement.

II. THE PROPOSED SETTLEMENT CLASS MEETS ALL ELEMENTS FOR CLASS CERTIFICATION[3]

A party seeking class certification must demonstrate:

> 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class.

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003) (alterations in original) (quoting Rule 23(a), SCRCP). Made up of both current and former direct Santee Cooper customers, the Settlement Class is defined in the Settlement Agreement as "all residential and business retail customers who received power and energy from Santee Cooper and who had Accounts with Santee Cooper between November 1, 2009 and February 28, 2021." *See* Settlement

[2] Notice was e-mailed to each Settlement Class Member for which an e-mail address was available, and was mailed via the United States Postal Service to each Settlement Class Member for which an e-mail address was not available.

[3] Santee Cooper does not oppose certification of the proposed Settlement Class, subject to the terms and conditions of the Settlement Agreement.

Agreement at ¶ 1.37. As indicated in the Court's Order Granting Plaintiff's Motion for Preliminary Approval, the proposed Settlement Class meets all elements for class certification under Rule 23(a), SCRCP.

Initially, the Settlement Class is made up of many thousands of individuals and entities who are or were direct Santee Cooper Customers during the class period. Under such circumstances, joinder of all members is plainly impracticable. Secondly, the questions of fact and law are the same for all Settlement Class members: whether Settlement Class members paid increased rates to Santee Cooper and whether those increases were attributable to Santee Cooper's actions; whether Santee Cooper is liable for the causes of action alleged in Plaintiff's Complaint; and the actual damages each Settlement Class member is entitled to. Third, Plaintiff's claims are typical of the claims of the Settlement Class members as they arise from the same nucleus of operative facts and Plaintiff's legal relationship with Santee Cooper is the same or similar to those of all Settlement Class members. Fourth, Plaintiff will adequately protect the interests of the Settlement Class as his interests are not antagonistic to those asserted on behalf of the Settlement Class and Plaintiff's counsel has extensive experience in class action litigation. Plaintiff's work as a practicing attorney makes him uncommonly well positioned and knowledgeable to assess and recommend this proposed settlement to the Settlement Class. Finally, Santee Cooper does not contest that the amount in controversy element is met.[4] Consequently, the proposed Settlement Class meets the prerequisites for class certification under Rule 23(a), SCRCP.

[4] For additional support, counsel refers the Court to Plaintiff's Motion and Supporting Memorandum for Certification of a Settlement Class, Preliminary Approval, and Approval of Notice. *See* Mot. for Prelim. Approval at § A.

III. THE COURT SHOULD GRANT FINAL APPROVAL FOR A REASONABLE SETTLEMENT THAT FACES SUBSTANTIAL RISKS IF LITIGATION CONTINUES

Rule 23, SCRCP, affords the Court discretion to approve a class action settlement and to direct reasonable notice to the class. The South Carolina Supreme Court and other courts in this State have found federal precedent applying Fed. R. Civ. P. 23 instructive, *see, e.g.*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008), keeping in mind that Rule 23, SCRCP, is less restrictive than the federal rule. "[W]e are cognizant that our appellate decisions have relied on federal precedent with respect to class action cases, but have also noted the significant differences between the two rules." *Id.* at 454-55, 661 S.E.2d at 88 (citing *Littlefield v. South Carolina Forestry Commn.*, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.")); *see also McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (relying on federal precedent to interpret new Rule 23, SCRCP); *Chestnut v. AVX Corp.*, No. 2007-CP-26-7459, 2011 WL 11684474 at *3 (S.C. Ct. Com. Pl. Aug. 30, 2011) ("It is well settled in South Carolina that the Class Action Rule (SCRCP 23) is more expansive than its federal counterpart"). Accordingly, where appropriate, this memorandum addresses instructive federal precedent.

This Court has already satisfied the first step of the settlement approval process by reviewing the settlement for obvious deficiencies at the preliminary approval stage. *See Horton v. Merrill, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994); *In re Mid Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983); MANUAL FOR COMPLEX LITIGATION (Fourth) §§ 21.632, 21.634 (2004). On Plaintiff's motion for final approval, the Court is now asked to consider whether the proposed settlement is fair, reasonable, and adequate. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991) (setting forth fairness and adequacy factors to be considered for approval of class settlement).

A. This Settlement Was Reached As the Result of Arm's Length Negotiations

The four years of litigation and obvious arms-length settlement negotiations that produced the settlement preclude any finding of collusion. *See, e.g.*, MANUAL, *supra*, § 21.61 ("Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arms' length."). Class counsel engaged in protracted negotiations where the outcome was uncertain. It was only after extensive discovery, Plaintiffs' engagement of an expert, and a formal mediation process that the parties reached the proposed Settlement Agreement.

Next, Class Counsel were fully and sufficiently informed to vigorously advocate on behalf of the Class. In addition to the formal discovery that the parties undertook, Class Counsel conducted extensive factual investigation and legal analysis to obtain sufficient information to weigh the benefits of the settlement against the risks of continued litigation. It is on the basis of their investigation that Class Counsel, who have substantial experience prosecuting class actions and negotiating class settlements, recommend approval of the proposed settlement as in the best interests of the Class. *See Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (noting that the court is "entitled to give consideration to the opinion of competent counsel that the settlement [is] fair, reasonable, and adequate"); *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (noting that absent fraud, collusion or the like, courts should be hesitant about substituting their own judgment for that of counsel).

B. The Proposed Settlement Satisfies the Adequacy Factors

Following preliminary approval, courts routinely apply adequacy factors at the final fairness hearing. These adequacy factors include: (i) the relative strength of the plaintiffs' case on the merits; (ii) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (iii) the anticipated duration and expense of additional

litigation; (iv) the solvency of the defendants and the likelihood of recovery of a litigated judgment; and (v) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159; *Flinn v. FMC Corp.*, 528 F.2d at 1169, 1173-74 (4th Cir. 1975).

First, the strength of Plaintiffs' case, balanced against the assured compensation under the settlement, weighs in favor of the adequacy of the settlement. Plaintiffs' ability to prevail on the merits of this litigation, like all contested matters, is uncertain. If the litigation continues without the negotiated class resolution, the proposed class must survive class certification, summary judgment, trial and appeal, all at significant delay and risk to the compensation available now. The proposed Settlement Agreement thus confers relief that might not be achievable, or achievable to the same degree, if the case proceeds to a contested judgment.

Second, there is no real debate that this litigation, if not resolved by the proposed Settlement Agreement, would continue at great expense and delay for the Class. As proposed, the Class relief is funded by an insurance policy which also serves as the source of payment for Santee Cooper's legal counsel. Informed that the policy was what is known as an "eroding limits" policy, Class Counsel took advantage of the opportunity to resolve the matter before the limits were depleted through continued litigation.

Third, the settlement produces a substantial benefit for the Class without risking the financial health of Santee Cooper in the face of continued litigation. Santee Cooper recently settled litigation arising from Santee Cooper's efforts to construct two nuclear generation units (*Cook v. Santee Cooper, et al*.). Pursuant to that settlement, Santee Cooper agreed to pay $200 million (in addition to $320 million paid by its codefendant) and to freeze customer rates through 2024. Class Counsel and Santee Cooper's counsel worked together to arrive at the $12.5 million settlement fund, which provides for recovery to all Class Members, delivers the benefits to the Class promptly, avoids the uncertainty of continued litigation, and does not impinge on Santee Cooper's

ability to continue to serve its existing customers and perform its obligations pursuant to the recent *Cook* settlement.

Fourth, opposition to the settlement has been exceedingly small. After emailing and/or mailing notice of the proposed settlement directly to approximately 322,806 Class members,[5] only three (3) requests for exclusion have been received to date.

Accordingly, on the basis of their extensive investigation and analysis, as well as their decades of experience in class action litigation, Class Counsel believe the settlement to fall well within the range of possible acceptable resolutions of this action.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court enter an Order certifying the settlement class, and finally approving the settlement.

Respectfully Submitted,

Dated: September 15, 2021

s/ Daniel S. Haltiwanger

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[5] After sending the 322,806 notices, 23,008 were returned by USPS as undeliverable. Of those, 1,029 included a forwarding address and RG2 was able to locate updated addresses for an additional 14,535 Class Members. In total, 7,444, or roughly 2.3%, of the Notices, remain undeliverable. *See* Ex. A at ¶¶ 9-14.

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