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STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS

G. Wayne Lorick, Michael W. Shuler, Dahl C. Shuler, Frederick H. Stabler, Jr., Tom L. Doyle, Jr., Sky Strickland, and Vertelle Pondexter-Jamison, individually and as representatives of others similarly situated and, as a representative of Tri-County Electric Cooperative, Inc.,

Plaintiffs,

vs.

Tri-County Electric Cooperative, Inc., Heath Hill, Maurice P. Etheridge, Jr., W. Kenneth Davis, Jr., F. Douglas Shuler, Jr., Barbara R. Heape and Mary A.W. Brown, Individually and in their official capacity as Current members of the Tri-County Electric Cooperative, Inc. Board of Trustees and Officers of Tri-County Electric Cooperative, Inc.,

Defendants.

Case No.: 2018-CP-09-00083

ORDER GRANTING FINAL APPROVAL OF SETTLEMENT

RECEIVED
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SC Court of Appeals

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court pursuant to the Parties' Joint Motion for Final Approval of the Settlement Agreement. The Court entered its Preliminary Approval Order on August 21, 2018 (the "Preliminary Approval Order"). In the Preliminary Approval Order, the Court preliminarily approved the Settlement Agreement among the Parties and the form and content of the Notice to be sent to the derivative class members.

Pursuant to Paragraph 9 of the Preliminary Approval Order, a Hearing was held before this Court on October 23, 2018, at the Orangeburg County Courthouse, to: (1)

consider objections raised by members of Tri-County; (2) determine whether the Settlement should be approved by the Court as fair, just, reasonable, and adequate; (3) consider entry of Final Judgment on the released claims; and (4) consider any related matters as described in the Parties' filings including the Parties' Comprehensive Settlement and Mutual Release Agreement of All Civil Claims attached to the Court's Consent Order as Exhibit 1 (the "Settlement Agreement").

After careful consideration of the entire record, based on the Court's experience with the litigation and careful review of all papers filed in the litigation, including objections submitted by members of Tri-County, relevant case law, review of lower court rulings and the presentations made by Counsel, the Court makes these findings and rulings on the matters presented. The Court finds and concludes the settlement agreement concluding the Derivative Action should be approved.

The factual background concerning this case is set out in the Court's Preliminary Approval Order; the accompanying documents, including the Settlement Agreement and class notice; filings by members of Tri-County after dissemination of the notice; and the Joint Motion for Final Approval of the Settlement Agreement and Incorporated Memorandum of Law and related documents. Briefly, this is a Derivative Action pursuant to Rule 23(b)(1), SCRCP. The Derivative Member Representatives ("Plaintiffs") are Members of the settling defendant cooperative, Tri-Count Electric Cooperative, Inc. ("Tri-County"). Defendants Heath Hill, Maurice P. Etheridge, Jr., W. Kenneth Davis, Jr., F. Douglas Shuler, Jr., Barbara R. Heape, and Mary A.W. Brown (the "Trustee Defendants")

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

are members of the Tri-County Board of Trustees.[1] Plaintiffs allege that certain actions of the Defendants violated Tri-County's policies and By-Laws, as well as state and federal laws applicable to electric cooperatives. The gravamen of Plaintiffs' claims is that Tri-County paid and the Defendant Trustees received excessive compensation and/or benefits which disadvantaged cooperative members by lowering available margins to be given to members. Defendants deny any wrongdoing.

Over time, the Parties worked to reach a resolution of their dispute. Their negotiating efforts led to the Settlement Agreement presented to the Court and tentatively approved on August 21, 2018. The Settlement Agreement provides for the Defendant Trustees to resign and to never again seek reelection or seek to elect their spouse or family member to Tri-County's Board of Trustees. The Defendant Trustees also agreed not to challenge any actions of a special membership meeting held on August 18, 2018, not to interfere with the ongoing operations of the cooperative, and not to take any action on behalf of the cooperative prior to resigning. Defendants also agreed to pay one-hundred twenty-five thousand ($125,000) dollars for Plaintiffs' attorneys' fees and costs. In return, Plaintiffs agreed to dismiss this action with prejudice and to release all claims of any civil nature whatsoever which Plaintiffs may now have against the released parties.

Subsequent to the preliminary approval of the Settlement Agreement, Notice was sent to all current members of Tri-County, which constitute the Derivative Membership (the "Class"), in the form previously approved by the Court at a cost in excess of $8,804, which was borne by the Defendants. Notice was also published on the Tri-County

[1] The Trustee Defendants were removed from the Board by a vote of the Tri-County membership on August 18, 2018; however, the legitimacy of the August 18, 2018 meeting and vote is disputed.

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

website. The Notice sets forth the deadline for derivative class members to file objections to the Settlement's terms. That deadline (October 9, 2018) has passed. Objections that were timely submitted are discussed below.

The Parties have jointly moved the Court for an Order granting final approval of the Settlement Agreement. In support of their Motion, the Parties have filed a Memorandum, affidavits, and other materials all of which the Court has carefully reviewed.

DISCUSSION

For the reasons set forth below in this Order, after all appropriate study and reflection, the Court finds that the proposed Settlement Agreement is meritorious and should be approved. The Court specifically finds:

(1) The Notice disseminated to the Class met the requirements of the law and rules governing the courts of the State of South Carolina and due process, was the best notice practicable under the circumstances, and constitutes due and sufficient notice to all persons and entities entitled to receive notice; and

(2) The terms of the Settlement Agreement are found valid and appropriate and are approved by the Court; and Final Judgment will be in accordance with Rule 23, SCRCP, and South Carolina law as described in the Settlement Agreement.

Accordingly, after appropriate consideration and reflection and after giving all concerned a fair opportunity to be heard, the Court has determined that it is in the interest of justice and in accordance with Rule 23, SCRCP, and South Carolina law, that the

Settlement Agreement be approved. In accordance with the Settlement Agreement, I therefore:

(1) Confirm the Court's preliminary finding, for settlement purposes only, that the Plaintiffs herein fairly and adequately represent the interests of others similarly situated as members of Tri-County, and that the prerequisites to derivative action treatment under Rule 23(b)(1), SCRCP, have been satisfied;

(2) Confirm the appointment of Plaintiffs as the representatives of the Class for settlement purposes only;

(3) Confirm the appointment of Derivative Action Counsel ("Class Counsel") for the Class for settlement purposes only;

(4) Approve the Settlement Agreement in its entirety as fair, reasonable, and adequate in accordance with South Carolina law;

(5) Dismiss this action with prejudice and without costs, with the condition that such action may be reinstated in the event that Final Judicial Approval is not obtained due to appellate action;

(6) Bar all Class members from asserting and/or continuing to prosecute against Defendants or any other released party any and all claims of any civil nature whatsoever, in law or in equity, known and unknown, accrued and unaccrued, which the Class members had or may have as of the date of the Court's Order;

(7) Retain continuing jurisdiction over the Parties, including Trustee Defendants and the Class members, to administer, supervise, interpret, and

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

enforce the Settlement Agreement in accordance with its terms; and

(8) Reserve the right to enter such other orders as are needed to effectuate the terms of the Settlement Agreement.

FACTORS RELEVANT TO SETTLEMENT APPROVAL

GENERAL FINDINGS CONCERNING SCRCP RULE 23

This is a derivative action by shareholders or members, pursuant to Rule 23(b)(1), SCRCP. SCRCP 23(b)(1) and (c) require the Court to approve any settlement in a derivative action.[2] This requires a finding by the Court that the named Plaintiffs fairly and adequately represent the interests of the similarly situated members of the corporation whose rights are sought to be enforced. The Amended Complaint herein sets forth the named Plaintiffs' status as longtime members of Tri-County, similarly situated with respect to other members. Plaintiffs' interests are representative of and consistent with the interests of the Tri-County membership; all seeking resignation and replacement of the Defendant Trustees, affirmation of the results of the August 18, 2018 meeting of the Tri-County membership, and repayment of excessive compensation and/or benefits allegedly received by the Defendant Trustees. Plaintiffs' vigorous pursuit of this matter demonstrates that Plaintiffs are and have been zealous advocates for the members of Tri-County. Because Plaintiffs have the same interests as the unnamed members of Tri-County and have hired experienced counsel to press their claim, the adequacy of representation requirement is met. Thus, the requirements of Rule 23(b)(1) are satisfied.

[2] When interpreting SCRCP 23, 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); McGann v. Mungo, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986).

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

FINDINGS CONCERNING ADEQUACY OF NOTICE

Pursuant to Rule 23(b)(1) and (c), SCRCP, notice of a proposed settlement or dismissal must be given to members "in such manner as the court directs." In the Preliminary Approval Order, this Court approved, in form and content, the Notice to be sent to all Tri-County members. The Court found that the Notice met the requirements of Rule 23(b)(1) and (c), SCRCP, and satisfied due process.

Based on the uncontested Affidavit of Chad Lowder, the Court now finds that the Notice was timely mailed via United States mail to all current members at their address on record with Tri-County pursuant to the Preliminary Approval Order. This involved 13,656 pieces of mail, the cost of which was borne by the Defendants. The Notice and Preliminary Approval Order were also published on Tri-County's official website, www.tri-countyelectric.net. Such notice is adequate and sufficient. It constitutes the best notice practicable under the circumstances, complies with the terms of the Court's Preliminary Approval Order, and satisfies in all respects Rule 23(b)(1) and (c), SCRCP, due process, and any other applicable law.

FINDINGS CONCERNING SETTLEMENT'S FAIRNESS

The Court must now consider whether the Settlement Agreement is fair, reasonable, and adequate. However "in assessing the fairness and adequacy of a proposed settlement, there is a strong initial presumption that the compromise is fair and reasonable." S.C. Nat. Bank v. Stone, 139 F.R.D. 335, 339 (D.S.C. 1991) (citations and internal quotations omitted). Courts frequently utilize the following factors when determining the fairness, reasonableness and adequacy of a proposed class action settlement: (1) the probabilities of ultimate success should the case be litigated; (2) the

complexity, expense and likely duration of the case if the case is not settled and litigation is pursued; (3) the stage of the proceedings when the case is settled; (4) the lack of collusion in the settlement between plaintiffs and defendants; (5) the reaction of the plaintiff class to the settlement; and (6) the experience of counsel who have represented the plaintiffs and their opinion regarding the settlement. See Flinn v. FMC Corp., 528 F.2d 1169, 1173-74 (4th Cir. 1974). See also In re Progress Energy Shareholder Litigation, No. 11 CVS 739, 2011 WL 5967183, at *7 (N.C. Super. Nov. 29, 2011); Brunson v. Louisiana-Pacific Corp., 818 F. Supp. 2d 922, 927 (D.S.C. 2011). No one of these factors is dispositive. Rather, all are to be weighed and considered in light of the particular demands of the case. See, e.g., Grenada Investments, Inc. v. DWG Corp., 962 F.2d 1203, 1205-06 (6th Cir. 1992).

Here, these factors, when considered both separately and together, demonstrate that the Settlement Agreement in this case is fair, reasonable, and adequate and in the best interests of the Parties, Tri-County, and the Members as a whole.

Probabilities of Ultimate Success. The Plaintiffs face numerous hurdles to recovery in this action. The alleged misconduct dates back to 2007 and, therefore, unless the statute of limitations is tolled, Plaintiffs' claims may be time-barred. Because there are allegations that the Plaintiffs knew of and acquiesced in the alleged conduct, tolling may be inappropriate under these circumstances. Moreover, even if the action were fully litigated, the likelihood of ultimate success is still uncertain. By its very nature, litigation directed at attacking the business judgment of corporate directors is an uncertain proposition. Furthermore, while an amendment to the Tri-County By-Laws regarding the compensation of board members may be desirable, it is uncertain whether the Trustee

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

Defendants violated the By-Laws as written and in effect at the time of the alleged misconduct or that any other applicable law was violated. Finally, even if the action were fully litigated and Plaintiffs were successful, their ability to collect or enforce a judgment is uncertain, particularly in light of the Affidavit of Dave Howser, which indicates that insurance coverage for the alleged wrongful acts may ultimately be denied.

Thus, even Plaintiffs' "best case scenario" has substantial risks and uncertainty. In fact, "[s]ettlements of shareholder derivative actions are particularly favored because such litigation is notoriously difficult and unpredictable." Zimmerman v. Bell, 800 F.2d 386, 392 (4th Cir. 1986) (citation and internal quotations omitted). The Court finds that the Tri-County members are receiving relief consistent with the strength of their case, which is strong but by no means overpowering. This finding supports a ruling that the Settlement is fair, adequate, and reasonable.

Complexity, Expense, and Likely Duration of the Case. The Court must weigh the settlement against the substantial time and expense that the litigation would entail if a settlement was not reached. "This factor is based on a sound policy of conserving the resources of the Court and the uncertainty that [avoiding] 'unnecessary and unwarranted expenditure of resources and time benefit[s] all parties.'" In re Computron Software, Inc., 6 F.Supp.2d 313, 317 (D.N.J. 1998). In this case, should the Tri-County members continue to pursue litigation, they would be required to undergo further discovery and pre-trial procedures, await a trial date, and then face years of appeals. The claims in this action have been the subject of much contention and, if litigation were to proceed, this case would likely continue to be hotly contested. In addition to this significant time and expense, continued litigation would impair the orderly operation of Tri-County. Thus,

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

because failure to settle would result in complex, expensive, and time consuming further litigation, the Court finds that this factor weighs in favor of settling and supports a ruling that the Settlement Agreement is fair, adequate, and reasonable.

Stage of the Proceedings. By the time the Settlement was reached, the Parties had engaged in written discovery, with Tri-County having produced over ten thousand pages of documents to Plaintiffs. The Parties have also indicated that they had engaged in substantial informal discovery in connection with negotiation discussions. See Newby v. Enron Corp., 394 F.3d 296, 306 (5th Cir. 2004) ("[F]ormal discovery is not necessary as long as (1) the interests of the class are not prejudiced by the settlement negotiations and (2) there are substantial factual bases on which to premise settlement."). See also Evans on behalf of United Dev. Funding IV v. Greenlaw, No. 3:16-CV-635-M, 2018 WL 2197780, at *4 (N.D. Tex. May 14, 2018) (finding that informal discovery was sufficient, even though the case was in the early stages of litigation, where the parties had sufficient information to gauge the strengths and weaknesses of their claims); DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1178 (8th Cir. 1995) ("The parties to a class action are not required to incur immense expense before settling as a means to justify that settlement."). Thus, the Court finds that Tri-County Members' Counsel had sufficient knowledge and understanding of the merits of the claims alleged in the action and the defenses asserted by the Defendants to determine that the Settlement Agreement confers a benefit upon all of the Tri-County Members. This finding supports a ruling that the Settlement Agreement is fair, adequate, and reasonable.

Lack of Collusion. Because of the danger of counsels' compromising a suit for an inadequate amount for the sake of ensuring a fee, the Court is obligated to determine that

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

the Settlement Agreement was reached as a result of good-faith bargaining at arm's length. Absent evidence to the contrary, the Court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. Muhammed v. Nat'l City Mortgage, Inc., No. 2:070428, 2008 WL 5377783, at *4 (S.D. W.Va. Dec. 19, 2008). In this case, the record is devoid of evidence that would suggest that the Parties or their counsel have acted in bad faith or colluded in any respect. To the contrary, the evidence indicates that the Settlement Agreement was the product of weeks of negotiations and discovery.

"Courts have recognized that settlements, by definition, are compromises which need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits." South Carolina Nat. Bank v. Stone, 139 F.R.D 335, 339 (D.S.C. 1991) (citation and internal quotations omitted). Here, it is clear that Tri-County Members Counsel were fully and sufficiently informed to advocate vigorously on behalf of the Tri-County Members and to weigh the benefits of the Settlement Agreement against the risks of continued and complex litigation. This supports a finding that the negotiations were arms' length and were conducted in good faith; and, therefore, that the Settlement Agreement is fair, adequate, and reasonable.

Reaction of the Tri-County Members. Notice of the terms of the Settlement Agreement was mailed to over thirteen thousand Tri-County members, yet only four (4) objected and only one appeared at this hearing. Thus, the overwhelming majority has been silent as to the Settlement Agreement. Such reaction of the membership here is notable and supports a finding that the Settlement Agreement is fair and reasonable. See Meyer v. Citizens & S. Nat'l Bank, 677 F. Supp. 1196, 1210 (M.D. Ga. 1988) (finding that

only 10 objections out of over 8,000 class members supported approval of settlement). See also In re NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465, 478-79 (S.D.N.Y. 1998) (holding that "[i]n litigation involving a large class it would be extremely unusual not to encounter objections") (citation and internal quotations omitted).

Three of the four objections do not take issue with the substance of the Settlement. Instead, they allege that the Trustee Defendants have committed crimes and should be held accountable. However, the Trustee Defendants are being held accountable by agreeing to resign, not to challenge the legitimacy of the August 18, 2018 vote, and to never again re-seek office. One such objection also indicates that there are ongoing criminal investigations that should continue and that, if illegal use of Tri-County resources is found, those funds should be repaid to Tri-County. The Court overrules these objections because, in addition to the reasons stated hereinabove, the Settlement Agreement is a full and complete release of civil liability only. It is well settled in South Carolina that a settlement and release of liability in a civil action does not prohibit criminal restitution. See State v. Morgan, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016). To the extent that there may be ongoing criminal investigations, such investigations are not within the control of the Parties, Tri-County Members' Counsel, or this Court.

The fourth objection is brought by Roy C. Smith and argues that the Settlement Agreement should be rejected on the following grounds: (1) it eliminates personal responsibility of the former board members; (2) it compromises the individual rights of Tri-County members, whereas derivative actions are intended to litigate corporate rights only; (3) it violates due process by failing to give proper notice of the terms of the Settlement Agreement and failing to permit members to opt out; and (4) it has not been approved by

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

the incoming Tri-County Board of Trustees. The Court addresses Smith's objections in this order.

(1) Personal responsibility of the former board members. The first basis for objection is unpersuasive for substantially the same reasons as the previous objections. The Settlement Agreement is a release of civil liability only and does not release former board members from criminal liability. Moreover, the fact that the Settlement Agreement calls for a total release of civil liability is not, in and of itself, objectionable and, in fact, such a release is entirely appropriate to obtain a meaningful settlement. Smith argues that the release is objectionable because it is offered "in exchange for no financial compensation to cooperative members." However, "a settlement may fairly, reasonably, and adequately serve the best interest of a corporation, on whose behalf the derivative action is brought, even though no direct monetary benefits are paid by defendants to the corporation." Maher v. Zapata Corp., 714 F.2d 436, 466 (5th Cir. 1983). Courts routinely decline to reject proposed derivative action settlements as inadequate based on the absence of monetary relief. See Zimmerman v. Bell, 800 F.2d 386, 391 (4th Cir. 1986) (citing Maher, 714 F.2d at 466) (explaining that, while monetary relief may be "an element of a derivative settlement, it is not the only element and 'parties to the settlement of a shareholders' derivative action are . . . permitted great freedom in shaping the form of the settlement consideration.'").

Smith argues that there has been no benefit to Tri-County because "the Former Board Members only promise not to challenge the results of the August 18, 2018 vote expelling them from office", but "even if [they] were able to invalidate the vote on procedural grounds, they would surely be expelled at the next opportunity." However,

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

this argument does not address the benefits to Tri-County's business operations, management personnel and employees as a result of the Trustee Defendants' agreement not to challenge any actions of the August 18, 2018 meeting and not to interfere with the ongoing operations of Tri-County, which are laid out in the Lowder Affidavit. Moreover, if litigation were to proceed, this case would likely continue to be hotly contested. The Settlement Agreement advances the interests of Tri-County by conserving its assets, avoiding the risks and expense of litigation, and enabling it to focus on its core mission, which is providing safe and reliable electrical service to its membership in an orderly and efficient fashion, which is itself a material and substantial benefit to Tri-County and its membership.

(2) Individual rights of the Tri-County members. Smith's second basis for objection is that the Settlement Agreement compromises the individual rights of Tri-County members, whereas derivative actions are intended to litigate corporate rights only. Smith primarily bases his argument on the fact that he has filed a putative class action against Tri-County. However, as the Parties' filings make clear, the Smith action was solely against the cooperative and was not pending at the time that the Parties entered into the proposed Settlement Agreement. Moreover, the Court's preliminary approval of the Settlement Agreement prohibited the institution or maintenance of further civil lawsuits by Tri-County members pending the final determination of fairness, reasonableness, and adequacy of the proposed Settlement. The Settlement's preclusive effect preventing future or piecemeal civil litigation of the same or similar allegations or controversies is necessary to the full and final disposition of the claims in this action, as desired and specifically negotiated by the Parties. Moreover, because Tri-County is owned by its

members, any direct claims that the members may have are the same as Tri-County's claims and, thus, both are appropriately and necessarily foreclosed by the Settlement Agreement.

Indeed, "[i]t is not uncommon for general releases to be granted in settlements of derivative suits." Maher, 714 F.2d at 459 (citation omitted). A settlement is not deemed unfair or improper simply because it contains a broad release or because of its possible *res judicata* effects. See, id. Moreover, a settlement release may "release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 221 (5th Cir. 1981) (citation and internal quotations omitted); see also, Granada Investments, Inc. v. DWG Corp., No. 1:89CV0641, 1991 WL 338233, at *7 (N.D. Ohio Feb. 12, 1991), aff'd, 962 F.2d 1203 (6th Cir. 1991) (holding that general releases may be binding even as to claims unknown at the time of the execution of the release if that was its intended scope).

Furthermore, this Court is tasked with determining the fairness and adequacy of the Settlement as to *these* Tri-County Members. The claims against the Defendant Trustees belong to Tri-County as a matter of law, not to the members. See Carolina First Corp. v. Whittle, 343 S.C. 176, 186, 539 S.E.2d 402, 407-08 (Ct. App. 2000) (explaining that, in a derivative action, shareholders may bring suit on the corporation's behalf, notwithstanding the general rule that such claims belong to the corporation). See also, In re Pittsburgh & L.E. R. Co. Securities and Antitrust Litigation, 543 F.2d 1058, 1068 (3rd Cir. 1976) ("It is generally assumed that recoveries in derivative actions belong to the corporations on whose behalf the suit was brought . . . . Since the corporation is the

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

intended beneficiary of the suit, fairness of the settlement must in the first instance . . . be measured by the benefit or detriment to [the corporation]."). Thus, Smith's argument concerning the individual rights of the members is misplaced as a matter of law.

(3) Due process. Smith argues that the Settlement Agreement violates due process by failing to give proper notice of the terms of the Settlement Agreement and failing to permit members to opt out. This argument is unpersuasive and unavailing. As a preliminary and dispositive matter, as set forth in detail hereinabove, the Court has determined that the Notice met the requirements of Rule 23(b)(1) and (c), SCRCP, and satisfied due process. The Notice summarized the Parties' contentions, the issues involved in the case, and the terms of the settlement agreement. The Notice cautioned Tri-County members that it only provided a summary of the proposed Settlement Agreement, and advised them where they could obtain additional information, as well as complete copies of all pleading and documents, including the Settlement Agreement.

Notice of a proposed settlement of a derivative action "is not required to eliminate all occasion for diligence on the part of the stockholders . . . . and need not explain to them all the consequences involved in the settlement. It is not required to provide a complete source of settlement information . . . and the shareholders are not expected to rely on it as such." Maher, 714 F.2d at 452 (citation and internal quotations omitted); see also, Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975). Nevertheless, Smith argues that the Notice violated due process because it failed to disclose that Defendants agreed to pay Tri-County Members' Counsel for Plaintiffs' attorneys' fees and costs. However, the Notice set forth minimal requirements; this is sufficient to satisfy due process. "[T]he standard for notice is that it must be the best

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Hospitality Management Assoc., Inc. v. Shell Oil Co., 356 S.C. 644, 591 S.E.2d 611, 621 (2004) (citation and internal quotations omitted). The Court finds that the Notice met this standard.

Moreover, although the Notice did not provide the exact dollar amount of attorneys' fees, it did indicate that Plaintiffs' Counsel's fees would not be paid by the Tri-County members. Moreover, the Preliminary Approval Order which is and has been posted on Tri-County's website provides that Defendants bore the costs of providing Notice to the membership. Finally, the Notice instructed Tri-County members how to obtain a full copy of the Settlement Agreement, which includes the complete provision for attorneys' fees. Thus, the agreement regarding attorneys' fees was not a "side agreement", as Smith alleges, but rather was information that was disclosed and readily accessible to the Tri-County members.

Smith argues that the Notice also violates due process because Tri-County members were not given an opportunity to opt out. However, as Smith acknowledges, the "opt out" notification requirement is applicable to putative class actions, not to derivative actions. Unlike in a putative class action, the real party in interest and intended beneficiary in a derivative suit is the corporation. Under these circumstances, a member in a derivative action may object to the proposed settlement as not being in the best interests of the corporation, but is not entitled to "opt out" of the class in the traditional sense.

(4) Approval by the incoming Board of Trustees. Finally, Smith objects to

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

approval of the Settlement Agreement on the basis that it has not been approved by the incoming Tri-County Board of Trustees. However, this argument is unavailing because the approval of the Settlement by the Board of Trustees (past, present, or future) is not determinative in this Rule 23(b) derivative action. Instead, the ultimate authority to decide this matter rests with the Tri-County members and this Court. Moreover, the Parties' filings indicate that, absent this Court's approval of the Settlement, the legitimacy of the August 18, 2018 meeting and vote is likely to be challenged, leaving open the possibility that the Trustee Defendants would be reinstated. If this were to happen, it would necessitate additional member meetings and litigation, which would require significant additional time and expense. Accordingly, because the validity of the election of the new Board of Trustees is a key issue which the Settlement Agreement seeks, in part, to resolve, Smith's argument is circular and without merit.

Having fully considered all timely objections to the Settlement Agreement, the Court are hereby overrules all four objections.

Experience and Opinion of Counsel. The inquiry into the adequacy of legal counsel focuses on whether counsel are competent, dedicated, qualified, and experienced enough to conduct the litigation and whether there is an assurance of vigorous prosecution. See McGlothlin v. Connors, 142 F.R.D. 626, 633-34 (W.D. Va. 1992). Here, all parties are represented by experienced and highly capable counsel. As reflected by their filings, Tri-County members' Counsel have much experience with major complex litigation and with cooperative derivative action lawsuits of this nature. The Court finds adequate and reliable the opinions of both Tri-County members Counsel and Defendants' counsel that the Settlement Agreement is fair, adequate, and reasonable.

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

While the opinions and recommendations of experienced counsel are not to be blindly followed by the trial court, such opinions should be given weight in evaluating the proposed settlement. See Flinn v. FMC Corp., 528 F.2d 1169, 1174 (4th Cir. 1975). No Tri-County member has contested the appointment of Plaintiffs' Counsel. Thus, the Court finds that experience-of-counsel factor has been satisfied.

APPROVAL OF ATTORNEYS' FEES

The Settlement Agreement provides that:

> 8. Upon the immediate and simultaneous resignation of each of the Trustees, and execution of this Release by each trustee, Defendants agree to pay ONE-HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($125,000.00) for Plaintiffs' attorneys' fees and costs.

"While a settlement agreement does not bind the court to award attorneys' fees to Plaintiffs' attorneys in any specific amount, the arm's-length agreement between the parties supports a finding that the [p]roposed [f]ee [a]ward is reasonable." In re Progress Energy S'holder Litig., 2011 WL 5967183, at *8. Rule 1.5(a) of the South Carolina Rules of Professional Conduct and South Carolina case law set forth several factors to be considered when determining a reasonable attorneys' fee. These factors include: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services; (7) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (8) the time limitations imposed by the client or by the circumstances; and (9) the nature and length of the professional relationship with the client. See Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); Rule 1.5(a), SCRPC.

ELECTRONICALLY FILED - 2018 Oct 23 4:14 PM - CALHOUN - COMMON PLEAS - CASE#2018CP0900083

The uncontested Affidavit of C. Bradley Hutto indicates that the attorney's fees set forth in the Settlement Agreement were based on a straight-forward, discounted hourly calculation. After careful consideration of the Hutto Affidavit, Rule 1.5(a), and applicable South Carolina law, the Court finds that the attorneys' fee provided in the Settlement Agreement is fair and reasonable.

SUMMARY CONCERNING FAIRNESS

A Court's review of class action settlements must not be perfunctory. In making its determination, however, the Court "enjoys wide discretion, and in exercising its discretion, [it] should not decide the merits of the action or attempt to substitute its own judgment for that of the parties." Maher, 714 F.2d at 455. See also Granada, 1991 WL 338233, at *5 ("The authority to approve a settlement of a derivative action is committed to the sound discretion of the trial court."). After careful consideration of the record, the submissions and arguments of counsel, and controlling law, the Court concludes that this Settlement Agreement entered into between the Parties is fair, adequate, and reasonable, and conforms in all respects to the strictures of Rule 23 and South Carolina law. Accordingly, the Settlement Agreement is approved.

CONCLUSION

For all of the above reasons, the Parties' Joint Motion for Final Approval of the Settlement Agreement is hereby GRANTED.

ORDERED THIS ____ DAY OF ________________, 2018.

____

Edgar W. Dickson
Chief Judge for Administrative Purposes

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Calhoun Common Pleas

Case Caption: G Wayne Lorick VS Tri County Electric Cooperative, Inc Et Al

Case Number: 2018CP0900083

Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153

Electronically signed on 2018-10-23 15:24:33

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