

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DANA SPIRES, GLENN GRANT, SUSAN
MOHLE, and TOM MIRANDA on Behalf of
Themselves and All Others Similarly Situated,

CASE NO: 2:16-cv-00616-RMG

Plaintiffs,

vs.

DAVID R. SCHOOLS, WILLIAM A.
EDENFIELD, JR., ROBERT G. MASCHE,
JOSEPH T. NEWTON III, BURTON R.
SCHOOLS, PIGGLY WIGGLY CAROLINA
COMPANY, INC. & GREENBAX
ENTERPRISES, INC. EMPLOYEE STOCK
OWNERSHIP PLAN AND TRUST PLAN
COMMITTEE, JOANNE NEWTON AYERS,
MARION NEWTON SCHOOLS, and JOHN
DOES 1-10,

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR APPROVAL OF
SETTLEMENT AND PLAN OF ALLOCATION, CERTIFICATION OF
SETTLEMENT CLASS, AND APPOINTMENT OF CLASS COUNSEL; AND MOTION
FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

Plaintiffs Dana Spires, Glenn Grant, Susan Mohle and Tom Miranda (“Named Plaintiffs”) respectfully submit this reply memorandum in further support of their Motion for Approval of Settlement and Plan of Allocation, Certification of Settlement Class, and Appointment of Class Counsel (“Final Approval Motion”), Docket No. 144, and their Motion for an Award of Attorneys’ Fees and Reimbursement of Expenses (“Fee Motion”), Docket No. 146. The paucity of objections

to the Settlement supports the fairness of the Settlement¹, as well as the reasonableness of the requested award of attorneys' fees and expenses².

DISCUSSION

A. Only Eight Individuals Out of 6,596 Potential Class Members Have Objected to the Settlement, and These Objections Do Not Warrant Reconsideration of the Settlement.

Only eight objections have been received to the Settlement, and none of these supports reconsideration of the Settlement.

1. *The Low Number of Objections Compared to the Size of the Potential Settlement Class*

Pursuant to the Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Settlement Class, Approving Notice Procedures, Preliminarily Approving the Plan of Allocation, and Setting Final Settlement Hearing, Docket No. 137 ("Preliminary Approval Order"), Notice of the Settlement was mailed on July 2, 2018, to 6,596 potential Class Members. *See* Affidavit of Kimberly K. Ness, for Dahl Administration, LLC ("Ness Affidavit") ¶ 9, attached as Exhibit A to the Joint Declaration of Class Counsel, Docket No. 145. Class Counsel also posted the Class Notice on the website identified in the Notice: www.wychesettlements.com/pig/. *See* Declaration of John C. Moylan, III in Support of Plaintiffs' Reply ("Moylan Decl.") ¶ 5, submitted concurrently herewith as Exhibit 1. On July 31, 2018, Plaintiffs filed their Final Approval Motion and Fee Motion, and shortly thereafter posted both documents on the Settlement website. Moylan Decl. ¶ 6.

¹ Capitalized terms not otherwise defined herein have the same meaning as ascribed to them in the Class Action Settlement Agreement ("Settlement Agreement" or "Settlement"), Docket No. 136.

² A certain number of objections are undoubtedly expected in a class action. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003).

The Preliminary Approval Order required Settlement Class members to object to the Settlement or Fee Motion by no later than twenty-one days before the date of the Fairness Hearing. Docket No. 137 at ¶ 6. The Class Notice similarly made clear that objections were to be received no later than August 10, 2018, twenty-one days before the date of the Fairness Hearing. Class Notice ¶ 14.

To date, Class Counsel have received and responded to approximately 265 telephone and e-mail inquiries received through the toll-free number and email address provided in the Class Notice. Most of these inquiries have been calls to seek additional clarification of the Settlement's terms and relief. Class Counsel have received 852 hits on the Settlement website that was listed in the Class Notice. Moylan Decl. ¶¶ 7-8.

Out of the 6,596 potential members of the Settlement Class who were sent the Class Notice and the approximately 265 people with whom Class Counsel have communicated, only *eight* Settlement Class members have objected to the Settlement. *See* Docket Nos. 139-43, 147-49. Class Counsel respectfully believe that none of these objections warrants reconsideration of the Settlement. As explained more fully below, these objections do not address the reasons set forth in the Class Notice and Preliminary Approval Memorandum (Docket No. 135) supporting the Settlement, and object in general terms to the monetary amount of the Settlement as not being large enough given the objectors' perceptions of the scope of Defendants' wrongdoing.

The scarcity of objections to this Settlement, particularly given the thousands of individuals who received notice of it, suggests "broad, class-wide support for the Settlement and support[s] its approval." *Clemans v. New Werner Co.*, No. 12-05186, 2013 WL 12108739, at *5 (W.D. Wash. Nov. 22, 2013); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975) (court approved of Settlement where 5 of 253 people objected); *In re: Mi Windows & Doors Inc. Prod. Liab. Litig.*,

No. 2:12-MN-00001-DCN, 2015 WL 12850547, at *9 (D.S.C. July 22, 2015); *aff'd sub nom. In re MI Windows & Doors, Inc., Prod. Liab. Litig.*, 860 F.3d 218 (4th Cir. 2017) (court may infer that a settlement is fair, reasonable, and adequate when few class members object).

2. The Substance of the Eight Objections

The eight objections received contain similar categories of objections, none of which warrants reconsideration of the Settlement. Each of these categories is addressed in turn.

Seven of the eight objections appear to criticize the monetary value of the Settlement and contend that value is too low in comparison to the objectors' perception of the degree of wrongdoing committed by the Defendants.³ See Docket Nos. 139-43, 147-49. Named Plaintiffs have already described in detail why the Settlement is fair, reasonable and adequate, *see e.g.*, Docket No. 144-1 at 7-16, and those grounds will not be repeated in full here. Suffice it to say, however, that the Settlement was reached only after the adjudication of motions to dismiss and considerable discovery – including the exchange of approximately 2.5 million pages of documents and the taking of 15 depositions – and after extended arm's length negotiations with the assistance of an experienced and well-respected mediator. Named Plaintiffs have also demonstrated why the Settlement is adequate, and shown how each of the five factors set forth in *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991), demonstrates adequacy. See Docket No. 144-1 at 11-16. As the discussion of the adequacy factors furthermore shows, the objectors' perceptions of the scope of wrongdoing must be balanced against (i) the existence of difficulties in proof and significant defenses should this matter go to trial, (ii) the declining availability of Defendants' fiduciary liability insurance coverage, and (iii) the challenges of recovery on a litigated judgment,

³ The objection of Phillip Davis, Docket No. 140, does not appear to criticize the monetary value of the Settlement.

among other factors. *See* Docket No. 144-1 at 12-15. The monetary value of the settlement is fair, reasonable, and adequate.

Six of the objectors – Rita Postell, Frank Ellis, Cecil Caprioli, Forest Norvell, Jennifer Goswick, and Phillip Davis – appear to criticize the settlement for not including an admission by the Defendants of wrongdoing or “guilt”. *See* Docket Nos. 139, 140, 142, 143, 148, and 149. As the Court is well aware, this Action is a civil rather than criminal matter, and settlement agreements in civil matters almost invariably do not include any admissions of fault by the Defendants. *Poole Foundry & Mach. Co. v. Nat'l Labor Rel. Bd.*, 192 F.2d 740, 745 (4th Cir. 1951) (“...it has been established that no admissions of guilt are to be imputed on account of a settlement. This is the customary and established understanding of settlements.”). The very absence of such an admission is specifically part of the consideration that Defendants receive in exchange for paying money into the settlement fund and waiving their right to have the causes of action adjudicated in a trial and to be potentially found not liable. *Grand Strand Water & Sewer Auth. v. Oltrin Sols., LLC*, No. 4:14-CV-2800-RMG, 2015 WL 13469927, at *6 (D.S.C. Mar. 30, 2015) (“A settlement is crafted for the express purpose of avoiding the risk of a final finding of liability.”). Admissions of guilt or wrongdoing would also be of no pecuniary value to Class Members, given the releases the Defendants are receiving. Such admissions would, at most, be symbolic. Named Plaintiffs respectfully submit that the absence of admissions of wrongdoing here is not atypical and not grounds for reconsideration of the Settlement.

Two of the objectors, Jennifer Goswick and Frank Ellis, object that “half of the ESOP settlement already belonged to the plan members.” *See* Docket Nos. 148 & 139. Neither objector details the basis for this allegation, but they may be referring to certain of the Additional Cash Amounts being deposited in the Settlement Fund. As detailed in the Settlement Agreement and

explained in the Class Notice, the Additional Cash Amounts include (i) the net proceeds of a worker's compensation insurance surety held by the State of South Carolina that will be released to the Company, and (ii) a portion of the net proceeds from the sale of certain real property owned by a subsidiary of A-C Development Club, LLC ("ACDC"). ACDC is itself a joint venture whose members include the Company.

Assuming *arguendo* that Ms. Goswick and Mr. Ellis are objecting to the inclusion of these Additional Cash Amounts as a portion of the overall Settlement as opposed to additional direct cash contributions from the individual Defendants, Named Plaintiffs would point out that there was no pre-existing legal obligation on the part of the Company or any of the Individual Defendants to contribute any portion of the Additional Cash Amounts into the Settlement Fund, nor did the Individual Defendants have a pre-existing legal obligation to hand over their portion of the Additional Cash Amounts to the Plan. Inclusion of the Additional Cash Amounts in the Settlement, coupled with the associated covenants in the Settlement Agreement, provides assurance that the Additional Cash Amounts will, in reasonably prompt fashion, be collected and made available for the benefit of the Plan's participants and beneficiaries.

Last, one objector – Frank Ellis – objects that the “[l]etters mailed out informing [potential class members] of this proposed settlement never mentioned on how these assets would be divided.” Docket No. 148. Mr. Ellis is mistaken. The Class Notice specifically described how funds in the Settlement Fund would be used, summarized the Plan of Allocation, and addressed other matters related to the distribution of Settlement Fund assets. *See* Class Notice § 4. It also provided information concerning how to contact Class Counsel if potential class members had any questions concerning the distribution of the Settlement Fund or any other matters. *See* Class Notice § 19.

The eight objections received, while likely sincere and certainly strongly felt, do not merit reconsideration of the Settlement.

B. The Motion for Attorneys' Fees and Reimbursement of Expenses Should Be Granted.

In Plaintiffs' Fee Motion, Plaintiffs have requested an award to Class Counsel of between \$2,558,000 and \$2,883,000 in attorneys' fees, plus reimbursement of Class Counsel's out-of-pocket expenses totaling \$302,583.74. *See* Docket 146 at 1-2; *see also* Settlement Agreement § X.

Only one potential Settlement Class member, Rita Postell, has specifically objected to the fee and expense request. *See* Moylan Decl. ¶ 11 & Docket No. 149 (Objection of Postell). Ms. Postell, who also objected to the Settlement itself, questions the amount of "attorneys' fees and expenses in comparison to the employee's possible distribution," and asks only how that proposed award can be "fair or just." Docket No. 149 at 2.

As explained in Plaintiffs' Fee Motion and supporting memorandum, Plaintiff's Counsel have applied for a fee of one-third of the Original Cash Amount and Additional Cash Amounts deposited in the Settlement Fund. If the aggregate amount deposited in the Settlement Fund is \$7.675 million (including the Original Cash Amount plus the Defendants' low-end estimate of Additional Cash Amounts) the requested fee would be \$2,558,000. If the aggregate amount deposited in the Settlement fund is 8.65 million (the Original Cash Amount plus the Defendants' high-end estimate of Additional Cash Amounts), the requested fee would be \$2,883,000. *See* Docket No. 146 at 1-2.

In the memorandum supporting the Fee Motion, Plaintiffs' Counsel demonstrated how the twelve factors set forth in the Fourth Circuit's decision in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), supports the fee award requested here. *See* Docket No. 146-1 at 8-21. In addition,

the lodestar cross-check confirms the reasonableness of the fee award: Plaintiffs' Counsel's one-third fee request represents a very significant discount to the lodestar if the Defendants' low-end estimate of the Additional Cash Amounts is paid into the Settlement Fund, and a smaller but still substantial discount to the lodestar if Defendants' high-end estimate of the Additional Cash Amounts is paid into the Settlement Fund. *See* Docket No. 146-1 at 15-18.

As for Plaintiffs' Counsel's request for reimbursement of out-of-pocket expenses, this too is reasonable. Plaintiffs' Counsel have spent years litigating this Action and advanced significant costs towards its prosecution, as demonstrated and substantiated in the memorandum in support of the Fee Motion and related filings, including the exhibits detailing the costs of Class Counsel attached to the Joint Declaration of Class Counsel. *See* Docket No. 146-1 at 21-22 & Docket Nos. 145-1 at 21-22; 145-7; and 145-8.

Under these circumstances, the requested award of fees and expenses is both fair and reasonable. The almost complete lack of objections and the reasonableness of the request all weigh in favor of approval. *Berry v. Schulman*, 807 F.3d 600, 618–19 (4th Cir. 2015) (approving requested award where one class member objected to the requested fees and costs and noting that the “almost complete lack of objection to the fee request provides additional support for the...court's decision to approve it.”).

CONCLUSION

For the foregoing reasons and those previously set forth by Class Counsel, the Settlement should be approved, and Class Counsel's request for attorney fees and expenses granted.

Respectfully submitted,

WYCHE, P.A.

s/John C. Moylan, III

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August 17, 2018

EXHIBIT 1

**DECLARATION OF
JOHN C. MOYLAN, III**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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DANA SPIRES, GLENN GRANT, SUSAN
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MARION NEWTON SCHOOLS, and JOHN
DOES 1-10,

Defendants.

CASE NO: 2:16-cv-00616-RMG

**DECLARATION OF
JOHN C. MOYLAN, III**

Pursuant to 28 U.S.C. § 1746, I, John C. Moylan, III, declare as follows:

1. I am a member of Wyche, P.A. (“Wyche”), one of the two firms preliminarily approved as Class Counsel for Dana Spires, Glenn Grant, Susan Mohle and Tom Miranda (“Named Plaintiffs”) by the Court Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Settlement Class, Approving Notice Procedures, Preliminarily Approving the Plan of Allocation, and Setting Final Settlement Hearing (“Preliminary Approval Order”), Docket No. 137. I am one of the attorneys personally involved in this Action¹ and responsible for its prosecution. I have personal knowledge of the facts set forth below and, if called as a witness, could and would testify competently thereto.

¹ Except as indicated, the capitalized terms used herein shall have the meanings ascribed to them in the Settlement Agreement previously filed on May 22, 2018 (Docket No. 136).

2. Class Counsel have been primarily responsible for the prosecution of this Action and negotiation of the Settlement Agreement.

3. The Court preliminarily approved the Settlement on May 23, 2018. Docket No. 137.

4. Pursuant to the Preliminary Approval Order, Class Notice was mailed on July 2, 2018, to 6,596 potential Class Members. *See* Affidavit of Kimberly K. Ness, for Dahl Administration, LLC. (“Dahl Aff.”) ¶ 9, attached as Exhibit A to Joint Declaration of Class Counsel, Docket No. 145.

5. By the deadline set forth in the Preliminary Approval Order, Class Counsel posted the Class Notice, the Settlement Agreement, the preliminary approval motion and order, and other case documents on the website identified in the Class Notice: www.wychesettlements.com/pig/.

6. On July 31, 2018, Plaintiffs filed their Motion for Approval of Settlement and Plan of Allocation, Certification of Settlement Class, and Appointment of Class Counsel (“Final Approval Motion”), Docket No. 144, and their Motion for Attorney Fees and Reimbursement of Expenses (“Fee Motion”), Docket No. 146. Shortly after filing these documents, Plaintiffs posted them on the Settlement website listed in the Class Notice.

7. Since July 2, 2018, when Class Notices were mailed out and posted on the website identified in the Class Notice, through August 16, 2018, Class Counsel have received and responded to approximately 265 phone and e-mail inquiries from potential Settlement Class members. Of this amount, Class Counsel received and responded to roughly 50 inquiries in the period from the filing of the Final Approval Motion on July 31, 2018, to present.

8. Between July 2, 2018 and August 16, 2018, the website identified in the Class Notice has recorded 852 visitor sessions.

9. Most of the inquiries that Class Counsel have received to date have been requests for additional clarification of the Settlement’s terms and relief. Staff persons for Class Counsel have spent considerable time responding to these inquiries, and have referred questions to attorneys as needed.

10. Only eight individuals have objected to the Settlement. Class Counsel has reviewed in detail the submissions that each objector has provided and prepared a reply to these objections that is submitted concurrently herewith.

11. Only one Settlement Class member has specifically objected to Plaintiffs' request for attorneys' fees and expenses.

12. Named Plaintiffs and Class Counsel believe that this Settlement is fair, reasonable, and in the best interests of the Settlement Class. Named Plaintiffs and Class Counsel are pleased to present this Settlement to the Court for its consideration, and believe strongly that it should be approved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is a true and correct.

Executed this 17th day of August, 2018.

s/John C. Moylan, III

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