UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY WILLIAMS, *et al*.	:	**Case No.: 1:08-CV-00046**
Plaintiffs,	:	**Chief Judge Edmund A. Sargus**
v.	:	**Magistrate Judge Norah M. King**
DUKE ENERGY INTERNATIONAL, INC., *et al.*	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR APPROVAL OF PLAN OF ALLOCATION

Pursuant to Fed. R. Civ. P. 23(e), Plaintiffs Anthony Williams, BGR, Inc., Munafo, Inc. and Aikido of Cincinnati ("Lead Plaintiffs" or "Class Representatives") on behalf of themselves and the Class they represent (collectively, "the Class" or "Plaintiffs"), respectfully move for an order (1) approving the proposed class action settlement contained in the parties' Stipulation of Class Action Settlement (Doc. No. 246, at Exhibit A) ("the Settlement") as fair, reasonable, and adequate, and (2) approving the proposed Plan of Allocation. The grounds for this motion are set forth in the accompanying Memorandum in Support. A proposed form of Order is attached.

MEMORANDUM IN SUPPORT

INTRODUCTION

Subject to the Court's approval, Plaintiffs have agreed to settle all claims asserted against Defendants Duke Energy International, Inc. and Duke Energy Ohio ("Defendants" or "Duke") in this action in exchange for payment of $80,875,000 (the "Settlement Amount"). Plaintiffs ask the Court to determine that the Settlement is fair, reasonable, and adequate. Considering the immediate and substantial benefits it provides to the members of the Class and the risks posed by continued litigation, especially the challenge of establishing Defendants' liability and proving damages, Plaintiffs respectfully submit that the Settlement represents an outstanding recovery for the Class, as further described below.

I. PROCEDURAL BACKGROUND

The following represents the relevant procedural background, as reflected in the Joint Declaration of W.B. Markovits and Randolph Freking supporting this Motion.[1]

In January 2008, Plaintiffs brought suit against Duke, alleging civil RICO claims pursuant to 18 U.S.C. § 1962(c) and Ohio's Pattern of Corrupt Activity Act, Ohio Rev. Code § 2923.31, *et seq.*, violations of the Robinson-Patman Act of 1936, 15 U.S.C. § 13, *et seq.*, and common-law claims of fraud and civil conspiracy.

[1] The Joint Declaration of W.B. Markovits and Randolph Freking in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and for Approval of Plan of Allocation, and (B) Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, and (C) Approval of Incentive Awards ("Joint Declaration" or "Joint Decl.") is an integral part of this submission. For the sake of brevity in this Memorandum, Plaintiffs respectfully refer the Court to the Joint Declaration for a detailed description of, among other things: the history of the Action; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Plaintiffs' Counsel provided for the benefit of the Class.

On March 21, 2008, Duke filed a motion to dismiss. On May 30, 2008, Plaintiffs filed an amended complaint, in part adding defendant General Motors Corp. Duke renewed its motion to dismiss on June 30, 2008. General Motors filed a motion to dismiss on August 25, 2008.

Plaintiffs filed a motion to certify the class on October 31, 2008. On November 11, 2008, the Court stayed the class certification motion until disposition of the motions to dismiss. On March 31, 2009, the Court granted the motions to dismiss.

Plaintiffs appealed this decision to the Sixth Circuit on April 29, 2010.

On June 4, 2012, the Sixth Circuit reversed the decision granting the motions to dismiss and remanded the case to this Court for further proceedings.

On September 18, 2013, Plaintiffs filed their Second Amended Complaint, dropping General Motors as a defendant and adding Duke Energy Ohio. The Court scheduled a jury trial to begin on July 27, 2015.

On March 13, 2014, following further motions and briefing, the Court certified a class generally consisting of ratepayers who received retail electric generation service from Duke between January 1, 2005 and December 31, 2008 and did not receive rebates under the side agreements. The Class was divided into two subclasses: Residential Ratepayers and Non-Residential Ratepayers.

On June 3, 2015, the parties argued Duke's summary judgment motion.

Throughout mediation sessions held on June 16, June 23, and July 20, 2015, the parties reached agreement on the material terms of a settlement. They continued negotiating settlement terms throughout the summer, finally entering into a memorandum of understanding on September 14, 2015.

On September 30, 2015, with the parties' consent and due to their having reached a settlement in principle, the Court administratively stayed the case, in effect denying Duke's summary judgment motion as moot.

On October 21, 2015, the parties filed the Stipulation memorializing their Settlement, which the Court preliminarily approved the same day, ordering that notice of it be transmitted to the members of the Class within 60 days.

Pursuant to the Preliminary Approval Order, beginning on December 15, 2015 roughly 400,000 copies of the Settlement Notice were mailed to potential class members; the Summary Notice is to be published in the *Cincinnati Enquirer*, *Dayton Daily News*, *Hillsboro Gazette*, and *Wilmington News Journal*; and the Summary Notice was sent to the email addresses Duke had for some of the potential class members. A copy of the Longform Notice was posted on the Class Action Website – www.dukeclassaction.com – and a geographically targeted ad describing the Settlement and the action is being posted on social media websites such as Facebook. All forms of notice include the URL of the Class Action Website.

II. ARGUMENT

A. The Settlement Is Fair, Reasonable, And Adequate And Warrants Final Approval.

"Before approving a settlement, a district court must conclude that it is 'fair, reasonable, and adequate.'" Fed. R. Civ. P. 23(e)(1)(C); *see* Fed. R. Civ. P. 23(e)(1)(A). "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Int'l Union, United Auto.,*

Aerospace, & Agric. Implement Workers of America v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007).

1. The Settlement resulted from mediated, arm's-length negotiations without any risk or evidence of fraud or collusion.

A proposed settlement that results from arm's-length negotiations by court-appointed class counsel is presumptively fair and reasonable. *See* 1 Herbert B. Newberg & Ala Conte, Newberg on Class Actions, § 11.41 at 90 (4th Ed. 2002). Courts presume the absence of fraud or collusion in settlement negotiations, unless there is evidence to the contrary. *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1106 (S.D. Ohio 2001).

The proposed Settlement is the product of protracted, hard-fought negotiations conducted on both sides by experienced counsel who were thoroughly familiar with the complex factual and legal issues in the case. The attorneys representing Plaintiffs have extensive experience in complex and class litigation spanning many decades. Joint Decl., ¶¶ 2-5. The attorneys representing Duke in this case have comparable experience. Counsel on both sides approached the prospect of settling this case just as they approached litigating it: with a firm fix on their respective positions and with great determination to attain the best possible result for their clients. This determined mindset completely forestalled any risk of fraud or collusion seeping into the negotiation process and in fact was the principal reason the parties needed six mediation sessions over three years to reach an agreement in principle, plus an additional four months to finalize their Settlement.

The first three mediation sessions took place prior to Your Honor's first session with the parties: on December 6, 2012, with Magistrate Judge Norah McCann King acting as mediator; on January 25, 2013, with Magistrate Judge King acting as mediator again; and on March 13, 2015, with Eric Green, a private mediator selected by the parties. On June 16, 2015, with Duke's

summary judgment motion still pending, the parties engaged in their first mediation session with Your Honor. Additional mediation sessions took place before this Court on June 23, 2015 and July 20, 2015. The parties essentially negotiated settlement terms on their own all summer long, including several phone conferences and one in-person meeting among counsel in Cincinnati, just to reach a memorandum of understanding, followed by another month of negotiating and exchanging drafts to finalize their Stipulation. The seasoned attorneys representing the Class have never experienced such a long and painstaking process from the time of the agreement in principle to the parties' presentation of their Settlement at the preliminary approval stage. Joint Decl., ¶ 33.

There is no evidence that fraud or collusion in any form invaded any of the mediated, arm's-length, and protracted settlement negotiations between the parties. This factor strongly supports final approval.

2. The complexity, expense, and likely duration of the litigation warrant final approval of the Settlement.

The fairness and adequacy of the Settlement is underscored by consideration of the obstacles that the Class would face in ultimately succeeding on the merits, as well as the expense and likely duration of both trial and potential post-trial proceedings.

"Generally speaking, '[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them.'" *Telectronics*, at 1103.[2] This case has been no exception. Commenced almost eight years ago, it involved a multitude of

[2] *See also Amos v. PPG Indus., Inc.*, No. 2:05-cv-70, 2015 WL 4881459, at *1 (S.D. Ohio Aug. 13, 2015) ("In general, most class actions are inherently complex, and settlement avoids the costs, delays, and multitude of other problems associated with them.") (internal citations and quotations omitted); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 905 (S.D. Ohio 2003) (noting that adding any further delay to an 11-year-old case "would not substantially benefit class members" and would support a finding that the settlement was fair, reasonable, and adequate); *Miracle v. Bullitt Cnty., Ky.*, No. CIV.A. 05-130-C, 2008 WL 3850477, *6 (W.D. Ky. Aug. 15, 2008) (The "uncertainty of the outcome of the litigation makes it more reasonable for the plaintiffs to accept the settlement offer from the defendant").

varied and complex claims, including those brought under federal and state civil RICO statutes and the federal Robinson-Patman Act. Although Plaintiffs believe that all of the claims they asserted in this action are meritorious and that the Class would have prevailed at trial, continued litigation against Duke would have posed significant risks that made recovery for the Class uncertain. If the litigation were to continue, Plaintiffs would face a plethora of high-stakes risks that could imperil their claims or severely limit any recovery on the part of the Class, including such possibilities as a summary judgment ruling in favor of Duke, *in limine* rulings curtailing Plaintiffs' evidence or available damages, a jury verdict for Duke, and adverse rulings in post-trial proceedings. If the history of this litigation serves as a predictor of its future course, the trial and post-trial proceedings would have been protracted, hard-fought, and expensive. And this is to say nothing of one peculiar risk of continuing this particular litigation — that the perilous and unforgiving filed rate doctrine could reemerge as an issue in this case at some level and somehow affect the outcome. In short, absent a settlement, this case was destined to continue and to be costly and risky for Plaintiffs for years to come.

In considering whether to enter into the Settlement, Plaintiffs and their Counsel carefully weighed the certainty of immediate monetary relief for the Class against the significant legal challenges and expenses the Class faced and the risk that it ultimately could lose any recovery it was able to obtain, whether through reversal of a judgment or of the as-yet-unreviewed class certification order. The sheer litany of litigation risks allayed by this Settlement weigh heavily in favor of finding that it is fair, reasonable, and adequate.

3. Discovery in this case was exhaustive and had been completed long before the Settlement was reached.

Extensive discovery that enables the parties to assess the strengths and weaknesses of their cases tends to suggest that the settlement they reached is fair, reasonable, and adequate. *See*

Gascho v. Global Fitness Holdings, LLC, No. 2:11-cv-436, 2014 WL 1350509, at *17 (S.D. Ohio Apr. 4, 2014). Discovery in this case was indeed exhaustive. Plaintiffs served subpoenas on the Duke customers that received the so-called option payments Plaintiffs have characterized as rebates. In addition, Duke produced extensive records. All told, Plaintiffs' attorneys reviewed more than 65,000 pages of documents.

Plaintiffs pushed for access to even more documents, filing a motion challenging Duke's privilege assertions — including as to certain withheld emails from the key month of December 2004 — and the parties briefed those issues extensively. (Docs. Nos. 175, 176, 179, 180, 181, 193, 201, 204, 205, 206, 207, 208 and 209). Although privilege challenges almost always present uphill battles given the privilege opponent's obligation to refute the proponent's assertions without having access to the documents, Plaintiffs were able to secure production of several of the withheld documents as a result of orders issued by Magistrate Judge Abel. *See, e.g.*, Doc. No. 187 at 37-38; Doc. No. 192 at 1-2, 3, 4-5, 6 and 7. While the documents that Duke was thus compelled to surrender turned out to shed important light on how the so-called option agreements came to be, the fate of other presumptively damning emails withheld by Duke based on privilege remained uncertain by the time fact discovery ended on October 15, 2014. Indeed, the privilege issues surrounding those emails still were unresolved at the time of the summary judgment hearing on June 3, 2015 — presaging a continued privilege fight in the run-up to trial and raising the specter that if Duke lost that fight, it might resort to mandamus proceedings and attempt to delay the trial.

In all, 27 fact witnesses had been deposed by the end of fact discovery, including the four Class Representatives (three of them through their designated spokespersons), some third parties,

and many past and current Duke employees. The Class and Duke each proffered the testimony of four expert witnesses. All eight experts produced reports all were deposed.

The parties reached their agreement in principle on the eve of trial, following the hearing on Duke's summary judgment motion but before the Court's ruling. By that time, counsel for both sides possessed all of the discovery they needed to make informed assessments of the potential risks and upsides of proceeding to trial and of what might lay beyond. This factor, too, strongly supports final approval.

4. Plaintiffs' Counsel aptly evaluated the likelihood of ultimate success on the merits and factored that evaluation into the decision to settle.

The Sixth Circuit has identified the likelihood of success on the merits as the most important of all the factors a district court must evaluate in assessing the fairness of a class action settlement. *Poplar Creek Dev. Co. v. Chesapeake Appalachia, LLC*, 636 F.3d 225, 245 (6th Cir. 2011). A district court must weigh the likelihood that the class ultimately will prevail "against the amount and form of the relief offered in the settlement." *Carson v Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also In re Gen. Tire & Rubber,* 726 F.2d 1075, 1086 (6th Cir. 1984); *Int'l Union*, 497 F.3d at 631.

From the beginning of this litigation, Plaintiffs believed there was a strong likelihood of success on liability. This belief was tested by the dismissal of their claims but vindicated by the Sixth Circuit decision overturning the dismissal. Even then, though, Plaintiffs recognized that they faced uncertain prospects on the issue of legally cognizable harm — the centerpiece of Duke's summary judgment motion — and on the quantum of damages assuming they could show such harm. But for this Settlement, this action could have been dismissed a second time, based on the arguments raised in Duke's then-pending summary judgment motion.

Even if Plaintiffs had prevailed on summary judgment, that was far from the end of their litigation risk. The claims advanced by Plaintiffs involve numerous complex legal and factual issues. If the case were to proceed to trial, the Class would have to overcome significant defensive positions taken by Duke (and disputed by Plaintiffs), including Duke's contentions:

- that the side agreements were legitimate option contracts, not, as Plaintiffs argue, agreements for the payment of illegal rebates;
- that, regardless of the side agreements' legitimacy, the members of the Class cannot prove they suffered legally cognizable harm as a result of the payments to the favored customers; and
- that, even if Plaintiffs could prove some legally cognizable harm, the quantum of that harm would be limited under traditional damages measures.

As the Court knows from the extensive summary judgment briefing in this case, there was a dearth of case law helpful in answering the question whether the Class suffered legally cognizable harm, as evidenced by the parties' citations to older cases involving corrupt practices from bygone eras. *See* Doc. No. 216 at 18-20; Doc. No. 220 at 5-6, 43, 48-49 and 51-53; Doc. No. 221 at 5-6 and 8-9. By definition, this makes success on the merits less certain. *See Gascho*, 2014 WL 1350509 at *17 (citing the lack of relevant authority supporting the class's claims as a factor "making the likelihood of success on these claims less certain"). While Plaintiffs were — and remain — convinced that they would have prevailed at the summary judgment stage on the issue of harm, nothing prevented Duke from attempting to deflate that victory by means of *in limine* or other pre-trial, mid-trial, or post-trial motions designed to limit the types and amounts of damages Plaintiffs could obtain. Indeed, as the Court previewed in response to Duke's arguments at the summary judgment hearing, there still was much work to be done in ironing out

the appropriate methodology for determining damages even if liability were established, and the Court was reserving that issue for the run-up to trial.

The risks that the harm/quantum of damages issues posed as this case careened toward trial must be balanced against the recovery secured for the Class through this Settlement. Viewed from a macro level, there is no gainsaying the impressive fact that the Settlement Amount ($80,875,000) is greater than the amount the favored customers received in so-called option payments (approximately $73,000,000). No less impressive are the facts that (1) the Settlement enables members of the Class to recover compensation and to begin receiving significant benefits immediately, some of which — like the programs and projects funded through the Class Benefit Fund — were unattainable through a jury verdict, and (2) it allows them to do so without either absorbing the added risks that the harm/quantum of damages issues posed and without incurring the added expenses associated with confronting them.

Depending on the Court's rulings on those issues, Plaintiffs may well have recovered nothing or substantially less than the real and significant benefits that this Settlement provides. *See* discussion of the proposed Plan of Allocation, *infra*, Section C. Although it is not yet possible to state exactly how much any particular Residential Class Member will receive from the fund set aside to pay their claims (not to exceed $25 million), payouts for valid and timely claims from eligible Residential Class Members who qualify for the entire class period will range from $40 to $400, depending on the total number of claim days calculated for the Class. Non-Residential Class Members will receive fixed payments, and possibly also variable amounts based upon usage, for each qualifying day they paid a tariffed rate during the class period, from a separate fund not to exceed $25 million. Payouts for valid and timely claims from eligible Non-

Residential Class Members that qualify for the entire class period will be approximately $200 to $4,000, depending on the total number of claim days calculated for the Class.

Moreover, as noted above, the Settlement provides additional benefits to the Class via the establishment of the Class Benefit Fund ("CBF"). The money allocated to the CBF — including the $8 million to be deposited initially and any additional amounts set aside but unused for compensating Residential and Non-Residential Class Members — must be used over a five-year period to fund and promote programs and projects related to energy. The goal is to use these programs and projects to leverage settlement dollars, multiplying their impact on, and for the benefit of, the Class. The CBF thus will provide additional opportunities for class members to receive significant benefits from the Settlement over and above the Settlement's cash payouts and to do so over a five-year period, and probably longer. *See Leonardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 835-836 (E.D. Mich. 2008).

The abundant benefits guaranteed by this Settlement — including the cash payouts to Residential and Non-Residential Class Members, augmented by the programs and projects funded through the CBF — overshadow the speculative recovery that might or might not be obtained through continued litigation. This factor, the most important consideration the Court must make, strongly supports finding the Settlement to be fair, reasonable, and adequate.

5. The fact that both Plaintiffs' and Duke's counsel, as well as the Class Representatives, recommend approval of the Settlement militates strongly in favor of finding that it is fair, reasonable, and adequate.

The Sixth Circuit has observed that, when experienced counsel immersed in the legal and factual issues comprising a class action recommend approval of their class settlement, their recommendations are entitled to deference. *See Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir. 1983) (a district court "should defer to the judgment of experienced counsel who has

competently evaluated the strength of his proofs" and that deference "should correspond to the amount of discovery completed and the character of the evidence uncovered"). Likewise, courts in the Sixth Circuit attach significance to recommendations made by class representatives who, like these, were intimately involved in the litigation and the settlement negotiations and favor the settlement reached. *See Gascho,* 2014 WL 1350509 at *18.

Plaintiffs' Counsel and the Class Representatives support this Settlement because it is an outstanding result that will provide extraordinary benefits to the members of the Class. Duke's attorneys are also supportive of the Settlement. The culmination of almost eight years of litigation, this Settlement was reached at a time when the parties fully understood the strengths and weaknesses of their respective positions. Plaintiffs' Counsel and the Class Representatives attained this level of understanding by virtue of having conducted an extensive investigation of their claims; filed an original complaint and two detailed amended complaints; briefed and argued Duke's motion to dismiss; successfully persuaded the Sixth Circuit to overturn the order granting that motion to dismiss; undertaken significant fact and expert discovery; briefed and argued a successful class certification motion; opposed Duke's summary judgment motion; and prepared the case for trial. Plaintiffs' Counsel, the Class Representatives, and Duke's counsel engaged in extensive arm's-length settlement negotiations and participated in mediation sessions under the supervision of this Court, which ultimately resulted in the Settlement. Based on their evaluation of the facts and applicable law and their recognition of the substantial risk and expense of continued litigation, Plaintiffs' Counsel and the Class Representatives submit that the Settlement is in the best interests of the Class and will provide an immediate and meaningful recovery for class members. They further submit that, in addition to providing any extraordinary recovery for the certified Class, the Settlement avoids the substantial risks and expense of taking

this action to trial, including the risk of recovering less than the Settlement Amount, or no recovery at all, after substantial delay. As detailed in the Joint Declaration of W.B. Markovits and Randolph Freking supporting this Motion, at the time the parties agreed to settle, the Class Representatives and their counsel had extensively and rigorously litigated the case and had a thorough understanding of the strengths and weakness of the claims and Duke's defenses. Messrs. Markovits and Freking's endorsement of the Settlement is informed by this understanding. Joint Decl., ¶ 36. In addition, Plaintiffs' Counsel considered: (a) the immediate cash benefit to Class Members under the terms of the Settlement; (b) the difficulties and risks involved in proving the operative allegations; (c) the potential for adverse opinions on or related to the outstanding summary judgment motion; (d) the attendant risks of litigation, especially in a complex action such as this, including the ability to maintain class status through to judgment and on an eventual appeal; (e) the uncertain prospects for Plaintiffs' theory of damages; and (f) the delays and uncertainties inherent in such litigation, including appeals. *Id.* at ¶ 37. The informed recommendations of Plaintiffs' Counsel, the Class Representatives, and Duke's counsel strongly support finding the Settlement to be fair, reasonable, and adequate.

6. It is premature to characterize absent class members' reactions to the Settlement.

Because notice of the Settlement began to be disseminated only a few days before the filing of this Motion and the deadline for class members to object to the Settlement is not until 90 days after the notice,[3] it is premature to characterize the reactions of absent class members to the Settlement, much less how those reactions might factor into the question of final approval. Plaintiffs' Counsel will supplement this Motion and address this issue following that deadline.[4]

[3] *See* Doc. No. 247, Order Granting Preliminary Approval of Class Action Settlement, pp. 6-7, ¶ 11.

[4] Doc. No. 247 also provides that counsel must respond to any objections to the Settlement no less than 20 days before the fairness hearing. *Id.* at p. 7, ¶ 12. In addition to that response, Plaintiffs' Counsel will

7. This Settlement serves the interests of the public in multiple ways.

Courts favor class action settlements that serve public interests. Broadly speaking, "[t]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) (quoting *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir.1992)). *Accord In re Nationwide Fin. Servs. Litig.,* No. 2:08–cv–00249, 2009 WL 8747486, at *8 (S.D. Ohio Aug. 18, 2009) ("[T]here is certainly a public interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve."). This Settlement serves the public's interest by ending already protracted litigation and freeing up judicial resources. *See In re Telectronics,* 137 F. Supp. 2d at 1025. It also serves the public's interest by broadly providing positive, substantial benefits to the electricity ratepayer base in southwestern Ohio. It provides these ratepayers benefits in the form of both immediate cash compensation and meaningful opportunities to take part in the valuable court-approved CBF programs and projects to be funded over a five-year period. The energy-related programs and projects funded by the Settlement through the CBF will serve the public's interest in promoting energy efficiency and in leveraging whatever dollars the participating ratepayers choose to invest in energy efficiency. The Settlement furthers the public's interest by providing these benefits without the further expense, delay, and uncertainty of protracted litigation.[5] And, finally, this Settlement serves the public's interest by furnishing these benefits while also providing for measured rather than preferential compensation to the Class Representatives and the attorneys who initiated this

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contemporaneously file proposed findings of fact and conclusions of law.

[5] *In re Broadwing*, 252 F.R.D. at 374 (S.D. Ohio 2006).

lawsuit almost eight years ago.[6] The varied public interests furthered by this Settlement militate strongly in favor of its approval.

In sum, all of the prescribed factors that can be addressed meaningfully at this stage weigh heavily in favor of a finding that the Settlement is fair, reasonable, and adequate. We will address the reactions of class members to the Settlement following the deadline for any objections.

B. The Form And Manner Of Providing Notice To The Class Was Reasonable And Is Not An Obstacle To Final Approval Of The Settlement.

In a given case, deficiencies in the form and manner of class notice could conceivably present obstacles to formal approval of a class action settlement. This is not such a case.

Under Rule 23(e) of the Federal Rules of Civil Procedure, the Court must "direct notice in a reasonable manner to all class members who would be bound" by the Settlement.[7] Notice of a settlement to class members must be the "best notice practicable."[8] "[B]est notice practicable" means "individual notice to all members who can be identified through reasonable effort."[9]

On October 21, 2015, the Court issued the Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement. (Doc. No. 247). Pursuant to that Order, Garden City Group, LLC ("GCG"), the Claims Administrator, has begun the process of disseminating copies of the court-approved notice of the Settlement to potential class members. Joint Decl., ¶ 42. By the time of the fairness hearing, the court-approved summary notice will have appeared in the *Cincinnati*

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[6] *See Thacker v. Chesapeake Appalachia, L.L.C.*, 259 F.R.D. 262, 271 (E.D. Ky. 2009); *contrast with In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-721 (6th Cir. 2013) (rejecting a class action settlement on grounds it provided "illusory" benefits to absent class members while affording "preferential treatment" to class counsel and the class representatives).
[7] Fed. R. Civ. P. 23(e)(1).
[8] Fed. R. Civ. P. 23(c)(2)(B).
[9] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

Enquirer, Dayton Daily News, Hillsboro Gazette, and *Wilmington News Journal*. *Id.* GCG also disseminated the court-approved postcard notice[10] to potential class members via regular U.S. Mail. That notice was a tri-fold postcard that included a perforated card that will serve as a claim form for class members to complete and mail back to GCG for processing.[11] Additional notice was given by posting these materials on the Settlement website and on social media sites such as Facebook and by dissemination via email. Joint Decl., ¶ 42.

Rule 23(h)(1) of the Federal Rules of Civil Procedure requires that "[n]otice of the motion [for attorneys' fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner."[12] Here, notice of the Settlement satisfied the requirements of Rule 23(h)(1), insofar as it notified class members that Plaintiffs' Counsel will apply to the Court for attorneys' fees of no more than 24% of the Settlement Sum (after certain costs and expenses) and for reimbursement of litigation expenses totaling no more than $2 million plus the costs of settlement administration and any interest on the above amounts.[13] As shown in more detail in the contemporaneously filed Motion for Approval of Attorneys' Fees and Expenses and the Joint Declaration, the proposed fee amount is well within the range of reasonable attorneys' fees awarded for similar complex class action matters in the Sixth Circuit as well as other federal district courts.[14]

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[10] *See id*.
[11] Class Members also will have the ability to submit claims electronically through the Class Website.
[12] Fed. R. Civ. P. 23(h)(1).
[13] *See* Stipulation, at Exhibits 4, 5, and 8.
[14] *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-CV-14369, 2015 WL 1498888, at *15 (E.D. Mich. Mar. 31, 2015), *appeal filed* ("Courts have noted that the range of reasonableness in common fund cases is from 20 to 50 percent of the common fund."); *In re Countrywide Fin. Corp., Customer Data Sec. Breach Litig.*, MDL No. 1998, 2009 WL 5184352 (W.D. Ky. Dec. 22, 2009) (noting that a 25% fee award generally is the benchmark attorney fee award in a class action when the fees are taken out the common fund); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 205-06 (D.D.C. 2011) (approving 22-25% of recovery, and citing cases with ranges of 20-33%); *Bebchick v. Washington Metro Area Transit Comm'n*, 805 F.2d 396 (D.C. Cir. 1986) (approving fee award of 25% of recovery).

The form of notice approved complies with Fed. R. Civ. P. 23 and due process because, among other things, it informs class members of: (1) the nature of the action; (2) the essential terms of the Settlement, including the definition of the Class and the claims asserted; (3) the binding effect of the judgment on class members; (4) the process for objecting, including the time and method for doing so and the fact that class members may make an appearance through counsel of their choosing; (5) information regarding Plaintiffs' Counsel's request for incentive awards for the Class Representatives and for reimbursement of litigation expenses; and (6) how to make inquiries.[15]

The notices, in all of their various forms, "fairly apprise the prospective members of the class of the terms of the proposed [S]ettlement and of the options that are open to them in connection with the proceedings."[16] The manner of providing notice in this case, which included individual notice by mail to all class members who were or could be identified, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23.[17] Thus, the notice requirements have been met, and nothing pertaining to the notice presents any obstacle to final approval of the Settlement.[18]

C. The Plan Of Allocation Also Should Be Approved.

Under the proposed Plan of Allocation, Residential Class Members will be compensated from a fund composed of not more than $25 million out of the Settlement Amount. Residential Class Members may make a claim electronically on the Settlement website or by mail with a

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[15] *See* Fed. R. Civ. P. 23(c)(2)(B).
[16] *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005).
[17] *Frost v. Household Realty Corp.*, 61 F. Supp. 3d 740, 745 (S.D. Ohio 2004); *see also Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982) (notice sent to individuals' last known address and notice published in the *Wall Street Journal* constituted adequate notice, even though some members of the class did not receive actual notice); *Jordan v. Global Natural Res. Inc.*, 102 F.R.D. 45, 51 (S.D. Ohio 1984) (due process does not require actual notice to all class members, and constructive notice by publication will suffice to inform potential class members).
[18] *See* Fed. R. Civ. P. 23(c)(2)(A).

postage-prepaid claim form. Unless there is some dispute, those making a claim will not need to submit documentation showing that they were a class member during the class period. Known class members will receive a claim form with a claim number, and will only need to attest to the residential address and the approximate time period of their residence. Database and other verifying information will be used to validate claims. Plaintiffs' Counsel estimate that, if every potential class member makes a claim for every possible qualifying day during the class period, each class member who paid tariffed rates for the entire class period would receive a minimum direct payment of $40. To the extent claims are not made for qualifying days, monies will be distributed pro rata to Residential Class Members. Given historical claims rates, it is more likely that each Residential Class Member claiming for the entire class period will receive a significantly higher payment, up to the maximum of $400. To avoid unwarranted administrative costs, claimants owed less than $10 will not receive a check under the proposed Plan of Allocation.

Under the proposed Plan, Non-Residential Class Members will also be compensated from a fund composed of not more than $25 million of the Settlement Amount. The claims process for Non-Residential Class Members will be similar to that for Residential Class Members, with one notable exception: in addition to receiving a minimum direct payment based on qualifying days, Non-Residential Class Members may be paid based on usage. The reason for this distinction is that Non-Residential Class Members have a much greater usage variation, suggesting greater compensation for higher users. Minimum payments for Non-Residential Class Members that qualify for the entire class period will be $200, and will come from $10 million of the $25 million fund allocated to Non-Residential Class Members. The additional $15

million will be used for payments that will vary based upon usage. The maximum payment for a Non-Residential Class Member will be $4,000.

The goal of this Plan of Allocation is to provide prompt and substantial compensation to Residential and Non-Residential Class Members through a cost-effective, user-friendly methodology. Plaintiffs' Counsel and the Class Representatives respectfully submit that the Plan of Allocation that they have crafted meets these goals and should be approved.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court (1) approve the Settlement as fair, reasonable, and adequate and (2) approve the proposed Plan of Allocation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 18, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

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