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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HAMPTON	)	CASE NO.: 2017-CP-25-335
Richard Lightsey, LeBrian Cleckley, Phillip Cooper, et al., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	
South Carolina Electric & Gas Company, a Wholly Owned Subsidiary of SCANA, SCANA Corporation, and the State of South Carolina,	)	
Defendants	)	

ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY CLASS

Before the Court is the Motion of Plaintiffs Richard Lightsey, LeBrian Cleckley, *et al*, to certify a class pursuant to South Carolina Rule of Civil Procedure 23(a). A hearing on this matter was held April 30, 2018. Subsequent to the hearing, Plaintiffs filed their Memorandum in Support of Class Certification on May 21, 2018. Defendants filed their Memorandum in Opposition on June 22, and Plaintiffs filed a Reply Memorandum on July 24. This motion having been argued and fully briefed, the Court is prepared to rule. After careful consideration and as set forth herein, Plaintiffs' Motion is **GRANTED**.

STANDARD

"Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." *Waller v. Seabrook Island Property Owners Ass'n,* 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are:

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

(1) the class must be "so numerous that joinder of all members is impracticable;"

(2) there must be "questions of law or fact common to the class;"

(3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;"

(4) "the representative parties [must] fairly and adequately protect the interests of the class;" and

(5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class."

Rule 23(a), SCRCP.

The South Carolina Supreme Court "has expressed the viewpoint that class actions are favored in this state[.]" *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010).

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Id. (quoting *Littlefield v. South Carolina Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999)). "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id.* (citation omitted).

ANALYSIS

The consolidated Complaint filed in this case proposes the following definition of the class seeking certification by the Court:

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

> All customers of Defendant SCE&G (including companies, corporations, partnerships, and associations) who have been assessed advanced financing costs for the construction of 2 nuclear reactor units at Defendant SCE&G and SCANA's Jenkinsville, South Carolina site from the first collection of any cost recovery associated with nuclear construction to present.
>
> This class shall exclude (a) all attorneys and their staff representing the putative class, (b) all members of the judiciary presiding over this case, and (c) the Defendant, including all Defendant's agents, officers, directors, and affiliates.

Consolidated Complaint at ¶ 104. In determining whether the class may be certified, the Court will consider each of the five requirements listed in SCRCP 23(a).

1. **Numerosity**

Plaintiffs indicate in their Memorandum in Support of Class Certification that the putative plaintiff class includes over 700,000 identifiable members. They further state that Defendant SCE&G's own website declares that it has over 500,000 customers. In its Opposition, Defendants do not challenge the potential number of class members asserted. Joinder of all members of a class this size would clearly be impracticable.

Furthermore, the practical alternative to having these claims treated as a class is to have these hundreds of thousands of cases tried in this Court individually. As further set forth in analysis below, these individual trials would be based upon the same operative facts, with the same legal issues, and the same witnesses and exhibits. Therefore, this Court finds that the numerosity requirement of Rule 23 is easily satisfied.

2. **Common Questions of Law or Fact**

Rule 23(a)(2), SCRCP, requires that there be common questions of law or fact for the class. This "commonality" requirement looks at "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). "This requirement is not onerous."

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ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

Matthews v. Buel, Inc., No. CA 7:11-162-TMC, 2012 WL 1825273, at *2 (D.S.C. May 18, 2012). Not all questions in a case need to be common; rather, the presence of one appropriate common question is sufficient. *Ealy v. Pinkerton Gov't Servs.*, 514 Fed. Appx. 299, 304 (4th Cir. 2013); *see also Gray v. Hearst Communications, Inc.*, 444 Fed. Appx. 698, 702 (4th Cir. 2011) ("determination of whether [defendant] breached its standard distribution obligation will resolve in one stroke an issue that is central to the validity of the class members' breach of contract claims"). The Rule does not demand all questions of law and fact to be common, only that common issues exist among the class. In fact, a single common issue will suffice if it is important enough. *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 54, 157-58 (Ct. App. 1986).

Plaintiffs put forth a substantial list of common questions of law and fact that, they argue, overwhelm any distinctions that could theoretically exist between class members. These include:

a. Whether SCE&G mismanaged construction of the New Units;

b. Whether SCE&G owed customers a fiduciary duty when Defendants accepted customer funds and represented that these funds would be used for the purpose of construction of the New Units;

c. Whether SCE&G breached a fiduciary obligation owed to customers by and through SCE&G's conduct with regard to the New Units;

d. Whether SCE&G's conduct with regard to construction of the New Units constitutes waste;

e. Whether SCE&G deviated or violated the applicable standard of care with regard to construction of the New Units;

f. Whether SCE&G's conduct constituted a gross deviation of the standard of care, or willful disregard of the standard of care, with regard to construction of the New Units;

g. Whether SCE&G had a duty to competently and adequately manage customer funds taken for the purpose of construction of the New Units;

h. Whether SCE&G breached a duty to competently and adequately manage customer funds taken for the purpose of construction of the New Units;

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ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

i. Whether SCE&G knowingly and willfully continued with construction of the New Units in order to increase executive compensation, and company profit, at the expense of the putative class, and despite knowledge that continued construction was infeasible;

j. Whether SCE&G made material misrepresentations regarding the progress of construction and/or the feasibility of construction to facilitate continued advanced cost recovery from customers;

k. Whether SCE&G's continued retention of benefits paid by the member class results in an inequitable and/or unjust windfall to Defendants in light of Defendants' unilateral decision to cease construction of the New Units;

l. Whether SCE&G paid executives and shareholders with funds paid by customers toward the completion of construction of the New Units;

m. The facts and circumstances surrounding the money paid by Toshiba to SCE&G in lieu of the construction guarantee;

n. Representations made by SCE&G regarding the settlement funds paid by Toshiba, and whether SCE&G materially and/or negligently misrepresented how those funds would be levied for the benefit of customers.

Pl. Mem. at 4 – 5.

Defendants argue that Plaintiffs' claims are predicated on "individualized promises and representations" such that class treatment would be improper. *See* Def. Mem. at 2. The Court does not believe the nature of the action is predicated upon individual communications with individual members. To the extent that communications to class members are material, Plaintiffs have presented evidence that SCE&G engaged in a common course of conduct with respect to all the class members. For example, SCE&G's corporate representative testified that all customers received the same communications and the same documents and bill inserts.

The Court finds that in this case every proposed class member has the same or similar relationship with SCE&G and that SCE&G's actions impacted every proposed class member in the same or similar manner. SCE&G utilized the provisions of the BLRA to charge every proposed

class member advanced construction costs for the nuclear project. SCE&G's alleged negligence and inappropriate behavior with regard to this construction, combined with the company's refusal to reimburse class members for those plants and refusal to distribute funds received from third parties, form the basis of every class member's legal and equitable claims against the Defendants.

Because Plaintiffs have challenged a uniform course of conduct by the Defendants that damaged all class members in an identical manner, the Court finds that the class satisfies the requirement of common questions of law or fact. *See Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 13008138, at *2 (D.S.C. July 31, 2012) ("Rule 23(a)(2)'s commonality requirement is met where the defendant engaged in a common course of conduct.")

3. **Typicality of Claims or Defenses**

The idea of typicality runs closely with the idea of commonality. As the Eastern District Court in Virginia has stated, "[t]he Rule 23(a) requirements of commonality and typicality tend to merge analytically." In general, commonality requires that there be "questions of law or fact common to the class," and typicality requires that "the claims or defenses of representative parties are typical of the claims or defenses of the class." *In Re Mills Corp. Securities Litigation*, 257 F.R.D. 101, *105 (E. D. Va. 2009)(citing *In Re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 524, 538 (E. D. Va. 2006) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102. S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

"A claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories." *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. at 637. This test does not require that the representatives have identical claims which other class members might present. "The question of typicality [instead] focuses on the similarity of the legal and remedial theories of claims of the named and

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

unnamed plaintiffs." *Bates v. TencoServices, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990). *See also* Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996) at 180 ("the use of the word 'typical' suggests that the claims or defenses do not need to be co-extensive, but rather similar to, or shared by most members of the class"). Moreover, "[t]ypicality is generally presumed when common questions exist." Newberg, *Newberg on Class Actions* at 164 (2d. Ed. 1985).

The proposed class members' claims all arise under the same South Carolina substantive law. The evidence that the named Plaintiffs will use to establish the scope of SCE&G's legal and equitable obligations—including the contracts, testimony by SCE&G personnel to the Public Service Commission, bill inserts, SCE&G internal documentation, SCE&G's public statements and representations, as well as expert evidence—will be the same for the named Plaintiffs as well as the claims of all Class members. Therefore, the Court concludes that the typicality requirement of Rule 23(a) is satisfied.

4. **Adequacy of Representation**

Rule 23(a)(4), SCRCP, requires that the representative parties "fairly and adequately protect the interests of the class." This standard has been described as whether counsel is "qualified, experienced and generally able to conduct the proposed litigation." *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991).

Encompassed in this rule is the requirement that class counsel's interests are not in conflict with the interests of members of the class. *Waller v. Seabrook Island Prop. Owners Ass'n.*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Defendants argue that class counsel have conflicts that would prevent them from adequately representing the class. Defendants allege a number of hypothetical or supposed conflicts of counsel, including bringing multiple lawsuits with inconsistent theories of liability, the abandonment of certain claims by some class members for

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

strategic reasons, and conflicts among class members in allocating a "limited fund." Each of the alleged types of conflicts is addressed below.

a. Multiple Lawsuits

Defendants argue that "counsel is inadequate where, as here, they represent 'different plaintiffs in different actions proceeding at the same time.'" Def. Mem. at 17 (citing *Lou v. Ma Labs., Inc.*, No. C 12-05409 WHA, 2014 WL 68605, at *2 (N.D. Cal. Jan. 8 2014)). The Court does not find the authorities cited by Defendants persuasive in this case. *Lou* involved two class actions simultaneously pending with substantially the same claims and the same defendant. Here the crucial distinction is that in the two state class actions there are different plaintiffs, different principal defendants, and different claims. (*Lightsey v. SCE&G, SCANA, and the State of South Carolina* and *Cook v. Santee Cooper, certain electric cooperatives, certain individuals, and SCE&G and SCANA.*) The federal RICO class action is against the same defendants but on different – strictly federal -- claims.

For a conflict of interest to defeat the adequacy requirement, "that conflict must be fundamental." *Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003). A conflict is not fundamental when, as here, all class members "share common objectives and the same factual and legal positions [and] have the same interest in establishing the liability of [defendants]." *Id.* at 431. Moreover, a conflict will not defeat the adequacy requirement if it is "merely speculative or hypothetical," *id.* at 430.

Nor is there merit in Defendants' argument that class counsel allege *inconsistent* theories of liability in the pending state and federal actions. For example, in *Lightsey,* Plaintiffs allege a duty "to provide continuing and competent management . . . including oversight of the financial viability, economic feasibility, and general progress of the project" and further "to be transparent

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

regarding progress of the project, particularly in light of the continuing representations made by Defendants that the project required additional financial contributions by members of the putative class." *Lightsey* Consolidated Complaint ¶128(e). Similarly, *Glibowsky* alleges Defendants made "false and/or fraudulent statements" regarding cost estimates, time estimates for completion, and providing proper supervision over the project. *Glibowsky* Amended Complaint, ¶ 151. While Plaintiffs' RICO claims and their negligence, breach of contract, and other claims will require distinct elements of proof, this does not render the claims "inconsistent" in any way that disadvantages the class members. Indeed, these claims involve many of the same operative facts.

b. "Abandoned Claims"

Defendants also claim the class representatives have made a strategic decision to "abandon claims," demonstrating that they have interests antagonistic to the class. Def. Mem. at 29. However, class members have not abandoned any claims. The plaintiffs in the *Delmater* case, now consolidated with *Glibowsky,* were able to eliminate state claims in the pending federal action because *the same class members* had *the same state claims* already pending in a separate state action. Therefore, rather than abandon claims, the class representatives have instead continued to pursue state claims in the appropriate forum.

Class actions are "one of the recognized exceptions to the rule against claim-splitting." *Gunnells,* 348 F.3d at 430. Defendants appear to acknowledge this point, conceding that "the reason Plaintiffs are inadequate class representative here has nothing to do with the rule against claim-splitting." Def. Mem. at 31. Rather it is counsel's "strategic choices" that make them inadequate according to Defendants. *Id.* at 32.

Strategic decisions in litigation do not necessarily call into question counsel's adequacy. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (weighing the value of a

purportedly waived claim against the value of proceeding as a class); *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016) ("A strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative."). More importantly, in criticizing class counsel's "strategic decisions," Defendants fail to identify any actual conflict that would pit the interests of some class members against others, or the interests of class counsel against class members.

c. Conflicts Due to the Possibility of "Limited Funds"

Defendants also claim class counsel have created a conflict by pursuing damages from a "limited fund" on behalf of different ratepayers. The Court agrees with Plaintiffs that it is simply too early to assess whether the funds to compensate the classes will be insufficient or limited. As set forth above, the federal action and the consolidated state actions serve the same Plaintiffs, and whether the funds come by way of one action or the other, the same class will benefit. As to a purported conflict between the SCE&G customers and Santee Cooper customers, any potential conflict is remote and hypothetical. *See Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("merely speculative or hypothetical" conflicts will not defeat adequacy). Denying class certification at this time based on the hypothetical assumption that at some point in the future a limited fund situation might arise would be improper.

The Court further notes that each of the state cases and the federal case include separate counsel not in the other two cases, thus insuring independent assessments can be made in the event future subclasses are deemed necessary, and any settlement in the case will be subject to Court approval to ensure fairness.

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

d. Plaintiff Phillip Cooper

Defendants also challenge the adequacy of one named plaintiff, Phillip Cooper, based on the employment of his wife as a paralegal by one of the listed class counsel (Creighton Coleman) in *Lightsey*. A "close personal relationship" between a named plaintiff and counsel that may support a finding of inadequacy. *See Spagnola v. Chubb Corp.*,264 F.R.D. 76, 96 (S.D.N.Y. 2010) (citing "a close personal relationship between a plaintiff and class counsel"); *Drimmer v. WD-40 Co.*, 343 Fed. App'x 219, 221 (9th Cir. 2009) (class representative and his attorney "worked together and are close friends"); *London v. Wal-Mart Stores, Inc.* 340 F.3d 1246, 1254 (citing "personal and financial ties" between named plaintiff and class counsel). However, the deposition of Mr. Cooper in this case makes clear that his relationship with a member of class counsel is far more tangential.

Q: Other than in connection with this case, do you have any relationship with any of your lawyers?

A: No, just I see Creighton, you know, occasionally because Karla works here. But, you know, we talk sports a lot, but, no, not really.

Cooper. Dep. at 76:17-21. It is the existence of a "close relationship" between Mr. Cooper, not his wife, that is the relevant inquiry. And the relationship described by Mr. Cooper falls short of the close ties that would render Mr. Cooper inadequate to represent the interests of the class in this matter.

The Court concludes that Plaintiffs and their counsel have met their burden of showing adequacy.

ELECTRONICALLY FILED - 2018 Sep 20 2:37 PM - HAMPTON - COMMON PLEAS - CASE#2017CP2500335

5. **Amount in Controversy**

Plaintiffs have put forth a number of possible recovery theories for members of the class.[1] Defendants have not challenged that members of the class will have claims in excess of $100. Therefore, Plaintiffs satisfy the amount in controversy requirement of Rule 23(a)(5).

CONCLUSION

Having considered the requirements for class certification under SCRCP 23(a), the Court orders that Plaintiffs' Motion to Certify Class is **GRANTED**.

IT IS HEREBY ORDERED that:

1. The action is certified as a class action pursuant to Rule 23, SCRCP, on behalf of the Class as defined herein; and

2. Richard Lightsey, LeBrian Cleckley, and Phillip Cooper are appointed Class Representatives.

3. Counsel for the Class is appointed as set forth in Pretrial Order #1 entered by this Court on November 20, 2017.

9/20, 2018

John C. Hayes III
Judge, Hampton County, South Carolina

#12

[1] For example, Plaintiffs assert that if SCE&G delivers the benefit it expressly warranted to customers, the average customer would receive a benefit in excess of $5,100. Under an unjust enrichment theory, the average customer will receive a benefit in excess of $2,700, an amount that would continue to increase monthly. Under the theory that third-party payments were for the benefit of the customers, the average customer would receive a payment of over $2,400.00.