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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
City of Myrtle Beach, For Itself and a Class of Similarly Situated Plaintiffs, Plaintiff, vs. Horry County, Defendant.	)	CIVIL ACTION NO. 2019-CP-26-01732 **ORDER CERTIFYING SETTLEMENT CLASS, PRELIMINARILY APPROVING SETTLEMENT AGREEMENT, AND APPROVING NOTICE PLAN**

This matter is before the Court on Plaintiff City of Myrtle Beach's ("City") Motion to Certify Settlement Class, Preliminarily Approve Settlement Agreement, and Approve Notice Plan ("Motion"). Defendant Horry County ("County") consents to the motion. Having duly considered all briefing submitted with respect to the Motion, it is hereby GRANTED.

FACTUAL/PROCEDURAL BACKGROUND

This case concerns the County's 1.5% uniform service charge imposed on the purchase of accommodations, prepared food and beverage, and admissions to amusements, and a 2.5% uniform service charge on rental cars, within the corporate limits of Horry County municipalities ("Hospitality Fee"). The County imposed the Hospitality Fee to provide funding for projects constructed under a report prepared by the Road Improvement and Development Effort ("RIDE") Committee, and to serve as security for loans obtained from the State Transportation Infrastructure Bank ("STIB") to fund the RIDE projects. The County adopted ordinances amending the period during which it can impose the Hospitality Fee, initially to ensure sufficient revenue to pay off the STIB loan, and expanding the purposes for which its revenues can be used beyond the RIDE projects, which have been completed. The County fully defeased the STIB loan in February 2019.

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

The City commenced this putative class action on March 20, 2019, to declare unlawful the County's collection of the Hospitality Fee on and after January 1, 2017, to preliminarily and permanently enjoin the continued collection of the Hospitality Fee, and to create a Common Fund whereby those who had paid the fee on or since January 1, 2017, could obtain a refund. The gravamen of the City's claims is that the County improperly extended the Hospitality Fee beyond this date and expanded the use of funds generated under it without first obtaining the consent of the municipalities in which the County imposed the Fee (the City and the "Participating Municipalities").[1] The County responded to the City's Complaint, denied all of the City's allegations in this regard, including but not limited to the allegation that municipal consent was required, and asserted counterclaims for costs of defense and promissory estoppel. This Court issued orders enjoining the County's collection and imposition of the Hospitality Fee *pendente lite*, which were affirmed by the Supreme Court. *City of Myrtle Beach v. Horry County*, Op. No. 2020-MO-014 (S.C. filed Dec. 2, 2020).

The parties have engaged in hundreds of hours of formal and informal mediation for over a year and a half through Karl Folkens, Esq., who was appointed by this Court as mediator. These extended negotiations resulted in the Class Action Settlement Agreement dated February 12, 2021, (hereinafter the "Agreement"), which is now presented to the Court for preliminary approval. The Agreement is on behalf of a class defined as "all individuals, businesses, sole proprietorships, corporations, companies, associations, firms, partnerships, societies, joint stock companies, political subdivisions, United States government agencies, counties, municipalities, state agencies, and instrumentalities of the State of South Carolina who have paid" the Hospitality Fee on or after

[1] The Participating Municipalities are the Town of Atlantic Beach, Town of Aynor, City of Conway, City of Loris, City of North Myrtle Beach, and Town of Surfside Beach.

January 1, 2017, and/or who are subject to paying the Hospitality Fee going forward ("Class Members"). In sum and substance, the Agreement provides as follows with respect to the City's claims for itself and on behalf of the Class Members:

- A settlement class will be certified under Rule 23, SCRCP. Class Members will be given publication notice of the settlement and their right to opt out of or object to the Agreement with respect to reimbursement for prior payment of the Hospitality Fee.

- The County pay to the City $19 Million for the establishment of a Common Fund from which the City will pay verified claims made by Class Members for reimbursement of the Hospitality Fee they paid on or after January 1, 2017, as well as the City's costs of providing notice to the Class Members and a 0.25% class representative fee to the City that will be used to defray the City's cost of administering the settlement as set forth in this Order and the Agreement.

- The Common Fund balance remaining after these disbursements will be distributed as follows: 50% to the City and the Participating Municipalities for use consistent with S.C. Code Ann. §§ 6-1-530 and 6-1-730, as amended, 25% to the South Carolina Bar Foundation for use in access to justice programs, and 25% to be held in escrow for three years to pay any additional claims, costs, and class representative and class counsel litigation fees and expenses related to the settlement, and any escrowed funds remaining after three years will be distributed to the City and the Participating Municipalities for use consistent with §§ 6-1-530 and 6-1-730. No attorneys' fees will be paid from the Common Fund nor will the City use any distribution it receives from the Common Fund to compensate class counsel. The City will compensate class counsel from other funds of the City.

- The City and Participating Municipalities consent to the County's continued imposition and collection of the Hospitality Fee within their corporate limits. All such Hospitality Fee collections will be returned to the City and Participating Municipalities in which they were collected less the County's 1% administrative fee. The City and the Participating Municipalities may only use these funds uses consistent with §§ 6-1-530 and 6-1-730, as amended.

- In exchange for consenting to the continued imposition of the Hospitality Fee within their corporate limits, the City and Participating Municipalities will return their local accommodations and hospitality fees and taxes to the levels as they existed on January 1, 2019.

- The fee disposition provision of the County's Hospitality Fee Ordinance No. 93-16 will be amended to remove the existing limitation on the use of fee revenues.

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

The proposed "roll out" deadlines for the settlement are detailed in § 6.5 of the Agreement. With the exception of $250,000, the $19 Million used to establish the Common Fund is from Hospitality Fee monies collected by the County from within the City and Participating Municipalities from and after January 1, 2017 until this Court enjoined the County's collection of the Fee.

The Court therefore finds that the Agreement accomplishes two main goals: (1) it provides for reimbursement to those who paid the Hospitality Fee collected during the period it was alleged to be invalid through the most effective means possible, and (2) it allows Hospitality Fee revenues generated within the City and the Participating Municipalities to be collected with the consent of their governing bodies which inures to the benefit of payors who include Class Members, residents and visitors via expenditures authorized under §§ 6-1-530 and 6-1-730.

LAW/ANALYSIS

"[C]lass actions are favored in this state." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). They "save[] resources of both courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). Similarly, there is an "overriding public interest in favor of settlement" of class actions, as settlement further minimizes expenses and conserves judicial resources. *George v. Academy Mortg. Corp. (UT)*, 369 F. Supp. 3d 1365, 1367 (N.D. Ga. 2019). For the reasons explained below, certification is proper and the Agreement is a just, fair, and equitable compromise of the City and the Class Members' claims against the County.

I. Certification of a Settlement Class.

Rule 23 sets forth five criteria a class must satisfy in order to be certified:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

> representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP. South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart." *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999). While this Court must apply a "rigorous analysis to determine each prerequisite is satisfied," the ultimate decision is committed to this Court's sound discretion. *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 199 (2003). In exercising this discretion to certify the class, the Court cannot consider the merits of the City's claims. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 43, 508 S.E.2d 16, 21 (1998).

The Court finds that the City has established each of the class certification criteria for certification of a class for settlement purposes only.

A. The Settlement Class Is Sufficiently Numerous.

There is no precise threshold at which the class becomes "so numerous that joinder of all members is impracticable." Rule 23(a)(1), SCRCP. But this case indisputably satisfies the numerosity requirement, for as this Court previously has taken judicial notice, millions of people pay the Hospitality Fee each year. *See* Order, Oct. 20, 2020, at 7, *vacated on other grounds*, Op. No. 2020-MO-014, at n. 2 (S.C. filed Dec. 2, 2020). Relatedly, the class must also be "definable," meaning it has "constant defining characteristics." *McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986). The class definition here—those who have paid the Hospitality Fee on or since January 1, 2017, within the City and the Participating Municipalities and those who will pay it in the future—is a constant and objective criterion that creates a definable class.

B. The Class Members' Claims Share the Common Question of Whether Municipal Consent Was Required to Extend and Expand the Hospitality Fee.

"The essence of a class action is common questions of law and fact." *McGann*, 287 S.C. at 568, 340 S.E.2d at 157-58 (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 198 (2d ed. 1985)). Rule 23(a)(2) "does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough." *Id.* (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 198 (2d ed. 1985)). The common issue must be one that is determinative. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200-01. "The mere fact that the plaintiffs may be entitled to different amounts of damages" does not defeat the commonality element. *McGann*, 287 S.C. at 569, 340 S.E.2d at 158.

The claims brought by the City rest on the central and determinative question of whether the County was required to obtain the consent of the City and each Participating Municipality before amending the applicable ordinances continuing the collection of the Hospitality Fee within their corporate limits beginning January 1, 2017. All Class Members share this core legal question, thereby satisfying the commonality requirement.

C. The City's Claims Are Typical of the Class Members' Claims Because They Share a Common Interest, Seek Common Relief, and Assert Common Grounds.

Next is whether the claims of the City—the proposed representative party in this matter—are "typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP. The typicality requirement is similar to commonality. *Pennington v. Fluor Corp.*, 327 F.R.D. 89, 95 (D.S.C. 2018). It asks whether "Plaintiffs and the putative class have an interest in prevailing in similar legal claims." *Id.* The named plaintiff's claims need not be "perfectly identical" to those of the class. *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 287 (D.S.C. 2012).

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

They just cannot be "so different from the claims of the absent class members that their claims will not be advanced by proof of [the named plaintiff's] own individual claim." *Id.* (quoting *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006)).

The City brings its claim as a past and future payor of the Hospitality Fee. The Complaint seeks to declare the fee invalid, enjoin its collection, and return of past collections to those who have paid it. These are the precise claims that inure to each of the Class Members. The basis for these claims and the relief sought is universal and does not vary by plaintiff or class member. The typicality requirement is therefore satisfied.

D. The City and Class Counsel Will Adequately Represent the Interests of the Class.

Adequacy of representation involves two related inquiries. First is whether the named plaintiff will adequately represent the proposed class, for which the Court must determine whether the representative's interests are "antagonistic or adverse to those of the rest of the class." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). The second is whether class counsel is "qualified, experienced and generally able to conduct the proposed litigation." *S.C. Nat. Bank v. Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991) (quotations omitted). Adequacy of the named plaintiffs and of counsel is presumed absent specific proof demonstrating otherwise. *Id.* at 330-31.

"The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Waller*, 300 S.C. at 468. The conflict must be fundamental and render the representative unable to "fairly and adequately . . . protect the interests of the proposed class." *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010); *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. A conflict that is speculative, hypothetical, or resting on an

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

"uncertain prediction" cannot defeat the adequacy requirement. *Ward*, 595 F.3d at 180. No conflict exists here. Just like the Class Members, the City seeks to stop the County's continued collection of the Hospitality Fee without consent of the City and the Participating Municipalities and obtain a refund of fees collected on and after January 1, 2017. The City and the class members are fully and firmly united on this front. The City is able to fairly and adequately represent the interests of the class.

The Court further finds that class counsel is qualified, experienced, and able to conduct this litigation. As they have amply demonstrated in this case, counsel John M.S. Hoefer, Chad N. Johnston, and R. Walker Humphrey, II, are experienced, capable, and knowledgeable attorneys, particularly with respect to class action and other complex civil litigation, including matters involving the imposition and collection of taxes and fees by local governments. Their firm, Willoughby & Hoefer, P.A., has the resources to ably manage this class action, as it has done with other class actions in the past.

E. The Primary Relief Sought is Injunctive and Declaratory.

South Carolina law allows for a class action "where the relief sought is primarily equitable, even though small monetary damages are sought" by individual class members below the $100 per class member requirement. Rule 23, SCRCP, cmt. Consistent with *Miller v. Borg-Warner Acceptance Corp.*, 279 S.C. 90, 92, 302 S.E.2d 340, 341 (1983), the Court finds that the primary relief sought is equitable and this requirement of Rule 23(a)(5) is met, for purposes of establishing a settlement class only.

II. Preliminary Approval of the Agreement.

This Court's approval is required to settle this matter. Rule 23(c), SCRCP. At this juncture, the Court will only give preliminary approval to the settlement as set out in the Agreement. "[T]he Court's function is merely to ascertain whether there is 'probable cause' to notify class members

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

of the proposed settlement and proceed with a fairness hearing." *Kirven v. Central States Health & Life Co. of Omaha*, 3:11-cv-2149-MBS, 2014 WL 12734325, at *8 (D.S.C. Dec. 12, 2014). The Court is not required to undertake a full evaluation of the settlement's fairness. *In re LandAmerica 1031 Exchange Servs., Inc. Internal Revenue Serv. § 1031 Tax Deferred Exchange Litig.*, 8:09-cv-00415, 2012 WL 13124593, at *2 (D.S.C. July 12, 2012). Preliminary approval will issue so long as "a proposed settlement appears to fall within the range of 'possible approval.'" *Id.*

The Court finds this standard has been met. This settlement was the product of hundreds of hours of formal mediation and other communications through the mediator and by and among counsel for the City and County; was heavily negotiated and thoroughly vetted by the parties, their inside counsel, and their outside counsel, before receiving approval by their governing bodies by way of a public vote; and was approved by the governing bodies of the Participating Municipalities by public votes. It also represents a fair compromise of the City's and County's claims. As mentioned above, the Common Fund of $19 Million contains Hospitality Fee monies collected by the County from within the City and Participating Municipalities from and after January 1, 2017 until this Court enjoined the County's collection of the Fee, very funds that are being challenged as having been collected unlawfully, now being offered to those who paid them.

Finally, the Agreement on its face does not grant unduly preferential treatment to the City as class representative. First and foremost, verified claims made by Class Members will be paid. The City is entitled to reimbursement of its costs for providing notice to the Class Members and a 0.25% class representative fee, both of which are common in class action settlements. *See Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 305-06 (S.D. Miss. 2014); *Manual for Complex Litigation* § 21.312 (4th ed. Supp. 2020). The Court also finds that the proposed distribution of the balance of the Common Fund after payment of verified Class Member claims, the costs of notice, and the

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

administrative fee to the City to be a reasonable distribution of the balance of the Common Fund.[2] This distribution does not grant unduly preferential treatment to the City, as Class Member claims will have been paid and the leftover funds can be used only for tourism-related projects, which mirrors the purpose for which they were collected to begin with. Probable cause therefore exists to preliminarily approve the Agreement.

III. Approval of the Notice Plan for Settlement Class Purposes.

The final step at this juncture is to notify the Class Members of the class certification for settlement purposes only, preliminary approval of the settlement as set forth in the Agreement, their right to opt-out or object, and the scheduling of the final fairness hearing. This Court has discretion to "order that notice be given in such a manner as it may direct" of a proposed settlement or any other proceedings in this action. Rule 23(d)(2), SCRCP; *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 455, 661 S.E.2d 81, 89 (2008) ("[O]ur state rule provides a trial court with broader discretion to make decisions regarding class notification procedures than the federal rule."). The notice given must, at a minimum, comport with the Due Process Clause. *See Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004).

For classes "which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments," due process requires that the notice be "the best practicable" and that absent class members be given an opportunity to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n. 3 (1985). This requires individual notice for those class

[2] Rule 23(e)(2), SCRCP, application of which is also contested in this case, provides that "[i]n matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina." With respect to the settlement under review here, the Bar Foundation has agreed to accept 25% of the Common Fund balance and waive any claim under Rule 23(e)(2) to 50% of it.

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

members who can be identified through reasonable means and notice by publication for any other class members. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974). Due process, however, does not require "impractical and extended searches" with respect to notifying class members of their right to opt out of the monetary component of the settlement. *See Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 317-18 (1950).

For other class actions, commonly called "mandatory" class actions in Federal court, notice of certification and a right to opt out are not necessarily required. *Berry v. Schulman*, 807 F.3d 600, 612 (4th Cir. 2015); *Int'l Union, United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007). Due process at the certification stage of a mandatory class accordingly is satisfied if the class representatives are adequate to represent the absent class members' interests. *See id.* at 612. When a mandatory class action is to be settled or dismissed, however, some form of notice and opportunity to object is required, but a right to opt out is not. *Id.*; *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir. 2012). Furthermore, individual notice to class members is not required. *Juris*, 685 F.3d at 1320.

While South Carolina has not expressly adopted the distinction between "mandatory" and other class actions, this classification is relevant to determining the constitutional notice requirements for the class certified herein for settlement purposes only. The instant case falls within the category of "mandatory" class actions for which due process does not require individual notice and the right to opt out. *See* Fed. R. Civ. P. 23(b)(1)(B); Fed. R. Civ. P. 23(b)(2). Regardless of whether the City is successful or not in its individual claim to invalidate the continued imposition of the Hospitality Fee without consent, there is no way to isolate any absent Class Members from the effect of such a ruling. *See Caroline C. ex rel. Carter v. Johnson*, 174 F.R.D. 452, 467 (D. Neb. 1996); *Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 251 (E.D. Pa. 1988);

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

Stewart v. Waller, 404 F. Supp. 206, 213 (N.D. Miss. 1975). Furthermore, and as explained above, a major component of the relief sought is to "either make a declaration about or enjoin the defendant's actions affecting the class as a whole," *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) (emphasis removed), and the monetary relief sought "flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief" and is calculable by objective standards, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).

Therefore, consistent with due process, the Court approves the parties' proposed notice plan: (1) print notice once per week for three consecutive weeks in a national newspaper, a newspaper of general circulation in Horry County, and a newspaper in the top 10 cities/metropolitan areas from which visitors to Horry County hail based upon data from the Myrtle Beach Area Convention & Visitors Bureau,[3] and (2) a website containing all pleadings, the Agreement, all required forms, and the notice document, which will be operative at least through the expiration of all deadlines in Section 6.5 of the Agreement. The Court also approves the proposed notice in that it meets due process requirements, comports with Rule 23(c), SCRCP, and sufficiently "'apprise[s] the prospective members of the class of the terms of the proposed settlement' so that class members may come to their own conclusions about whether the settlement serves their interests." *Int'l Union*, 497 F.3d at 630 (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008).

[3] The newspapers are USA Today, The Sun News, the Charlotte Observer, the Baltimore Sun, the Star News (Wilmington, NC), the New York Times, the News & Record (Greensboro, NC), the News & Observer (Raleigh, NC), the Greenville News, The State, the Post & Courier, and the Florence Morning News.

The publication plan and accompanying website ensure that a sufficient number of Class Members will receive notice of the settlement and its terms, their right to opt-out or object, and the fairness hearing. The requirements of due process will be met.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion and it is ORDERED, ADJUDGED, and DECREED as follows:

1. A settlement class is certified that encompasses all individuals, corporations, companies, associations, firms, partnerships, societies, joint stock companies, political subdivisions, counties, municipalities, state agencies, and instrumentalities of the State of South Carolina who have paid a 1.5% fee for purchases of covered accommodations, food, beverage, and amusements and a 2.5% fee on car rentals under Section 19-6(a) of the Code of Ordinances of Horry County, South Carolina, as amended, on or after January 1, 2017, within municipalities situated in Horry County, and/or are subject to paying such fees on a going forward basis within those municipalities.
2. The City is appointed class representative;
3. John M.S. Hoefer, Chad N. Johnston, and R. Walker Humphrey, II of Willoughby & Hoefer, P.A. are appointed class counsel;
4. The Agreement is preliminarily approved;
5. The proposed notice plan, Exhibit B (publication notice) and Exhibit C (comprehensive notice) are approved;
6. All "roll out" deadlines as set forth in the applicable subsections of Section 6.5 of the Agreement are approved and made a part of this Order;

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

7. The forms attached as Exhibits A, D, E, H, and I to the Agreement are approved for use for class purposes; and

8. The Court will hold a Final Fairness Hearing on the Agreement, and receive any properly lodged objections to it, on April 16, 2021, at 10:00 A.M. via WebEx due to coronavirus restrictions. The approved notice forms provide instructions for Class Members to attend this hearing. The City shall post any updated information regarding the Final Fairness Hearing on the website it will maintain, including whether the Court later allows in-person attendance at the hearing.

IT IS SO ORDERED.

[COURT'S ELECTRONIC SIGNATURE PAGE FOLLOWS]

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732

Horry Common Pleas

Case Caption:	Myrtle Beach City Of VS Horry County Of , defendant, et al
Case Number:	2019CP2601732
Type:	Order/Class Certification

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

ELECTRONICALLY FILED - 2021 Feb 16 2:36 PM - HORRY - COMMON PLEAS - CASE#2019CP2601732