STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **C/A NO. 2019-CP-26-01732**
City of Myrtle Beach, On behalf of Itself and a Class of Similarly Situated Plaintiffs, Plaintiff, vs. Horry County, Defendant.	**ORDER**

I. BACKGROUND FACTS

This matter is before the court for approval of the terms and conditions of a "Settlement Agreement in Principle" entered into by the parties on September 4, 2020, and for a ruling on a provision contained in that Agreement concerning the proper distribution of settlement funds. The Agreement endeavors to settle a putative class action lawsuit between the parties involving collection by Horry County of a "Hospitality Fee", with the signatories to the Agreement being not only the County and City of Myrtle Beach, but all the other Horry County municipalities within whose jurisdictional boundaries the Hospitality Fee was collected (together with the City constituting the "Participating Municipalities"). The parties ask the court to give preliminary approval to the Agreement and to decide on the only issue outstanding between the parties, i.e. proper distribution of $19,000,000.00 of Hospitality Fee monies collected by Horry County from within the Participating Municipalities from January 1, 2017 through June 21, 2019 (Myrtle Beach) and August 10, 2019 (Atlantic Beach, Aynor, Conway, Loris, North Myrtle Beach, and Surfside),

collections from within these municipalities being enjoined by this court pending disposition of this litigation.

A hearing was scheduled by me and was held on September 16, 2020 at the Horry County Justice Center in Conway, South Carolina. Prior to the hearing, this court advised the parties that it would hear only oral argument with demonstrative support without briefs or testimonial evidence. Present at the hearing representing the City of Myrtle Beach was John Hoefer of Hoefer and Willoughby, P.A. Present at the hearing representing Horry County was the Horry County Attorney, Arrigo Carotti, and Gene M. Connell, Jr. of Kelaher, Connell & Connor.

II. THE SETTLEMENT AGREEMENT IN PRINCIPLE.

Pursuant to the Settlement Agreement in Principle , the court has been asked to decide the proper manner of distribution of the $19,000,000.00 of Hospitality Fee monies which the County is currently holding in trust and has agreed to pay over to the Participating Municipalities as part of the Agreement. The parties' alternative positions for disposition are found in Sections 1.a (City proposal) and 1.b (County proposal) of the Settlement Agreement in Principle:

A. The City of Myrtle Beach proposal

> 1.a. The City's position is that class certification and distribution of class proceeds are required to satisfy its fiduciary duty to putative class members. The $19 Million will be paid to the City in trust to establish a common fund. The common fund will be handled as follows: a) the City will receive an administrative fee of 0.25% (i.e. $47,500), plus litigation costs and expenses incurred as of the date of this Agreement, including but not limited to the expenses associated with the surety bond obtained by the City for the injunction. No attorneys' fees and no other costs or expenses will be paid out of the common fund; b) the City will be solely responsible for all matters relating to the class and of class administration, and the County will have no liability of any kind with respect to the common fund or class administration; c) after due notice, a claim period of six (6) months will be established within which persons or entities that have paid the Hospitality Fee within any of the Participating Municipalities (including the City) from and after January 1, 2017 may submit documented claims to a Claims Administrator for full reimbursement. Following the

> expiration of the claims period, the amounts remaining unclaimed will be distributed in accordance with Rule 23(e)(2), SCRCP, i.e. 50% to the S.C. Bar Foundation, 50% to the Participating Municipalities (as defined below in Section 2) in proportion to the relative percentage of the hospitality fee collected by the County in each of the municipal jurisdictions (based on FY2019 collections, as shown on Exhibit A to this Agreement), to be used and expended solely for the purposes set forth in sections 6-1-530 and 6-1-730 of the Code of Laws of South Carolina.

B. Horry County proposal

> 1.b. For the purposes of settlement only, setting aside its opinion that there can be no class under law, the County's position is that because in this case it is impractical if not impossible to reach all members of the alleged putative class, a government or public benefits disposition of the $ l 9 Million is warranted, whereby the court will certify a "Settlement Class", and after extensive notice with opportunity for making claims, objecting, or opting out, the balance of the $19 Million will be distributed to each Participating Municipality in proportion to relative percentage collected in each municipal jurisdiction (based on FY2019 collections), to be used and expended solely for the purposes set forth in Sections 6-1-530 and 6-1-730 of the Code of Laws of South Carolina, as will be more fully briefed to the Court. No attorneys' fees will be paid out of these monies. In an abundance of caution, this proposed course of action with respect to the $19 Million will include setting aside a settlement fund of $2 Million for six (6) months after notice, from which any putative class member can make a documented claim for refund to be handled by a Settlement Administrator. No part of the $19 Million will constitute "residual funds" under Rule 23(e), SCRCP. The County believes that this process will satisfy any duty that may be owed.

The Settlement Agreement in Principle provides that:

> The Parties will ask the Court to decide whether the City's proposed disposition of the $19 Million is required to satisfy duties the City believes are owed to putative class members. The Parties will also ask the Court to decide whether the County's proposed disposition of the $19 Million is an appropriate method of disposition satisfying any duties that may be owed under the circumstances of this case.

Thus, the parties have agreed to allow me to decide which distribution plan is just, reasonable and fair in this case, the crucial difference in the proposed models of distribution being whether 50% of the funds remaining after payment of claims should be distributed to the S.C. Bar Foundation or to the Participating Municipalities to be spent in accordance with relevant law.

III. RULE 23 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

This case involves a legal interpretation of Rule 23(e)(1) and 23(e)(2), SCRCP.

23(e)(1) provides in pertinent part:

> Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds. (emphasis added)

23(e)(2) provides:

> Any order, judgment, or approved compromise in a class action under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of the 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. The court may disburse the balance of any residual funds beyond the minimum percentage to the South Carolina Bar Foundation to any other entity or entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class. (emphasis added)

The court is faced with two choices: (1) accept the County's proposal that Rule 23(e)in its entirety allows the court to approve a settlement that does not create residual funds; or (2) under Rule 23(e)(2) find that if residual funds are required in this case, fifty percent of those funds must be distributed to the South Carolina Bar Foundation.[1]

After careful consideration of the arguments of counsel, the presentations, a review of Rule 23 and applicable case law, the court finds that it does have the authority to approve a settlement that does not create residual funds (Rule 23(e), and in particular 23(e)(1)), and that under Rule 23(e)(2) an order requiring residual funds to be distributed to the South Carolina Bar Foundation is neither required nor warranted. The court's ruling is based on the inherent authority of courts

[1] The City's position is contradictory to the plain language of Rule 23(e)(2) which provides "any order…MAY provide for the disbursement of residual funds." (emphasis added)

in class action settlements, Rule 23(e), SCRCP, and in particular 23(e)(1), case law around the country, and the fact that the parties have agreed that I should decide this matter.

IV. APPLICABLE CASE LAW.

The court notes at the outset that there is no South Carolina case law on the interpretation of Rule 23(e)(1) or (e)(2). The reason for the lack of applicable case law appears to be due to this Rule having only recently been adopted in 2016. The court has reviewed the Notes to Rule 23(e)(1), which give the court additional guidance. The Notes to the rule emphatically state: "However, the rule does not require that parties create residual funds as part of any class action settlement." (emphasis added)

Thus, the court finds that both the Notes to Rule 23(e)(1) and (e)(2) and the language of the Rule itself clearly provide this court ample authority to consider and approve a settlement without creating residual funds. Given the plain language of Rule 23(e)(1), it is clear that 23(e)(1) must be considered before the court considers 23(e)(2). This is especially applicable in a case involving Hospitality Fee monies which were collected expressly for a specific purpose and are required by law to be used for that purpose. (See S.C. Code Ann. § 6-1-530, S.C. Code Ann. § 6-1-730, and County Ordinance 93-16 (retroactively consented to by the Participating Municipalities, see below)). S.C. Code Ann. § 6-1-530 and § 6-1-730, which are mirrored in Ordinance 93-16, both restrict how Hospitality Fee monies may be spent. It is further very important to point out that the Settlement Agreement in Principle specifically contemplates that Hospitality Fee monies may only be used for the purposes listed under those statutes. (See, e.g., Sections 1, 3 and 5 of the Settlement Agreement in Principle)

As mentioned above, and notably, Section 2 of the Settlement Agreement in Principle provides that all the Participating Municipalities "ratify and provide retroactive consent to the

County's Ordinance 105-96, Ordinance 11-04, Ordinance 93-16, Ordinance 32-17, Ordinance 7-97, Ordinance 76-97, Ordinance 80-01, Ordinance 111-01, and Ordinance 50-04 (collectively the 'Hospitality Fee Ordinances') with respect to the Hospitality Fee and all Hospitality Fee monies heretofore collected by the County, both within and without the corporate limits of the Participating Municipalities, both expended and unexpended." This retroactive consent by the Participating Municipalities subjects expenditure of Hospitality Fee monies to the restrictions set forth in S.C. Code §6-1-530 and § 6-1-730, and that includes the $19,000,000.00 at issue. Any further restriction that the money be used only for a "Road Fund", as argued at the hearing by Plaintiff's counsel, is repealed by consent of all the parties to the Settlement Agreement in Principle. See Section 5 of the Agreement.

Alternatively, Plaintiff's counsel argued at the hearing that the County's Hospitality Fee is a uniform service charge and not a tax subject to the use restrictions found in §6-1-530 and §6-1-730. Notwithstanding the fact, as noted above, that those use restrictions were specifically made part and parcel of the County's Hospitality Fee Ordinances, a uniform service charge also comes with restrictions on use. Under *Brown v. Horry County*, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992) and *Campbell v. City of Charleston*, 325 S.C. 235, 481 S.E.2d 437, 438 (1997), the revenue generated from a uniform service charge is to be used for the benefit of the payers and for specific improvements. It is obvious that expenditure of those monies under the use restrictions set forth in §6-1-530 and §6-1-730 and set forth in the County's Hospitality Fee Ordinances clearly satisfy those requirements, whereas the purposes for which the S.C. Bar Foundation will be expending those monies do not.

V. THE DOCTRINE OF CY PRES IS APPLICABLE IN CLASS ACTIONS.

This case involves a classic theory of recovery which is used throughout the country in class actions. Cy pres or fluid recovery allows for a class action settlement when absent class members cannot be located and the costs to find them are prohibitive. Cy pres, which is also described as the "next best use" doctrine by many courts, has been extensively and widely used nationwide in class action cases when absent class members cannot be located.[2]

Cy pres distribution of class damages is best explained in the well-known treatise, Newberg on Class Actions, § 10.17. In § 10.17 - Cy pres distributions of class damages - the author writes:

> When a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or when a balance of a class recovery remains following individual distributions, the court is faced with the issue of how to dispose of the common fund or the remaining balance thereof. Several options exist. The court may determine that recovery funds that are not distributed to class members to compensate them for their claims should be returned to the defendant, or the court may direct that such undistributed funds be applied prospectively to the indirect benefit of the class. Alternatively, the court may declare that funds, being unclaimed, shall be placed in escrow for a given period, following which they shall escheat to the state…. (emphasis added)

In this case, we have precisely that issue in that the court takes judicial notice that 20.6 million visitors came to Myrtle Beach during the class period according to the Myrtle Beach Area Convention and Visitors Bureau Annual Report. Those visitors (from near and far) paid the Hospitality Fee by staying in over 425 hotels, visiting over 1,800 restaurants, not including fast food restaurants, and using various other entertainment venues. Further, available public information from the Myrtle Beach Chamber of Commerce indicates that people from all over the country and indeed the world came to Myrtle Beach during that period and paid this tax, and it is

[2] The City argues the cy pres doctrine has been rejected in South Carolina. However, the City cites no authority that the doctrine has ever been addressed here. However, the fact that the Supreme Court adopted Rule 23(e)(1) and (e)(2) indicates that the Court is aware of the issue of absent class members and approved of a remedy when class members cannot be located. Practically speaking, the Court by enacting Rule 23(e)(1) has approved the cy pres doctrine.

impossible to determine who they all are and how to advise them of this settlement. Also, many of the people would have very small claims, since the Hospitality Fee monies at issue represent only 1.5% of their total bill.

The court has been provided multiple cases which support releasing these moneys to the Participating Municipalities for the "next best benefit" of the absent class members, to be used exclusively for tourism related purposes, which was the expectation when paid and collected. Indeed, the Settlement Agreement in Principle specifically contemplates that none of the Participating Municipalities may use the Hospitality Fees for any purpose other than those provided in S.C. Code § 6-1-530 and § 6-1-730. The court also observes that even the City of Myrtle Beach's proposed distribution, and the specific language of the Settlement Agreement in Principle, require the South Carolina Bar Foundation to use the Hospitality Fees monies only for purposes allowable under S.C. Code § 6-1-530 and § 6-1-730. Obviously, the Bar Foundation's mission is legal services and not tourism related projects or services, which makes it impossible for it to satisfy this requirement.

Many cases from around the country have allowed for the type of settlement proposed by the County. Examples of those cases include: *Market Street Railway Co. v. Railroad Commission*, 28 Cal. 2d 363, 171 P.2d 875 (1946) (court holding that trolley fees which were excessive would be used to improve the system because class members could not be located); *Olson v. County of Sacramento*, 274 Cal. App. 2d 316 (1969) (garbage contract declared illegal, monies to be used for the benefit of the payors and no refunds to be granted); *Bynum v. District of Columbia*, 412 F.Supp.2d 73 (DDC 2006) (use money from class wide settlement of long distance charges by unknown prisoners for prisoner building upgrades because class members could not be identified and thus no refunds to absent class members); *Six (6) Mexican Workers v. Arizona Citrus Growers*,

904 F.2d 1301 (9th Cir. 1990) (court erred in giving money to Mexico when could not locate absent class members - appeals court holds the next best use is to give the money to the state).

In sum, this court finds that the funds at issue should be used for the next best compensation use, e.g. for the aggregate, indirect, prospective benefit of the absent class members. See Newberg on Class Actions, Section 10.17 (4th Ed. 2002). The reason for this is that it would be onerous and impossible to locate class members who have very small potential recoveries and would make an individual distribution economically prohibitive. The court finds that while the South Carolina Bar Foundation has laudable goals including low cost or no cost legal representation, the Hospitality Fee in this case was paid by tourists, vacationers, and residents alike with the expectation that the moneys would be used only for tourism related purposes. The Settlement Agreement in Principle in this case clearly provides that the Participating Municipalities can only use the funds for those purposes, as set forth in S.C. Code § 6-1-530 and § 6-1-730. Those purposes include facilities, projects and services such civic centers, coliseums, aquariums, tourism related cultural, recreational, or historic facilities, beach access and nourishment, highways, roads, streets and bridges for tourists, advertisements and promotions relating to tourism development, water and sewer infrastructure to serve tourism related demand, and tourism related fire protection, police protection and emergency medical services and operations. The court can think of no better use of the fees than for these purposes since all of the absent class members (including Horry County residents) use and benefit from these facilities and services. And whereas the Participating Municipalities are in the business of providing these services, building these facilities, and performing these functions, the S.C. Bar Foundation is not.

Finally, the court takes judicial notice that if the entirety of $19 Million (after claims) is returned to the Participating Municipalities (instead of ½ being diverted to the S.C. Bar

Foundation), it would create a $13.9 Million positive economic impact for the community. This is commonly known as the multiplier effect in economics. Thus, providing the money to the Participating Municipalities rather than the South Carolina Bar Foundation would have a significant economic impact in Horry County and would support more jobs, add more payroll, and increase total economic activity and economic benefit for all.

VI. PLAINTIFF'S CASE LAW IS NOT APPLICABLE.

During the hearing, the Plaintiff advanced multiple arguments as to why the City's plan should be accepted. The first argument the Plaintiff advanced was that it had a fiduciary duty to the class. While this is in fact true, that the class representative does have a fiduciary duty, the court also has a similar duty to review all settlements. The Plaintiff's citation of *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (1984) is not applicable. In *Green*, an attorney was sued because he assumed and retained benefits from a class which was never certified. The court in reviewing an appeal found that a fiduciary cannot profit from a breach of fiduciary duty. In the *Greene* case, the class members received no notice nor were they told of the potential settlement. The court ordered Green and a trustee to turn over $85,000.00 and the title to three lots. The facts of this case are markedly different in that the parties are before the court for an approval of a settlement pursuant to SCRCP 23 which provides that the court must approve a dismissal or settlement of a class action. Thus, Plaintiff's counsel's citation to *Green* is inconsequential.

Plaintiff's counsel also argues that South Carolina has not adopted the doctrine of cy pres in class actions. Plaintiff's counsel cites *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) for the proposition that the cy pres theory is not recognized in South Carolina. In fact, in *Epworth*, the Supreme Court found that the cy pres was not recognized in trust law but

went on to note that the equitable deviation doctrine was recognized. The equitable deviation doctrine permits deviation from the terms of a trust if owing to circumstances not known to the settler and not anticipated by him and if compliance would substantially impair accomplishment of the purpose of the trust. Obviously, this has no application to the facts of this case. Cy pres was developed in class action law to find a way to resolve class actions where absent class members could not be located. It is clear to this court that because the South Carolina Supreme Court adopted Rule 23(e)(1) entitled "Residual Funds" that the court would adopt the doctrine of cy pres in a class action. The court is convinced that the doctrine of cy pres and its application in class actions has been uniformly adopted and approved around the United States to handle distribution of benefits that may be available to absent class members. Accordingly, the court declines to adopt Plaintiff's counsel's argument that cy pres is not allowed in class action litigation in this state.

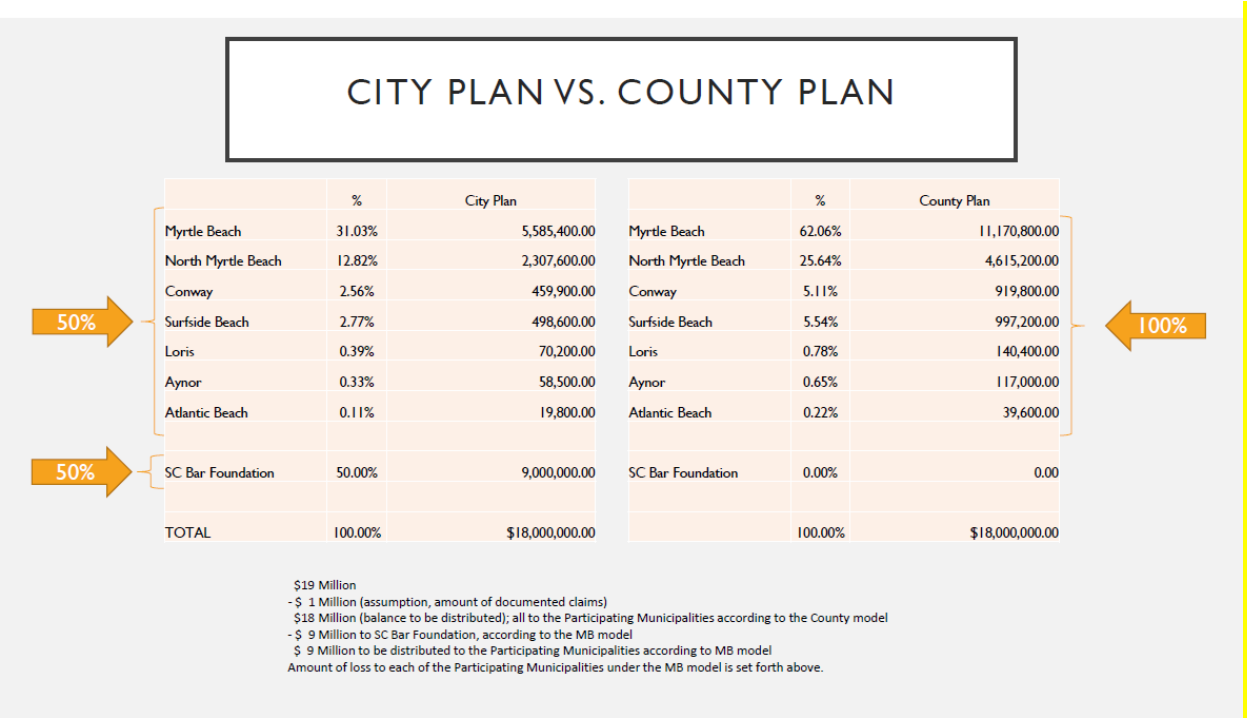
In sum, the court finds that while the City of Myrtle Beach does have fiduciary duties in regard to absent class members, the court also has fiduciary duties to absent class members which are to review the settlement for fairness.

VII. COURT'S RULING.

The court finds that Rule 23(e)(1) allows this court the considerable discretion to consider and approve a settlement proposal which does not create residual funds. Further, while no South Carolina case law has decided this issue, the court finds that Rule 23(c) imposes on this court the duty of protecting absent class members. See Rule 23(c) (A class action shall not be dismissed or compromised without the approval of the court.) Other states have held that the court itself has a fiduciary duty to review a settlement agreement and protect absent class members in the settlement context. See *In Re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*,

55 F.3d 768, (3rd Cir. 1995) (citing Newberg on Class Actions). In this case, the settlement distribution offered by the County allows each of the Participating Municipalities to receive twice the amount allowable under the City of Myrtle Beach's plan, for the benefit of the absent class members, including all County residents who paid the Hospitality Fees. A set forth above, the Hospitality Fee can only be used for tourism related facilities, projects and services, inuring to the benefit of the absent class members whose interests can be served only by the Participating Municipalities with the ability to provide those facilities, projects and services, as opposed to the S.C. Bar Foundation.

The Court specifically approves the following distribution plan put forth by the County:



CITY PLAN VS. COUNTY PLAN

	%	City Plan
Myrtle Beach	31.03%	5,585,400.00
North Myrtle Beach	12.82%	2,307,600.00
Conway	2.56%	459,900.00
Surfside Beach	2.77%	498,600.00
Loris	0.39%	70,200.00
Aynor	0.33%	58,500.00
Atlantic Beach	0.11%	19,800.00
SC Bar Foundation	50.00%	9,000,000.00
TOTAL	100.00%	$18,000,000.00

	%	County Plan
Myrtle Beach	62.06%	11,170,800.00
North Myrtle Beach	25.64%	4,615,200.00
Conway	5.11%	919,800.00
Surfside Beach	5.54%	997,200.00
Loris	0.78%	140,400.00
Aynor	0.65%	117,000.00
Atlantic Beach	0.22%	39,600.00
SC Bar Foundation	0.00%	0.00
	100.00%	$18,000,000.00

$19 Million
- $ 1 Million (assumption, amount of documented claims)
$18 Million (balance to be distributed); all to the Participating Municipalities according to the County model
- $ 9 Million to SC Bar Foundation, according to the MB model
$ 9 Million to be distributed to the Participating Municipalities according to MB model
Amount of loss to each of the Participating Municipalities under the MB model is set forth above.

In conclusion, because the court has determined that in accordance with Rule 23(e)(1), SCRCP, it has the authority to approve a class action that does not require residual funds, the court need not address the constitutionality of Rule 23(e)(2).

Therefore, the court approves the County's proposed class wide settlement proposal of distribution and directs the parties to immediately commence implementation of the Settlement Agreement in Principle accordingly, which Agreement is hereby approved.

AND IT IS SO ORDERED.

_____
The Honorable William H. Seals, Jr.

_____, 2020

_____, South Carolina

Horry Common Pleas

Case Caption: Myrtle Beach City Of VS Horry County Of , defendant, et al

Case Number: 2019CP2601732

Type: Order/Approval Of Settlement

IT IS SO ORDERED

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