

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

FORSYTH COUNTY

16 CVS 2801

2017 OCT -5 P 3:50

EDWARD R. FASANO and DEBRA L. )  
FASANO, on behalf of a class of those )  
similarly situated, )

FORSYTH CO., C.S.C.

Plaintiffs, )

BY NEG

v. )

**ORDER**

TOWN OF KERNERSVILLE and )  
WINSTON-SALEM – FORSYTH )  
COUNTY CITY/COUNTY UTILITIES )  
COMMISSION, )

Defendants. )

THIS MATTER, assigned to the undersigned pursuant to Rule 2.1 of the General Rules of Practice, is before the Court on Plaintiffs' Unopposed Motion for Class Certification and Appointment of Class Representatives and Class Counsel. After considering the motion and the record, the Court makes the following findings of fact and conclusions of law:

1. There are two named Plaintiffs in this action. The named Plaintiffs filed this action as a putative class action and now seek appointment as class representatives for a proposed class comprised of all other citizens and residents of Kernersville and persons in its outlying (extraterritorial) area, including any businesses, firms, trusts, corporations or any other entity, who received, and paid for, Kernersville sanitary sewer system services at any time between 1 July 2012 and the effective date of the 2016 Restatement and Modification Agreement, which is to be determined by the Court during the damages phase.

2. As a result of Plaintiffs' efforts, Defendants' liability for overcharging its customers within the Kernersville sanitary sewer system services area was established by this

Court's Order of 1 August 2017, granting Plaintiffs' motion for judgment on the pleadings and denying Defendants' Rule 12 motions, for the reasons and in the manner set forth therein, thereby establishing Defendants' liability for breach of contract and unconstitutional takings without justification under the United States and North Carolina Constitutions.

3. Defendants do not object to class certification.

4. “[A] ‘class’ exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.” *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

5. The Court has broad discretion in determining whether to certify a class action. *See Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 547, 613 S.E.2d 322, 325 (2005) (citing *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997)). Under Rule 23 of the North Carolina Rules of Civil Procedure, the Court may certify a class meeting the following criteria “(1) the existence of a class, (2) ... the named representative will fairly and adequately represent the interests of all class members, (3) ... there is no conflict of interest between the representative and class members, (4) ... class members outside the jurisdiction will be adequately represented, (5) ... the named party has a genuine personal interest in the outcome of the litigation, (6) ... class members are so numerous that it is impractical to bring them all before the court, (7) ... adequate notice of the class action is given to class members.” *In re Harris Teeter Merger Litig.*, 2014 NCBC 44 ¶ 23 (N.C. Super. Ct. Sept. 24, 2014) (internal quotation omitted). Here, all class action prerequisites have been satisfied and certification of a class is appropriate.

6. An opt-out class exists related to the claims alleged in this action by the named Plaintiffs.

7. Plaintiffs' claims and the claims of the putative class arise from the same facts: overcharges for sewer services to users of the Kernersville sanitary sewer system during the relevant time period. As a result, the exact same issues of law and fact apply to Plaintiffs' claims and those of the putative class with regard to establishing Defendants' liability and calculating the resulting damages.

8. The issues of law and fact in which the unnamed members of the class and the named Plaintiffs share a common interest include, but are not limited to, the following: (1) whether the putative class members had contractual rights with respect to the rate multiplier charged for sanitary sewer services; (2) whether Defendants' overcharges for sanitary sewer services constituted a breach of contractual obligations to Plaintiffs; (3) whether Defendants' overcharges for sanitary sewer services constituted an unconstitutional taking without just compensation; (4) whether Defendants' purported oral agreement and subsequent adoption of the 2016 Restatement and Modification Agreement acted to preclude Plaintiffs' contract and constitutional claims; (5) the appropriate damages calculations based on the rates charged by Defendants at various points in time; (6) the appropriate amounts of pre- and post-judgment interest to award putative class members; and (7) any injunctive relief that may be warranted. The Court's Order of 1 August 2017 resolved the first four issues. Under the Amended CMO, the remaining issues will be resolved by way of a summary judgment motion following damages discovery.

9. The only variance between class members' claims is the amount of damages owed to specific class members. That variance is collateral to and does not predominate over the common issues of law and fact shared by the named Plaintiffs' and the putative class.

10. Plaintiffs have provided, and the Court believes will continue to provide, fair, adequate, and unconflicted representation on behalf on the putative class. Like other putative class members, Plaintiffs were overcharged for sanitary sewer services by CCUC, overpaid their bills as a result of those overcharges, and will be entitled to a refund of the overcharges. Plaintiffs will continue to have "a clear stake and genuine personal interest, not a mere technical interest, in the controversy[.]" *In re PokerTek Merger Litig.*, 2015 NCBC 8 ¶ 25 (N.C. Super. Ct. Jan. 22, 2015).

11. As set forth above, Plaintiffs' claims are aligned with those of the putative class members. There is no conflict of interest between Plaintiffs and the putative class members.

12. The Court believes that Plaintiffs can and will provide any class members who have moved out of this State with the same fair, adequate, and unconflicted representation provided to in-state members.

13. The proposed class is sufficiently numerous, and includes, at least, thousands of class members.

14. Plaintiffs will provide notice to prospective class members in both manner and form that accord with the Court's eventual determination as to what constitutes "adequate notice" in the instant case.

15. The prosecution of separate actions by thousands of individual members of the proposed class would create a risk of inconsistent or varying adjudications and damages calculations with respect to individual members of the Class, which would establish

incompatible standards of conduct for Defendants and, as a practical matter, could substantially impair or impede the progress of the instant case. Furthermore, the defense of thousands of individual actions would cause unnecessary expenditures of public funds by Defendants, when instead all issues can be addressed and a refund mechanism can be established and overseen through this single, streamlined proceeding.

16. A class action is superior to other available methods of adjudication of this controversy and this case should proceed as a class action.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore ORDERED that Plaintiffs' Unopposed Motion for Class Certification is hereby GRANTED and the Court further decrees and orders as follows:

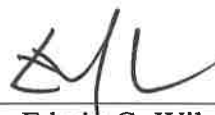
1. All of the class action prerequisites have been satisfied and an opt-out Class is hereby certified and defined as Plaintiffs and all other citizens and residents of Kernersville and persons in its outlying (extraterritorial) area, including any businesses, firms, trusts, corporations or any other entity, who received, and paid for, Kernersville sanitary sewer system services at any time between 1 July 2012 and the effective date of the 2016 Restatement and Modification Agreement, which is to be determined by the Court during the damages phase.

2. Subject to further order, the Court appoints as Class Representatives Edward R. Fasano and Debra L. Fasano of 409 Wesley Park Drive, Kernersville, NC 27284.

3. Subject to further order, the Court appoints as co-Lead Class Counsel herein H. Brent Helms and Franklin Scott Templeton of Robinson & Lawing, LLP, 101 North Cherry Street, Suite 720, Winston-Salem, NC 27101 and Alan W. Duncan and Stephen M. Russell, Jr. of Mullins Duncan Harrell & Russell PLLC, 300 N. Greene St., Suite 2000, Greensboro, NC 27401.

4. The members of the opt-out Class shall be given the best notice practicable under the circumstances, as determined by the Court on or about the conclusion of the damages phase, including individual notice to all members who can be identified through reasonable effort of the parties. The parties shall propose the form of notice to class members in connection with the plan for administering the refund process, pursuant to Paragraph 5 of the Amended Stipulated Case Management Order entered 29 August 2017.

SO ORDERED, this the 3 day of October, 2017.



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Hon. Edwin G. Wilson, Jr.  
Superior Court Judge

CERTIFICATE OF SERVICE

The undersigned, as counsel of record for Plaintiffs, hereby certifies that, on this date, he served a copy of the foregoing ORDER upon Defendants by placing same in the United States Mail in Winston-Salem, North Carolina, first class, postage prepaid and addressed as follows:

Mr. John G. Wolfe, III  
JOHN G. WOLFE, III & ASSOCIATES, PLLC  
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Kernersville, NC 27284

Ms. Jodi D. Hildebran  
ALLMAN SPRY DAVIS LEGGETT & CRUMPLER, PA  
380 Knollwood Street, Suite 700  
Winston-Salem, NC 27103

This the 5<sup>th</sup> day of October, 2017.



H. Brent Helms (NC State Bar #19068)

OF COUNSEL

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