

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Master File No. 4:17-CV-141-D**

**IN RE: OUTER BANKS POWER OUTAGE)
LITIGATION)**

_____)
)
This Document Relates To:)

All Actions.)
_____)

**[PROPOSED] ORDER GRANTING PLAINTIFFS’ UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFYING
CLASSES FOR PURPOSE OF SETTLEMENT, DIRECTING NOTICE TO THE
CLASSES, AND SCHEDULING APPROVAL HEARING**

WHEREAS, this matter has come before the Court on Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Settlement, Certifying Classes for Purpose of Settlement, Directing Notice to the Classes, and Scheduling Approval Hearing (the “Motion”) filed by Plaintiffs Matthew Breveleri, Robert Case, Rhonda Derring, Nina Edgar, Thomas Edgar, Edwin Fitzpatrick, Karen Fitzpatrick, Alex Garrish, Tami Gray d/b/a Family Water Adventures, Marissa Gross d/b/a Down Creek Gallery, Stephen Harris, Hatteras Blue, Inc., Charles Hofmann, Michael Janssen, Las Olas, Inc., Jack Levis, Briggs McEwan, Bryan Meekins d/b/a TBM Construction, Miss Ocracoke, Inc., Daniel Spaventa, Michael Stockwell d/b/a Morning Star Stables, Kathleen Triolo d/b/a Island Vibe Café, Tri-V Conery, Inc., Edward Waas, Mike Warren, William Bailey, Kerry Fitzgerald, Stephen Wilson, and Stephen Wright (collectively, “Plaintiffs”), individually, on behalf of themselves and all other similarly situated (collectively, “Settlement Class Plaintiffs”);

WHEREAS, the Court finds that it has jurisdiction over this action and the Parties for purposes of settlement;

WHEREAS, this Court is otherwise fully advised of the facts and circumstances of the proposed settlement;

IT IS HEREBY ORDERED THAT:

Preliminary Approval of the Settlement Agreement

1. The Court preliminarily approves the Settlement Agreement and Release dated March 9, 2018 between Plaintiffs and Defendant (the “Settlement Agreement”), subject to further consideration thereof at the final approval hearing provided for below. The Settlement Agreement calls for Defendant to provide a settlement fund of \$10.35 million allocated as follows – \$8.1 million of the fund for claims brought by the Business Class and \$2.25 million of the fund for claims brought by the Rental/Vacationer and Resident Class Members. The Parties have agreed that Defendants will pay, as part of the Settlement Fund, \$100,000 to cover the costs of notice and administration. All costs of notice and administration for the Class Plaintiffs in excess of \$100,000 shall be payable from the remainder of the Settlement Fund. Class Counsel will request an award of attorneys’ fees not to exceed \$3,415,500, which is thirty-three percent (33%) of the Settlement Fund, as well as costs not to exceed \$100,000. Class Counsel will request a Service Award payment to each of the Class Representatives in the amount of \$2,500 (the “Service Award”) – not to exceed, in the aggregate, \$72,500. The Settlement Agreement is the result of extensive, arms-length negotiations by experienced counsel over the course of three days of mediation and assisted by experienced mediator, Donald H. Beskind. The Court finds that the terms embodied in the Settlement Agreement are sufficiently within the bounds of reasonableness so that Notice of the Settlement should be given as provided in this Order.

Preliminary Approval of the Settlement Classes

2. The Court preliminarily finds that the Proposed Settlement Classes, for the purposes of settlement only, meet the requirements of Fed. R. Civ. P. 23(a) and (b)(3), and hereby conditionally certifies the following Settlement Classes for settlement purposes only:

Business Class: All businesses located and/or operating on Hatteras and Ocracoke Islands during the time of the Incident. This class does not include persons or entities renting homes to vacationers.

Rental/Vacationer Class: All persons who rented a vacation property on Hatteras or Ocracoke Islands during the time of the Incident (the “Vacationers”), together with all persons or entities that rented homes to Vacationers.

Resident Class: All permanent residents of Hatteras and Ocracoke Islands at the time of the Incident.

As used in the above Class Definitions, the “Incident” refers to the loss of power, and the subsequent forced evacuation, of Ocracoke and Hatteras Islands beginning on July 27, 2017.

Excluded from the Settlement Classes are: (1) persons who are Defendants’ employees, agents, directors, officers, insurers, contractors, subcontractors, including employees of Defendants’ agents, contractors, and subcontracts; (2) persons who timely and properly exclude themselves from the Settlement Classes as provided in the Settlement Agreement; (3) any federal, state, or local governmental entity that would otherwise be a member of a Settlement Class; (4) anyone or any entity that has previously executed a release of all claims against Defendants related to the Incident and would otherwise be a member of a Settlement Class; (5) the Court, the Court’s immediate family, and Court staff; (6) the attorneys for any of the Parties and members of their law firms; (7) any person or entity whose losses were paid, in whole or in part, by Arch Insurance Company¹; (8) the State of North Carolina’s claim for lost tax revenue; (9) Dare County and its claim for lost tax revenue; (10) Hyde County and its claim for lost tax revenue; (11) any utility company servicing Hyde and Dare Counties that is asserting a claim for

¹ All future claims or demands by or on behalf of Arch Insurance Company for insurance claims that Arch Insurance Company may pay to its insureds are expressly included in the Vacationer Class.

lost revenue; and (12) Real Water Sports and Ocracoke Variety for the claims that have already been made against Defendants.

3. The Court preliminarily finds Matthew Breveleri, Robert Case, Rhonda Derring, Nina Edgar, Thomas Edgar, Edwin Fitzpatrick, Karen Fitzpatrick, Alex Garrish, Tami Gray d/b/a Family Water Adventures, Marissa Gross d/b/a Down Creek Gallery, Stephen Harris, Hatteras Blue, Inc., Charles Hofmann, Michael Janssen, Las Olas, Inc., Jack Levis, Briggs McEwan, Bryan Meekins d/b/a TBM Construction, Miss Ocracoke, Inc., Daniel Spaventa, Michael Stockwell d/b/a Morning Star Stables, Kathleen Triolo d/b/a Island Vibe Café, Tri-V Conery, Inc., Edward Waas, Mike Warren, William Bailey, Kerry Fitzgerald, Stephen Wilson, and Stephen Wright are adequate representatives of the Settlement Classes for settlement purposes only.

4. If the Settlement Agreement is terminated or is not consummated for any reason, the certification of the Settlement Classes shall be void, and Plaintiffs and Defendants shall be deemed to have reserved all their rights to propose or oppose all certification issues.

5. The Court preliminarily approves the settlement benefits as described in the Settlement Agreement. Defendants will also pay the costs of notice and administration up to \$100,000 under the terms and conditions specified in the Settlement Agreement. The Settlement Fund will cover the costs of notice and claims administration beyond \$100,000, as well as any attorneys' fees, litigation expenses up to \$100,000, and service awards approved by the Court.

Approval of Notice Plan and Schedule

6. The Court has reviewed and hereby approves the Notice Plan designed by Angeion Group (the "Notice Plan"), attached as Exhibit C to the Settlement Agreement. The Court finds that the Notice to be provided to the Settlement Classes as set forth in the Notice

Plan to be the best practicable notice under the circumstances and, when completed, shall constitute fair, reasonable, and adequate notice of the Settlement to all persons and entities affected by or entitled to participate in the Settlement, in full compliance with the notice requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process.

7. The Court appoints Crawford & Company as the Settlement Administrator. Responsibilities of the Settlement Administrator include the following: (i) processing settlement claims and opt-out forms; (ii) receiving and serving on Class Counsel, Defendants' counsel, and the Court written objections and opt-out requests; (iii) determining the amounts of the awards due to eligible Settlement Class Members in accord with the terms and procedures set forth in the Settlement Agreement; (iv) resolving any issues, challenges, and associated documentation, to the awards due to eligible Settlement Class Members, after consultation with Class Counsel as necessary or appropriate; (v) reporting, in summary or narrative form, to Class Counsel and Defendants' counsel regarding the completion of the tasks identified in this paragraph; (vi) issuing other reports and providing any and all files, documents, and data related to the Settlement, upon request, to Defendants' Counsel or Class Counsel; (vii) carrying out other related tasks in accordance with the terms of the Settlement Agreement; and (viii) agreeing to employ best efforts to faithfully and fully perform any and all obligations and duties imposed on the Settlement Administrator pursuant to the Settlement Agreement and its Exhibits and Amendments (if any).

8. The Court appoints Angeion Group as the Notice Provider. Responsibilities of the Notice Provider include the following: (i) preparing the notice plan; (ii) disseminating the Notice of Class Settlement via United States Mail, e-mail, and publication, as described in the Settlement Agreement; (iii) reporting, in summary or narrative form, to Class Counsel and

Defendants’ counsel regarding the completion of the tasks identified in this paragraph; (iv) issuing other reports and provide any and all files, documents and data related to the Settlement, upon request, to Defendants’ Counsel or Class Counsel; (v) establishing and maintaining a website for purposes of posting the notices, downloadable claim forms, the complaint and other case pleadings, and related documents; (vi) establishing a toll-free telephone number, through which Settlement Class Members may obtain information about the Action and the Settlement and request a mailed copy of the Notices and Claim Form; (vii) preparing a declaration attesting to its compliance with the Notice Plan; (v) carrying out other related tasks in accordance with the terms of the Settlement Agreement; (vi) employing best efforts to faithfully and fully perform any and all obligations and duties imposed on the Notice Provider pursuant to the Settlement Agreement and its Exhibits and Amendments (if any).

9. The Court hereby orders the Notice Provider to implement the notice events identified in the Settlement Agreement and Notice Plan, using the forms attached as Exhibits to the Settlement Agreement, pursuant to the following schedule:

EVENT

DATE

Notice Period to Begin

 (no later than 10 days from the date of this Order)

Notice Period to End

 (no later than 60 days from the date of this Order)

*Post-Notice Declaration of Notice Provider
 Attesting to its Compliance with the Notice
 Plan to be Filed with the Court*

 (10 days prior to the final approval hearing date set in this Order or 7 days prior to the filing of any motion in support of final approval of the Settlement, whichever is earlier)

Objections to the Settlement

10. Any member of the Settlement Classes who objects to the Settlement Agreement shall file a written objection with the Court, with a written copy served on Class Counsel and Defendants' counsel, pursuant to the schedule below.

EVENT

DATE

*Deadline to File, Postmark, and Send
Objections*

_____ (No later than 30 days after the end of the Notice Period)

11. The written objection must comply with the following requirements:

a. Objections must include: (i) the objector's name, address, and telephone number; (ii) the name of this Action and the case number; (iii) a statement of each objection; and (iv) a written brief detailing the specific basis for each objection, including any legal and factual support the objector wishes to bring to the Court's attention and any evidence the objector wishes to introduce in support of the objection.

b. If the objection is made through an attorney, the written objection must also include: (1) the identity and number of the Settlement Class Members represented by objector's counsel; (2) the number of such represented Settlement Class Members who have opted out of any Settlement Class; and (3) the number of such represented Settlement Class Members who have remained in the Settlement Class and have not objected.

The objector must include with the objection a signed and sworn statement verifying under penalty of perjury that the objector is a member of the Settlement Class and provide all information required by the Claim Form.

c. If the attorney intends to seek fees and expenses from anyone other than the objectors he or she represents, the attorney shall also file with the Court and serve upon Class

Counsel and Defense Counsel not later than 15 days before the Final Approval Hearing or as the Court may otherwise direct a document containing the following: (1) a description of the attorney's legal background and prior experience in connection with class action litigation, including the previous cases in which the attorney has represented an objector to a class action settlement; (2) the amount of fees sought by the attorney for representing the objector and the factual and legal justification for the fees being sought; (3) a statement outlining the specific method of fee calculation; (4) the number of hours already spent by the attorney and an estimate of the hours to be spent in the future; and (5) the attorney's hourly rate.

d. Objectors must also make themselves available for deposition by counsel for the Parties between the time the objection is filed and a date no later than 5 days before the Final Approval Hearing, and the objection must include the dates when the objector is available for deposition.

e. Class Members or their attorneys intending to make an appearance at the Final Approval Hearing must deliver to Class Counsel and Defense Counsel and have file-marked by the Court, no later than 10 days before the Final Approval Hearing or as the Court otherwise may direct, a Notice of Intention to Appear.

f. Any Settlement Class Member who fails to timely file such a written statement of his or her intention to object shall be foreclosed from making any objection to the Settlement and shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of this Agreement and by all proceedings, orders and judgments, including but not limited to, the Release.

Requests to be Excluded from the Settlement

12. Any member of the Settlement Classes who wishes to be excluded from the Settlement Classes shall mail written Request for Exclusion to the Settlement Administrator, pursuant to the schedule below:

EVENT

DATE

Deadline to File, Postmark, and Send Exclusions _____
(No later than 30 days after the end of the Notice Period)

13. Any member of the Settlement Classes who submits a timely Request for Exclusion shall not be bound by the Settlement, Settlement Agreement, or Final Order and Judgment. Within 10 business days of the expiration of the deadline for submitting a Request for Exclusion, the Settlement Administrator shall send Defendants' counsel and Class Counsel a report of the total number of valid Opt-Outs. The report will include the names and addresses of each valid Opt-Out and copies of each Request for Exclusion it receives from putative members of the Settlement Classes (whether valid or not).

14. Any member of the Settlement Classes who does not properly and timely mail a Request for Exclusion as set forth herein shall be bound by all the terms and conditions of any final approved settlement.

15. Any potential Settlement Class Member that effectively excludes himself or herself from the Settlement shall not participate in or be bound by the Settlement.

16. Should a potential Settlement Class Member submit objections to the proposed Settlement and also timely submit a Request for Exclusion, that potential Settlement Class Member shall be deemed to have excluded himself or herself from the Settlement Class and his or her objections shall not be considered by the Court.

17. Counsel for the Parties shall file any responses to the objections submitted by objecting Settlement Class Members at least 8 days before the date of the final approval hearing.

Filing and Administration of Claim Forms

18. To participate in the settlement, a Settlement Class Member must complete, sign under penalty of perjury, and mail, a Claim Form, attached as Exhibit A to the Settlement Agreement. The Claim Form and any other required documentation must both be mailed via first class mail to the Settlement Administrator and postmarked on or before the last day of the Claims Period, or submitted electronically through the Settlement Website on or before the last day of the Claims Period.

19. The Settlement Administrator shall process each claim, confirm whether each claimant satisfies the eligibility requirements set forth in the Settlement Agreement, and determine the amount, if any, of each valid claim as provided for in the Settlement Agreement. The Settlement Administrator shall review all Claim Forms for the adequacy of the submittal, inclusive of the required supporting forms, submissions, and claimant affirmation.

20. Where the Settlement Administrator believes there are insufficiencies in any part of a submittal, it shall follow the process for handling insufficiencies outlined in the Settlement Agreement.

21. 10 days after the Notice Provider commences the Notice Period (and every week thereafter), the Settlement Administrator shall provide Class Counsel and Defendants' Counsel a report listing: (1) any putative claims denied as fraudulent or otherwise ineligible; and (2) any claims determined to be valid.

EVENT

DATE

Deadline to Postmark and Send Claim Form

(on or before 150 days from preliminary approval of this Order)

Final Approval Hearing

22. A hearing on final settlement approval (the “Final Approval Hearing”) will be held before this Court on _____ (135 days from preliminary approval) at the Terry Sanford Federal Building, 310 New Bern Avenue, Raleigh, North Carolina, 27601 at _____, to consider matters relating to the Settlement, including the following: (a) whether the Settlement Classes should be certified, for settlement purposes only; (b) the fairness, reasonableness and adequacy of the Settlement, the terms of the Settlement Agreement, the dismissal with prejudice of the Litigation as to Defendants, and the entry of final judgment; and (c) whether Class Counsel’s application for attorneys’ fees, expenses, and service awards for the Settlement Class Representatives (the “Fee Petition”), and their other costs should be granted.

23. The Court orders Class Counsel to file with the Court any memoranda or other materials in support of final approval of the Settlement and any Fee Petition pursuant to the schedule set forth below.

24. Any member of the Settlement Class that has not filed a Request for Exclusion in the manner set forth above may appear at the Final Approval Hearing in person or by counsel and may be heard, to the extent allowed by the Court, either in support of or in opposition to the fairness, reasonableness and adequacy of the proposed Settlement or the other matters to be considered. However, no person will be heard, and no papers, briefs, or other submissions will be considered by the Court, unless such person has filed with the Court and served upon Class Counsel and Defendants’ counsel a Notice of Intent to Appear pursuant to the schedule set forth

below. The Notice of Intention to Appear must: (1) state how much time the Settlement Class Member anticipates needing to present the objection; (2) identify, by name, address, and telephone number, all witnesses the Settlement Class Member proposes to have testify; (3) summarize in detail the anticipated testimony of all such witnesses; (4) identify all exhibits the Settlement Class Member intends to offer in support of the objection; and (5) attach complete copies of all such exhibits.

25. Any Settlement Class member may retain an attorney at his or her own expense to appear in the action. Such attorney shall file with the Court and serve a Notice of Appearance on Class Counsel and Defendants' counsel pursuant to the schedule set forth below.

26. The date and time of the Final Approval Hearing and related filings as identified herein shall be as follows:

<u>EVENT</u>	<u>DATE</u>
<i>Deadline for Notices of Intent to Appear</i>	_____ (10 days before Final Approval Hearing)
<i>Motions for Final Approval, Attorneys' Fees and Expenses, and Service Awards to be Filed by Class Counsel</i>	_____ (20 days before Final Approval Hearing)
<i>Responses to Motions for Final Approval, Attorneys' Fees and Expenses, and Service Awards Due</i>	_____ (10 days before Final Approval Hearing)
<i>Replies in Support of Motions for Final Approval, Attorneys' Fees and Expenses, and Service Awards Due</i>	_____ (5 days before Final Approval Hearing)
<i>Final Approval Hearing to be Held</i>	_____ (135 days after preliminary approval)

27. The date and time of the Final Approval Hearing shall be set forth in the Notice to be disseminated pursuant to this Order and Summary Notice, but shall be subject to adjournment

by the Court without further notice other than that which may be posted at the Court, on the Court's website, and/or the website to be established pursuant to the Notice Plan.

28. Upon Final Approval, every term and provision of the Settlement Agreement (except as may be modified by the Final Approval Order) shall be deemed incorporated into the Final Order and Judgment as if expressly set forth therein and shall have the full force and effect of an Order of the Court.

Service of Objections, Notices of Intent to Appear and Other Documents

29. When this Order directs that papers, briefs, objections, notices and other documents be served upon Class Counsel and Defendants' counsel, service shall be made to the attorneys listed below by United States Mail, first class, addressed as follows:

Class Counsel

Daniel K. Bryson
Mona Lisa Wallace
Robert Zaytoun
c/o Whitfield Bryson & Mason LLP
900 W. Morgan St.
Raleigh, NC 27603

Counsel for Defendants PCL Civil Constructors, Inc. and PCL Construction Enterprises, Inc.

Rodney E. Pettey
David M. Fothergill
Alexandra L. Couch
Yates, McLamb & Weyher, LLP
434 Fayetteville St.
Suite 2200
Raleigh, NC 27601

Status of Litigation and Settlement

30. All discovery and other pretrial proceedings in this action are stayed and suspended, pending the Effective Date of the Class Settlement ("Final Approval"), except for

such proceedings as are provided for in the Settlement Agreement, or which may be necessary to implement the terms of the settlement, Settlement Agreement, or this Order. Pending Final Approval, no Class Member, either directly, representatively, or in any other capacity (other than a Class Member who validly and timely elects to be excluded from the Class), shall commence, continue or prosecute against any or all Released Parties any action or proceeding in any court or tribunal asserting any of the matters, claims or causes of action that are to be released upon Final Approval pursuant to the Settlement Agreement, and are hereby enjoined from so proceeding.

31. Upon Final Approval, all Settlement Class Members who do not file a timely notice of exclusion shall be forever enjoined and barred from asserting any of the matters, claims or causes of action released pursuant to the Settlement Agreement, and any such Settlement Class Member shall be deemed to have forever released the Released Parties from any and all such matters, claims and causes of action as provided for in the Settlement Agreement.

32. In the event the Settlement is terminated in accordance with the provisions of the Settlement Agreement, the Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided in the Settlement Agreement, and without prejudice to the *status quo ante* rights of Settlement Class Plaintiffs or the Defendants.

33. Neither this Order nor the Settlement Agreement shall constitute any evidence or admission of liability by any Defendant, or an admission regarding the propriety of any certification of any particular class for purposes of litigation, nor shall they be offered into evidence in this or any other proceeding except to consummate or enforce the Settlement Agreement or the terms of this Order, or by any Released Party in connection with any action asserting Released Claims.

SO ORDERED. This ____ day of March, 2018.

HON. JAMES C. DEVER III
Chief United States District Court Judge