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 INCIDENT LITIGATION	)
	)
This Document Relates To:	)
All Actions.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFYING CLASSES FOR PURPOSE OF SETTLEMENT, DIRECTING NOTICE TO THE CLASSES, AND SCHEDULING FAIRNESS HEARING

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I. INTRODUCTION

On July 27, 2017, employees of Defendant PCL Civil Constructors, Inc., in the course of performing construction work on the Herbert C. Bonner Bridge, severed the sole power cable that provides electricity to the Islands. This occurred during the height of summer tourist season and power was not completely restored for nine days. As a result of the loss of power on the Islands, the North Carolina Governor declared a state of emergency that forced visitors to evacuate the Islands and local businesses to shut down.[1]

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"), brought a class action suit against PCL Civil Constructors, Inc. and PCL Construction Enterprises, Inc. (hereafter ""PCL" or "PCL Defendants") for damages incurred by businesses, home rentals owners, and vacationers as a result of the Incident. After months of extensive negotiations, Plaintiffs have reached a settlement in principle with PCL (hereafter, the "Settlement") to resolve claims brought on behalf of local businesses, property owners and vacationers and now present the Settlement to the Court for preliminary approval.

[1] The loss of power, and the subsequent forced evacuation are hereinafter referred to as the "Incident."

Under the Settlement, PCL will pay a total of $10.35 million into a Settlement Fund, which includes up to $100,000 for claims administration and class notice. The proposed Settlement is the result of extensive negotiations that included three days of mediation conducted by an experienced mediator, Donald H. Beskind. The terms of the Settlement are set forth in the detailed Settlement Agreement and General Release of All Claims ("Settlement Agreement"). *See* Declaration of Daniel K. Bryson (Mar. 8, 2018) ("Bryson Decl.") Exhibit (Exh.") 1.

As further explained herein, the terms of the proposed settlement are fair, adequate and, reasonable; the proposed Settlement Classes meet all of the requirements for certification for purposes of settlement, and the proposed notice program provides the best practicable notice under the circumstances and comports with Fed. R. Civ. P 23(c)(2). Accordingly, Plaintiffs respectfully request that the Court take the first step in the approval process and enter the Parties' proposed Preliminary Approval Order (*see* Settlement Agreement (Mar. 8, 2018) ("SA") Exhibit ("Exh.") D), which: (1) grants preliminary approval of the proposed Settlement; (2) certifies the three Settlement Classes contemplated by the Parties' Settlement Agreement; (3) orders that the Parties' proposed Notice be sent to the Settlement Classes; and (4) schedules a final approval hearing to consider final approval of the proposed Settlement as well as approval of attorneys' fees, costs, and service awards to the Class Representatives.[2]

[2] Plaintiffs will file a separate motion for attorneys' fees and the reimbursement of litigation costs and expenses, as well as for service payments to the Class Representatives, along with supporting declarations and reports, contemporaneously with the motion seeking final approval of the settlement. Plaintiffs have proposed a schedule for the filing of each of these motions in the Proposed Order. *See* SA at Exh. D.

II. BACKGROUND

a. History of the Litigation

On July 27, 2018, Plaintiffs filed the first of several class action lawsuits against PCL for cutting the underground power cable while constructing the Herbert C. Bonner Bridge. The lawsuit claimed that the resulting power significantly impacted every business and resident on Hatteras Island ("Hatteras") and Ocracoke Island ("Ocracoke) (collectively, "the Islands") as well as tourists visiting or planning to visit the Islands. Thereafter, five more class action lawsuits were filed against PCL in North Carolina state and federal courts to recover the damage caused by the Incident. Defendants removed all of the state court actions to federal court, and all cases were assigned or reassigned to this Court.

From early in the litigation, Plaintiffs' counsel sought to coordinate their cases against PCL. Plaintiffs' counsel met and conferred with one another regarding whether to consolidate their actions and whether they could agree on a common leadership structure. Bryson Decl. at ¶ 13. After much consideration, Plaintiffs' counsel concluded that such actions would promote judicial efficiency and clarity while reducing the risk of confusion and conflicting decisions. Accordingly, Plaintiffs submitted a motion to consolidate the cases and appoint interim lead counsel. Bryson Decl. at ¶ 12. On October 12, 2017, this Court granted Plaintiffs' motion and named Whitfield Bryson & Mason LLP, Zaytoun Law Firm, and Wallace & Graham, P.A. as Interim Co-Lead Counsel, and the Law Office of Jean Sutton Martin, PLLC, Morgan & Morgan Complex Litigation Group, McCune Wright Arevalo, LLP, Hendren, Redwine & Malone, PLLC, Rose Harrison & Gilreath, P.C. and Wolf Haldenstein Adler Freeman & Herz LLP to the Interim Plaintiffs' Steering Committee (collectively, "Plaintiffs' counsel"). Bryson Decl. at ¶ 12.

In addition to consolidating the six actions and instituting an interim-leadership structure, this Court also ordered Plaintiffs to file a consolidated amended complaint. Bryson Decl. at ¶ 12. Plaintiffs' counsel thoroughly researched all legal issues presented by analyzing relevant case law from federal and state courts throughout the country, reviewed the six filed complaints and memoranda on the major legal challenges, and met in-person to extensively negotiate, edit, and then finalized the Master Consolidated Class Action Complaint ("Master Complaint") after numerous rounds of editing and drafts. Bryson Decl. at ¶ 14. Plaintiffs filed the Master Complaint on November 10, 2017. *See* Master Consolidated Class Action Complaint, Nov. 10, 2017, Dkt. # 3 ("Master Compl."). The Complaint asserted six causes of action including: (1) Negligence, (2) Negligence *Per Se*, (3) Gross Negligence; Willful and Wanton Conduct, (4) Private Nuisance, (5) Private Claim for Public Nuisance, and (6) Third Party Beneficiary. *Id*. at ¶¶ 229-289.

Simultaneously, Plaintiffs' counsel conferred, interviewed, and retained an expert economist, Industrial Economics ("IEc"), to develop damage models to determine the scope and amount of damage caused by the Incident. Bryson Decl. at ¶ 15. IEc is a nationally recognized economic consulting firm with substantial environmental impact assessment experience. Bryson Decl. at ¶ 15. Notably, IEc lent its considerable experience to assist the State of Louisiana in the aftermath of the BP oil spill on 2010. Bryson Decl. at ¶ 15.

After filing the Master Complaint, Plaintiffs' counsel began discussions with Counsel for PCL regarding a potential resolution to the litigation, which included selecting an experienced mediator who could help facilitate complex claim negotiations in a class action case of this nature. Bryson Decl. at ¶ 16. After several productive conversations, the Parties jointly submitted an interim case management plan that stayed the case for sixty days to allow the Parties to

engage in mediation, Bryson Decl. at ¶ 16. The Court entered its order for a stay on November 29, 2017. Bryson Decl. at ¶ 16.

b. Settlement Negotiations

By agreement with PCL, the Parties retained Donald Beskind, Esq. to facilitate settlement negotiations. Bryson Decl. at ¶ 17. Working closely with IEc to evaluate a variety of economic data, Plaintiffs' counsel were able to develop a highly refined projection of the economic impact of the Incident on members of each of the Classes. Plaintiffs' counsel worked extensively with IEc over several months to research, draft, and refine an expert report it produced to defense counsel for purposes of settlement *Id.* at 18.

After an initial mediation session in December 2017, the parties attended three full-day sessions in January and February 2018. Bryson Decl. at ¶ 17. Following significant, arms-length negotiations and deliberations, the Parties, with Mr. Beskind's able assistance, reached agreement on the principle terms for a settlement. The Parties then entered into a Settlement Agreement on March 8, 2018.

c. Terms of the Settlement

The Settlement Agreement establishes a non-reversionary Settlement Fund of $10,250,000, along with a reversionary amount of $100,000 for notice and administrative costs. As described in the Settlement Agreement, the parties have non-exclusively allocated the Settlement Fund to the three Settlement Classes and agreed upon the releases of PCL's liability and the terms of the Class Notice Program.

i. *The Settlement Classes*

The Settlement Classes are defined as follows:

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.

ii. *The Settlement Benefits*

Pursuant to the Settlement, Defendants agree to pay $10.35 million into the Settlement Fund for the benefit of the members of the Settlement Classes. The Parties have agreed to a non-exclusive allocation of the fund, with $8 million of the fund tentatively allocated for Business Class claims and $2.25 million for Rental/Vacationer Class and Resident Class claims. Additionally, PCL has agreed to pay up to $100,000 for claims administration and notice. The totality of the Settlement Fund is available to pay the claims of all members of the Settlement Classes; the final allocation between Classes will be a function of the claims that are received.

In addition, pursuant to the Plaintiffs' Plan of Distribution, as outlined in the Settlement Agreement, *see* Bryson Decl. at Exh. 1, members of the Business Class will have two options: each Business Class Member that timely submits an approved Business Claim Form shall be entitled to either (1) a payment in the amount of $2,500 upon proof of a valid Business Tax Identification Number at the time of the outage and a sufficient written statement of the economic loss incurred; or (2) may submit documentation of proof of loss, as indicated in the Notice and Claim Form, and seek a recovery in excess of $2,500.00. In the event the Business

Class Member elects to claim an amount greater than $2,500.00, the Business Class Member is not guaranteed to recover any specific amount. This approach will not only significantly reduce the burden on small businesses when making a claim, it also fully protects the interests of those businesses who can demonstrate substantial economic damages claims as part of this settlement.

Further, funds remaining in the Settlement Fund, if any, after all claims are processed and other fees, expenses and costs are paid, shall be distributed in the following order: First, to Members of the Business Class, Rental/Vacationer Class and Resident Class in an amount to each Member equal to 20% of their Crawford Payment Amount, subject to *pro rata* deduction dependent upon fund availability. Second, to *cy pres* recipients to be approved by the Court, which will use the funds to promote tourism on Hatteras and Ocracoke Islands.

iii. *Administration of Notice and Claims*

The cost of notice and claims administration shall be payable from the Settlement Fund. Defendants have agreed to pay up to $100,000 to offset the costs of claims administration and class notice. If any amount of the $100,000 is not expended for costs of claims administration and class notice, then the remainder is to be paid back to Defendants.

iv. *Attorneys' Fees and Costs and Service Awards to Class Representatives*

The parties did not discuss the issue of attorneys' fees and service awards until after reaching agreement on the class member benefits. Bryson Decl. at ¶ 29. An amount not to exceed thirty-three percent (33%) of the Settlement Fund shall be allocated to pay Attorneys' Fees as approved by the Court. Such amount will be payable in two steps as follows: (1) 75% of the amount awarded shall be paid to Class Counsel within ten days of the Effective Date, and (2) the remaining 25% shall be paid within 30 days of the end of the Claims Period, provided that the Settlement Fund is sufficient to pay both the amount awarded and the total amount claimed by

Settlement Class Members. An amount not to exceed $100,000 shall be used from the Settlement Fund for the costs incurred by Attorneys in the prosecution of this matter.

Service Awards shall be paid to each of the twenty-nine Class Representatives in the amount of $2,500 such that the payments shall not exceed, in the aggregate, $72,500. These Service Awards shall be payable from the Settlement Fund and shall not reduce or otherwise limit the claims of the Claims Representatives.

III. LEGAL STANDARDS FOR PRELIMINARY APPROVAL, CONDITIONAL CLASS CERTIFICATION, AND APPROVAL OF THE NOTICE FORM.

a. **Preliminary Approval of Settlement**

Federal Rule of Civil Procedure 23(e) requires judicial approval of any proposed settlement of claims brought on behalf of a class. *See* Fed. R. Civ. P. 23(e) ("The claims . . . of a certified class may be settled . . . only with the court's approval."). Courts may approve a proposed class settlement upon a "finding that [the settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts in the Fourth Circuit follow a bifurcated approach to determine whether a settlement is "fair, reasonable, and adequate" under Rule 23. *See In re MicroStrategy, Inc. Sec. Litig.,* 148 F.Supp.2d 654, 663 (E.D. Va. 2001) (citing *In re Jiffy Lube Sec. Litig.,* 927 F.2d 155, 158 (4th Cir.1991)).

First, at the preliminary approval stage, the court determines whether the proposed Settlement is "within the range of possible approval" or, whether there is "probable cause" to give notice of the proposed Settlement to class members. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994); *accord In re NeuStar, Inc. Sec. Litig*., Case No. 14-885, 2015 U.S. Dist. LEXIS 129463, at *23-24 (E.D. Va. Sep. 23, 2015). The primary issue before the Court is whether the proposed Settlement is within the range of what might be found fair, reasonable, and adequate. *Matthews v. Cloud 10 Corp.,* Case No. 14-00646,

2015 U.S. Dist. LEXIS 114586, at *4 (W.D.N.C. Aug. 27, 2015); *accord* MANUAL FOR COMPLEX LITIGATION, FOURTH, §13.14, at 172-73 (2004) ("Manual Fourth") (at the preliminary approval stage, "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed Settlement, and date of the final fairness hearing.").

The Court of Appeals for the Fourth Circuit has laid out a series of factors for courts to consider when determining whether a proposed settlement is fair and adequate and, thereby, reasonable. *Jiffy Lube*, 927 F.2d at 159. To determine the fairness of a proposed Settlement, the Court considers: (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation. *Jiffy Lube*, 927 F.2d at 159. There is a "strong presumption in favor of finding a settlement fair." *Lomascolo v. Parsons Brinckerhoff, Inc*., 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) (internal quotation omitted). To determine the adequacy of a proposed Settlement, the Court considers: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *Id*. at 159; *MicroStrategy*, 148 F.Supp.2d at 665.

In making the determination of preliminary approval, the Court does not answer the ultimate question of whether the proposed Settlement is fair, reasonable, and adequate; this analysis is reserved for the second stage of the settlement approval process. Instead, the first stage of the settlement approval process is focused on whether the settlement is sufficiently

adequate to permit notice to be sent to the class. *See Hall v. Higher One Machs., Inc.*, 2016 U.S. Dist. LEXIS 131009, at *15 (E.D.N.C. Sep. 26, 2016) ("If the proposed settlement is preliminarily acceptable, the court then directs that notice be provided to all class members who would be bound by the proposed settlement in order to afford them an opportunity to be heard on, object to and opt out of the settlement."). The court has the discretion to determine whether to approve the proposed Settlement. *Jiffy Lube*, 927 F.2d at 158. This Court has noted, however, that "[t]here is a strong judicial policy in favor of settlement, in order to conserve scarce resources that would otherwise be devoted to protracted litigation." *Covarrubias v. Capt. Charlie's Seafood, Inc.*, 2011 U.S. Dist. LEXIS 72636, *6-7 (E.D.N.C. July 5, 2011) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

b. **Conditional Class Certification**

"When a settlement is reached prior to Rule 23 certification, the law permits a class to be certified solely for the purposes of settlement." *Gamas v. Scott Farms, Inc.*, 2014 U.S. Dist. LEXIS 177206, *4 (E.D.N.C. Dec. 24, 2014). A district court faced with a settlement-only class need not inquire whether the class would present intractable problems with trial management, but must analyze whether the other requirements for certification must have been satisfied. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). To approve a class settlement, the Court must still consider the requirements for class certification under Rule 23. *In re NeuStar*, 2015 U.S. Dist. Lexis 129463, at *5-6 (E.D.V.A. Sept. 23, 2015) (citing and quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004)). The Settlement Class must also satisfy one of the categories of Rule 23(b). *Id*. However, the Court may disregard the manageability concerns of Rule 23(b)(3) because the Court may properly consider that there will be no trial. *See Amchem*, 521 U.S. at 620.

c. Notice Form Approval

As part of the preliminary approval process, the district court must also approve the notice of the settlement that the Parties propose be sent to Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B). The notice must comport with due process and provide the "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id.*; *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Furthermore, the notice must:

> clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; (v) and the binding effect of a class judgment on the class members.

Fed. R. Civ. P. 23(c)(2)(B). Rule 23 leaves the form of the notice to the Court's discretion. *See Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) ("a court may exercise its discretion to provide the best notice practicable under the circumstances."); *see also* Fed. R. Civ. P. 23(c)(2)(B).

IV. ARGUMENT

The proposed Settlement warrants preliminary approval. In addition to being fair, adequate, and within the range of reasonableness, the proposed Settlement satisfies the standards of Rule 23. Additionally, the proposed Notice meets the requirements of due process and is accurate, informative, and easy to understand. Accordingly, Plaintiffs seek this Court's approval of the attached. Plaintiffs also request that the Court schedule a final approval hearing given that Plaintiffs have met the appropriate standards for preliminary approval of settlement, class certification, and notice of settlement.

a. <u>The Proposed Settlement is Fair, Adequate, and Reasonable.</u>

i. The Proposed Settlement is Fair

Application of the Fourth Circuit's fairness analysis to the Parties' Settlement Agreement establishes that the proposed Settlement is fair. The fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (citing *In re Jiffy Lube*, 927 F.2d at 159). Here, there is no hint of collusion. The proposed Settlement is the product of good faith negotiations between informed counsel. *See* Bryson Decl. at ¶ 7. Additional evidence that the Settlement was reached in good faith, without collusion, comes from the fact that a mediator experienced in complex litigation assisted the Parties' negotiations. *See* Bryson Decl. at ¶ 6.

In accordance with the first and third *Jiffy Lube* factors, concerning the posture of the case at the time of settlement and the circumstances of settlement, Plaintiffs filed the strongest Complaint possible against Defendants, which incorporated the most viable claims of six separate class actions initially filed against PCL. *See, generally*, Master Compl. Plaintiffs were able to adequately gauge the success of their claims given the motion to dismiss filed by PCL in a pre-consolidation case. *See* Bryson Decl. at ¶ 13. The Parties engaged in extensive negotiations, which included a pre-mediation session and three, full-day mediated sessions with a highly-experienced mediator. *See* Bryson Decl. at ¶ 18. Furthermore, Plaintiffs retained a firm with expertise in economics to assess the economic impact of the Incident and provide data and expert opinions for the mediation. Over the course of several months and three mediation sessions, Plaintiffs were able to obtain a recovery for the Class that likely exceeds 100% of the remaining economic losses incurred by members of the Classes, even after deducting costs and fees. *See* Declaration of Mark D. Ewen, ¶ 5 (Mar. 9, 2018) ("Ewen Decl."). "These adversarial

encounters dispel any apprehension of collusion between the parties." *NeuStar*, 2015 U.S. Dist. LEXIS 129463, at *25.

Pursuant to the second factor, the Court evaluates the "extent of discovery" to ensure that sufficient discovery has taken place to allow class counsel and the Court to evaluate the settlement. *Horton*, 855 F. Supp. at 830. Here, Plaintiffs engaged in an extensive investigation into the facts and circumstances of the Incident, which included conducting numerous town hall meetings to understand how the Incident was affecting businesses, residents, and vacationers, as well as meetings with the North Carolina Attorney General's office that led to the production of PCL's approved bid to construct the Herbert C. Bonner Bridge. PCL publically admitted that its actions caused the Incident shortly after it occurred, leaving the character and scope of damages as the primary issues in the case. *See* Bryson Decl. at ¶ 8. Throughout their negotiations, the Parties exchanged confirmatory discovery to allow Plaintiffs to understand the scope of the potential damages caused by the Incident. *See* Bryson Decl. at ¶ 26. This confirmatory discovery was used in the IEc report, which provided a reliable assessment of damages arising from the Incident. *See* Ewen Decl. at ¶ 36. Armed with the work performed by IEc, Plaintiffs were able to approach the negotiations confident in their understanding of the damages suffered by Class Members.

Plaintiffs also satisfy the last *Jiffy Lube* factor, here, because Plaintiffs' counsel consist of some of the most experienced and respected class action law firms in the country and have decades of experience litigating and successfully settling class action suits, including cases involving significant economic losses. *See* Bryson Decl. at Exhs. 2-4. Given that the circumstances underlying the Settlement Agreement satisfy the Fourth Circuit's four-factor test, Plaintiffs contend that the proposed settlement is fair.

ii. The Proposed Settlement Is Adequate

The proposed Settlement also satisfies the Fourth Circuit's test of adequacy. Courts in the Fourth Circuit determine a settlement's adequacy by weighing the settlement amount recovered against:

> (1) The relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Horton, 855 F. Supp. at 828 (quoting *Jiffy Lube,* 927 F.2d at 159). Other than the degree of opposition to the Settlement, which Plaintiffs can only weigh after receiving objections in response to Class Notice, these factors weigh heavily in favor of finding the proposed Settlement adequate.

First, Plaintiffs' claims in the Master Complaint are meritorious. As stated therein, PCL won a contract from the North Carolina Department of Transportation ("NCDOT") to replace the Herbert C. Bonner Bridge and expressly agreed not to engage in work that could interrupt the power from Memorial Day to Labor Day or "commence work at points where the highway construction operations are adjacent to utility facilities, until making arrangements with the utility company to protect against damage work." Master Compl. at ¶¶ 73, 75, 86, 94. Plaintiffs contended that, on the date of the Incident, PCL was aware of plans and drawings marking the locations of the power cables provided by Cape Hatteras Electrical Cooperative ("CHEC") and NCDOT. *Id.* at ¶¶ 109-110. Yet, PCL engaged in conduct that severed the powerlines and caused a nine-day blackout in Hatteras and Ocracoke Islands. *Id.* at ¶¶ 109-124. Plaintiffs allege that

PCL understaffed and improperly supervised the construction as well as mismanaged the project in violation of the contract with NCDOT and its own internal policy and safety manuals. *Id.* at ¶¶ 112-129. Moreover, the IEc expert report confirms that Plaintiffs suffered extensive damages from the Incident. *See* Ewen Decl. at ¶ 8. Thus, Plaintiffs' allegations support Plaintiffs' claims for negligence and nuisance, among other causes of action.

Second, although Plaintiffs are confident about their case, the risks involved cannot be disregarded. The Court has not yet ruled on PCL's forthcoming motion to dismiss. Class certification is always challenging, and, assuming a class is certified, Plaintiffs will undoubtedly face the risks of losing on summary judgment, at trial, or on appeal. In particular, Plaintiffs have already encountered PCL's economic loss rule defense that has proven to be fatal in previous cases involving similar, albeit distinguishable, circumstances. *See, e.g.*, *Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726 (4th Cir. 2010); *Yarmouth Sea Products Ltd. v. Scully*, 131 F.3d 389 (4th Cir. 1997); *Marine Nav. Sulphur Carriers, Inc. v. Lone Star Indus., Inc.*, 638 F.2d 700 (4th Cir. 1981). In short, Plaintiffs faced real and potentially insurmountable challenges to their case.

Third, as all experienced trial lawyers know, continued litigation through trial – and likely appeals – is both lengthy and expensive. This case would involve likely voluminous discovery, extensive expert involvement, and robust briefing over motions to dismiss, motions for summary judgment and *Daubert* challenges. Class action litigation, in particular, adds an additional layer of time and expenses, as the parties must conduct separate discovery on class-related issues as well as research and draft extensive class certification briefs.

Fourth, while Plaintiffs are not concerned about Defendants' solvency, many Settlement Class Members are small business owners or rental property owners that suffered significant financial losses from the Incident because it occurred in the height of the tourist season and these

business and property owners continue to struggle financially in the aftermath of the Incident. *See* Bryson Decl. at ¶ 16; Ewen Decl. at ¶ 9. For them, time of payment is of the essence. The proposed Settlement will provide a tremendous benefit by providing relief in a few months versus potentially years from now.

Fifth, Plaintiffs will address the remaining factor – the degree of opposition to the Settlement – in the Motion seeking final approval, after the members of the Settlement Classes have been given Notice of the proposed Settlement and an opportunity to object. To date, the Class Representatives are unaware of any potential objections to the Settlement by any members of the Settlement Classes.

Given the litigation risks involved, the complexity of the underlying issues, the skill of Defense Counsel, and the time-sensitive financial needs of Settlement Class Members, the proposed Settlement ensures an immediate and meaningful recovery by the Settlement Classes. Plaintiffs and their counsel respectfully submit that the proposed Settlement is both fair and adequate, such that notice of the Settlement should be sent to the Settlement Classes.

b. <u>The Class Should Be Conditionally Certified for Settlement Purposes</u>

When presented with a settlement-only class, the United States Supreme Court has held that a district court must determine whether a class meets the requirements of Federal Rules 23(a) and 23(b)(2) or 23(b)(3) – save for evaluation of any class manageability issues at trial. *Amchem Products, Inc.*, 521 U.S. at 591, 617, 620. Because the Settlement Classes meet Rule 23(a) and Rule 23(b)(3) standards, Plaintiffs move for conditional certification.

i. The Settlement Classes Satisfy the Requirements of Rule 23(a)

Certification is appropriate under Rule 23(a) if: "(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 representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

1. Numerosity

Plaintiffs satisfy numerosity because the Settlement Classes contain thousands of absentee Class Members. Rule 23(a)(1) demands evidence that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). No set minimum number of potential class members is required to fulfill the numerosity requirement. *Sanchez-Rodriguez v. Jackson's Farming Co.*, Case No. 16-28, 2017 U.S. Dist. LEXIS 11215, at *5 (E.D.N.C. Jan. 27, 2017). When the class becomes sufficiently large, however, the number of class members in and of itself makes joinder "exceedingly impracticable" such that numerosity is met. *See Gunnells v. Healthplan Servs.*, 348 F.3d 417, 425 (4th Cir. 2003).

Although there is no specific rule on how many members a class must have, the estimated 300 businesses, 475-1,500 vacation rental properties, and 1,000 residential properties that have not already settled their claims fall within the Settlement Classes, *see* Ewen Decl. at ¶¶ 36-37, 40, 41, 43, far surpass the numerosity threshold. *See Cypress v. Newport News General & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (eighteen class members sufficient); *Sanchez-Rodriguez*, 2017 U.S. Dist. LEXIS 11215, at *5 (135 class members sufficient); *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 713 (E.D.N.C. 2011) (2,000 class members sufficient). Thus, Plaintiffs satisfy the numerosity requirement.

2. Commonality

The Settlement Classes almost meet Rule 23's "commonality" requirement because "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The

requirement is "liberally construed… a class action will not be defeated solely because there are some factual variations among the members' grievances." *Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 537 (E.D.N.C. 1995). Commonality "does not require that all questions of law or fact in a case be common to each class member, rather, only a single common question must exist." *Id.* With respect to commonality, "[w]hat matters to class certification is 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 (2011).

Rule 23(a)(2)'s commonality requirement is met where, as here, the defendant engaged in a common course of conduct. *Fisher v. Virginia Elec. & Power Co.*, 217 F.R.D. 201, 223 (E.D. Va. 2003). Common questions with respect to the Business Class, the Rental/Vacationer Class, and the Resident Class include:

- Whether the power line damage was caused by employees or agents of PCL acting in the normal course and scope of their duty;
- Whether PCL's conduct breached a duty of due care owned to Plaintiffs and Class Members;
- Whether PCL's conduct violated the Underground Utility Safety and Damage Prevention Act, N.C. Gen. Stat. § 87-115 *et seq.*
- Whether PCL engaged in willful, wanton and reckless conduct;
- Whether PCL's conduct constituted an unreasonable interference with the common interests or rights of the general public; and
- Whether Plaintiffs and Class Members are third-party beneficiaries to an agreement by which PCL and its parent company established a claims facility

Accordingly, the commonality requirement is satisfied.

3. Typicality

Class Representatives for the Settlement Classes fulfill Rule 23(a)'s "typicality" requirement because "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The "typicality" requirement does not require the Class Representatives to have identical facts and legal claims as the class; rather, the

claims "cannot be so different from the claims of absent class members that their claims will not be advanced by [Class Representatives] proof of [their] own individual claim[s]." *Beaulieu v. EQ Indus. Servs.*, 2009 U . S . Dist. LEXIS 133023, at *39-40 (E.D.N.C. Apr. 20, 2009). For typicality to be satisfied, the "representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). "Generally, the court must determine whether the asserted claims 'arise from the same event or practice or course of conduct and are based on the same legal theories as the claims of the unnamed class members.'" *Id.* at *40 (citing *Rodger*, 160 F.R.D. at 538).

Here, typicality is satisfied. The Plaintiffs representing the Business Class and members of the Business Class are all businesses or business owners located on Hatteras Island or Ocracoke Island operating during the Incident and they assert the same claims based on the PCL's conduct in negligently cutting the power to Hatteras and Ocracoke. *See* Master Compl. at ¶¶ 229-289. Similarly, members of the Rental/Vacationer Class are persons who rented a vacation property on Hatteras or Ocracoke Islands during the time of the Incident, together with all persons or entities that rented homes to Vacationers. The members of the Rental/Vacationer Class, including Class Representatives, assert the same claims based on the PCL's conduct in negligently cutting the power to Hatteras and Ocracoke. *Id*. Likewise, the representatives of the Resident Class and members of the Resident Class assert similar claims based on the same conduct of PCL. The legal and factual arguments that the Plaintiffs representing the Settlement Classes advance are the same arguments that other Settlement Class Members would advance in support of their claims.

In this case, "[b]ecause the claims of the representative parties are the same as the claims of the class, the typicality requirement is satisfied." *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 339 (4th Cir. 2006).

4. Adequate Representation

Last, Plaintiffs meet Rule 23(a)(4)'s adequacy requirement because Class Representatives have "common interests with unnamed members of the class" and "vigorously prosecute[d] the interests of the class through qualified counsel." *Beaulieu*, 2009 U.S. Dist. LEXIS 133023, at *43 (citing *Olvera-Morales v. Intern. Labor Mgmt Corp.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007)). The adequacy analysis evaluates potential conflicts of interest between named parties and the class. *Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 338 (4th Cir. 1998). "…[B]asic due process requires that the named plaintiffs possess undivided loyalties to absent class members." *Id.*

First, the interests of the Class Representatives fully align with the members of the Settlement Classes. As discussed above, the Class Representatives are prosecuting the same claims as the Settlement Classes and these claims uniformly arise from PCL's conduct in negligently cutting the power to Hatteras and Ocracoke. *See* Master Compl. at ¶¶ 229-289. The Class Representatives have also demonstrated their commitment to monitor and supervise the prosecution of the case on behalf of the Settlement Classes. They have, among other things, reviewed the pleadings, provided documents in support of the case, spoken with Plaintiffs' expert and provided support for his report, and maintained regular communications with Counsel. *See* Bryson Decl. at ¶ 19; Ewen Decl. at ¶ 8.

Second, the Class Representatives have protected the interests of the Settlement Classes by retaining qualified, experienced counsel to represent the Settlement Classes. Plaintiffs'

counsel are nationally recognized for their work prosecuting large, complex class actions. As discussed above, Class Counsel are among the most experienced class action law firms in the country, with proven track records of success, including within North Carolina and this District. *See* Bryson Decl., Exhs. 2-4. Thus, as required by Rule 23, both Class Representatives and Plaintiffs' counsel provide adequate representation of the Settlement Classes.

ii. The Settlement Class Satisfies the Requirements of Rule 23(b)(3)

Because the Settlement Classes seek to recover damages, the Court must also determine whether the Classes comply with the requirements of Fed. R. Civ. P. 23(b)(3), which authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is "designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 614-15 (internal quotations and citations omitted). Certification of the Settlement Classes serves these purposes.

1. Common Questions of Law and Fact Predominate.

The Settlement Classes satisfy the predominance inquiry because the "'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Beaulieu*, 2009 U.S. Dist. LEXIS 133023, at *60 (citing *Amchem Products,* 521 U.S. at 623). "The inquiry with respect to the predominance standard focuses on the issue of liability, and if the liability issue is common to the class, common questions are held to predominate over individual ones." *In re Red Hat,*

Inc. Sec. Litig., 261 F.R.D. 83, 89-90 (E.D.N.C. 2009) (internal citation omitted); *accord McLaurin v. Prestage Foods, Inc.*, 271 F.R.D. 465, 478 (E.D.N.C. 2010) ("common evidence … would establish a prima facie case for the class. Individual issues may exist, but the court does not believe they predominate."). Factual differences between members of the settlement class members do not defeat predominance where "the principle questions surrounding plaintiffs'… claim are the same." *Id.* (citing *Martinez-Hernandez v. Butterball, LLC*, 2008 U.S. Dist. LEXIS 111931, at *13 (E.D.N.C. November 14, 2008)). Furthermore, the likelihood that class members may have suffered individual damages does not impact the predominance analysis. *See Gunnells*, 348 F.3d at 427-28 ("Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification.").

Here, Plaintiffs can establish PCL's liability using common Class-wide evidence including the NCDOT's contract with PCL, the drawings of the power line locations provided to PCL by NCDOT and the local power company CHEC, and PCL's course of conduct prior to cutting the powerlines to Hatteras and Ocracoke Islands. *See, generally*, Master Compl. Class Representatives maintain that Defendants' conduct presents common operative facts and common questions of law, as iterated in the commonality analysis. This common evidence forms the basis the Settlement Class Members' claims. Importantly, Defendants have not identified individual issues that would compromise the legal claims of the Settlement Classes and Plaintiffs cannot identify individual issues that would predominate over the common legal claims and questions in light of Defendants' uniform conduct.

2. Class Resolution of this Action is Superior to Other Methods of Adjudication.

Lastly, Plaintiffs fulfill the superiority requirement of Rule 23(b)(3). In order to determine whether the class action device is the superior method of adjudicating these claims, Rule 23(b)(3) enumerates four factors for consideration: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. Rule 23(b)(3). "The Supreme Court explained in *Amchem* that when dealing with a settlement only class pursuant to Rule 23(e), a district court need not inquire whether the case, if tried, would present intractable management problems." *Gunnells,* 348 F.3d at 440 (internal quotes omitted). It is well-settled that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* (quoting *Amchem*, 521 U.S. at 617).

This case presents a disincentive to pursue individual lawsuits because the prospect of small individual recoveries is dwarfed by the cost of litigation, which includes the collection and presentation of the common proof required to establish PCL's liability. If each Class Member were required to sue PCL individually, then each would also have to present evidence that PCL acted negligently and/or created a nuisance, which would require extensive discovery and expert testimony. Because this action arises from a common event caused by a common course of conduct, without variation, across the Settlement Classes, it presents a quintessential example of a case suitable for aggregate treatment.

c. Plaintiffs' Notice Form and Plan Satisfies the Requirements of this Court

According to Rule 23, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(l). In accordance with this rule and the relevant due process considerations, adequate notice must be given to all absent class members to enable them to make an intelligent choice as to whether to participate in or opt-out of the Class. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326-27 (3d Cir. 1998); *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227 (9th Cir. 1996). An adequate notice must provide the "best notice practicable" and clearly states the facts required under Fed. R. Civ. P. 23(c)(2)(B).

i. The Notice Plan Provides the Best Practicable Notice

Notice of a proposed Settlement to class members must be the "best notice practicable." *See* Fed. R. Civ. P. 23(c)(2)(B). "[B]est notice practicable" means "individual notice to all members who can be identified through reasonable effort." *Eisen,* 417 U.S. at 173. The Notice provided for in the Agreement has been developed with the thought of providing the most comprehensive notice possible, with a reach that more than satisfies federal guidelines.

In this case, the Notice includes sophisticated efforts to provide direct notice to absent Settlement Class Members. The Notice plan will utilize the most reliable and modern technologies to provide publication notice to Settlement Class Members who are unknown and email, as well as first-class mail, to known Class Members. Furthermore, Notice will meet all necessary legal requirements and provide a comprehensive explanation of the Settlement in layman's terms. *See* SA Exhs. B, C, F.

ii. The Notice Form Clearly States the Facts Required by Fed. R. Civ. P. 23(c)(2)(B)

The proposed Notice provides clear and accurate information as to: (1) a summary of Plaintiffs' Master Complaint as well as the nature and principal terms of the Settlement Agreement; (2) the definitions of the Settlement Classes; (3) the claims alleged by Plaintiffs and defenses raised by PCL; (4) the procedures and deadlines for opting-out of the proposed Settlement or submitting objections and the date, time and place of the Final Approval Hearing; and (5) the consequences of taking or foregoing the various options available to Class Members. Notice will also inform Absentee Class Members about the maximum amount of attorneys' fees and costs that may be sought by Plaintiffs' Counsel, pursuant to Fed. R. Civ. P. 23(h) and the identities and contact information for Co-Lead Counsel, Counsel for PCL, and the Court. *See id*.

The Notice Program complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See, e.g.*, Manual for Complex Litigation, Fourth § 21.311-21.312 (2008). As a result, Plaintiffs respectfully request the Court direct Notice to all members of the Settlement Classes.

d. <u>Plaintiffs Requests That the Court Enter the Schedule in the Attached Proposed Order to Facilitate Settlement.</u>

Plaintiffs request that the Court schedule form submission and objection deadlines to facilitate settlement. Plaintiffs also ask the Court to set a date for a final approval hearing to determine that final approval of the settlement is proper. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.633 (2008). The final approval hearing will provide a forum to explain, describe or challenge the terms and conditions of the settlement, including the fairness, adequacy and reasonableness of the settlement as well as the attorneys' fees,

reimbursement of costs, and enhancement awards to the Class Representatives. Plaintiffs have outlined the proposed schedule in the attached Proposed Order. *See* SA at Exh. D.

V. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court: (1) preliminarily approve the proposed Settlement Agreement pursuant to Fed. R. Civ. P. 23(c) and (e); (2) preliminarily certify each of the proposed Settlement Classes; (3) approve the proposed Class Notice and Notice forms; and (4) schedule a final approval hearing to consider final approval of the proposed Settlement, and approval of attorneys' fees, costs, and enhancement awards.

Dated: March 9, 2018

Respectfully submitted,

Interim Co-Lead Counsel:

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of March, 2018, a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Daniel K. Bryson
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