

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.)
_____)

ORDER

Plaintiffs and defendants PCL Civil Constructors, Inc. and PCL Construction Enterprises, Inc. (collectively “PCL” or “defendants”) entered into a settlement agreement on March 9, 2018, to settle the above-captioned consolidated class action litigation, subject to this court’s preliminary and final approval. See Fed. R. Civ. P. 23. On May 2, 2018, this court granted preliminary approval of the settlement and described the factual and legal background of the case. See [D.E. 24]. As discussed in that order, on November 10, 2017, plaintiffs, on behalf of themselves and others similarly situated, filed a complaint against PCL for negligence, negligence per se, gross negligence, private nuisance, private claim for public nuisance, and breach of contract [D.E. 3]. On March 9, 2018, plaintiffs moved for preliminary approval of a class action settlement [D.E. 11] and filed a memorandum in support [D.E. 12]. On May 2, 2018, the court held a hearing on the motion [D.E. 23] and entered an order that granted preliminary approval of the settlement [D.E. 24].

Since that date, the parties cooperated to share information and implement the plan to provide Notice to the Class. Class counsel, working with the designated settlement administrator, Crawford & Company, and the notice provider, Angeion Group, gave notice to the class by means including U.S. Mail, publicizing the proposed settlement in the media, distributing materials in relevant island communities, and establishing a dedicated website and toll-free number. At the final approval

hearing on September 21, 2018, and in the filings made in advance, the parties provided the court with information regarding the success of the notice plan in communicating notice to the class of the terms of the settlement, the status of ongoing administration of claims of affected class members, the nature of any requests for exclusion from the settlement received from class members, and the anticipated next steps should this court grant final approval of the settlement.

In analyzing the motion for final approval of the class action settlement, this court first must determine whether to finally certify the class for settlement. See *Speaks v. United States Tobacco Coop., Inc.*, 324 F.R.D. 112, 133–36 (E.D.N.C. 2018). The requirements for certification of a settlement class parallel the requirements for certification of a litigation class. Id. at 135 (collecting cases). The putative class must meet the four Rule 23(a) prerequisites and fit within one of the three Rule 23(b) categories. See id. at 135; Fed. R. Civ. P. 23(a).

On May 2, 2018, this court certified the class for purposes of preliminary approval pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3). [D.E. 24] 6–11. The court finds that certification is appropriate for purposes of the final approval of the settlement. The three settlement classes are defined as the business class, the rental/vacationer class, and the resident class. [D.E. 13-1] 4; [D.E. 24] 2–3. The business class is defined as “[a]ll 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.” The rental/vacationer class is defined as “[a]ll 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.” The resident class is defined as “[a]ll permanent residents of Hatteras and Ocracoke Islands at the time of the Incident.” [D.E. 13-1] 4; [D.E. 24] 2–3. Various individuals and entities are excluded from the settlement classes as described in the settlement agreement and the court’s preliminary approval

order. [D.E. 13-1] 4–5; [D.E. 24] 3.

The court finds, for the purpose of final approval of the settlement, and consistent with its preliminary approval order, that the requirements of Rule 23(a) are met: (a) the numerous class members would make joinder impractical; (b) there are questions of law and fact common to the members of the class; (c) the claims of the class representatives are typical of the claims of the members of the class; and (d) the class representatives and counsel will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a); [D.E. 24] 6–9.

The court finds that questions of law and fact common to the class members predominate over any questions affecting individual class members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. See Fed. R. Civ. P. 23(b)(3); [D.E. 24] 9–11.

The court confirms for purposes of final approval that the plaintiffs named in its preliminary approval order as class representatives are 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. [D.E. 24] 8–9.

Pursuant to Rule 23(c)(2)(B) and (e)(1), the court finds that the plan for the distributing notice to the class of the settlement constitutes the best notice practicable under the circumstances, and is reasonably calculated to apprise class members of the pendency of the litigation, the terms of the agreement, their right to exclude themselves from the class or to object to any part of the

settlement, and the binding effect of a judgment on class members who do not exclude themselves. The court finds based on the submissions made in connection with the final approval hearing that the notice plan has been properly performed and complies with the notice requirements of Rule 23(c)(2)(B) and due process.

To approve a proposed settlement, the court must find that the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *see Speaks*, 324 F.R.D. at 142 (collecting cases). “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) (quotation and alteration omitted).

In assessing the fairness of the proposed settlement, courts consider the following factors: “(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.” *Speaks*, 324 F.R.D. at 150 (quotation and alteration omitted). The fairness analysis ensures the settlement is reached as a result of good-faith bargaining at arm’s length, without collusion. *Id.* (quoting *Berry*, 807 F.3d at 614).

Here, the court finds that the case posture was appropriate in that the plaintiffs coordinated their claims and pleadings, and the parties engaged in good-faith, arms-length negotiation and mediation with a qualified mediator. Before the mediation, the plaintiffs investigated the case and retained an economic expert, and the parties engaged in informal and confirmatory discovery and information sharing. Counsel for all parties are reputable and experienced, and there is no evidence of collusion.

“In assessing the adequacy of the proposed settlement courts consider the following factors: ‘(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.”” Speaks, 324 F.R.D. at 142 (quoting In re Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991)). As discussed in this court’s preliminary approval order, the plaintiffs consolidated their claims and collaborated to file the strongest complaint against PCL. The settlement agreement resulted from extensive, arms-length negotiations, which included a three-day mediation with a highly experienced mediator. The parties also engaged in confirmatory discovery to allow plaintiffs to understand the scope of damages. See [D.E. 24] 5.

In conducting its fairness analysis, a court need not “reach any dispositive conclusions” concerning the merits of the case. Speaks, 324 F.R.D. at 143 (quoting Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975)). Here, the court’s review of the facts and law demonstrates that certain key issues were hotly contested, including whether the plaintiffs’ claims for damages were barred in whole or part by the economic loss rule. Compare Sanders v. Norfolk S. Ry., 400 F. App’x 726, 728–29 (4th Cir. 2010) (per curiam) (unpublished) (defense successful), with Beaulieu v. EQ Indus. Servs., Inc., 5:06-CV-400-BR, Order [D.E. 181] 4–8 (E.D.N.C. Apr. 28, 2008) (unpublished) (defense unsuccessful).

Given this legal uncertainty, the settlement provides significant compensation to the class. The settlement provides monetary benefits to defined classes encompassing island residents and businesses, as well as vacationers and tourists. The settlement establishes a claims program whereby the classes will receive cash payments. PCL will pay into the settlement fund \$10,350,000 (less any attorneys’ fees, costs, incentive awards, and less any sums already advanced after the court’s preliminary approval of settlement) of which \$100,000 will be used to pay for the costs of notice and

administration. Any additional costs for notice and administration also will be paid from the fund. [D.E. 13-1] 8; [D.E. 24] 3.

Class counsel will request an award of attorneys' fees not to exceed \$3,415,500 (33% of the settlement fund), as well as costs not to exceed \$100,000. Class counsel also will request a service award payment of \$2,500 for each of the class representatives. The aggregate service award payments will not exceed \$72,500. [D.E. 13-1] 10; [D.E. 24] 3.

Payments into the settlement fund will be allocated as follows: (1) \$8,100,000 of the settlement fund will be allocated to the business class, and (2) \$2,250,000 of the fund will be allocated to the rental/vacationer and the resident classes. Business class members that submit a timely claim form may either: (1) receive a \$2,500 payment 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) they may submit documentation of proof of loss and seek a recovery in excess of \$2,500. Rental/vacationer and resident class members who submit a timely claim form can recover their economic damages. Any funds remaining after all claims are processed and all other attorneys' fees, expenses, and costs are paid will be first distributed to business class, rental/vacationer class, and resident class members pro rata in an amount equal to 20% of their recovery. Any remaining funds will be paid to one or more cy pres recipients approved by the court. [D.E. 13-1] 26–28, 47–52; [D.E. 24] 3–4. Plaintiffs' economic expert opined that class members who submit claims will likely be able to recover 100% of their remaining economic losses. See [D.E. 24] 5–6.

The class members have reacted favorably to the settlement. Moreover, the court has not received any objections to the settlement.

In sum, the court GRANTS the plaintiffs' motion for final approval of the class action settlement [D.E. 25]. The court will enter a final judgment consistent with this order.

SO ORDERED. This 21 day of September 2018.



JAMES C. DEVER III
Chief United States District Judge