UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. KIMBERLY-CLARK CORPORATION, et al., Defendants.	Civil Action No. 1:14-cv-01142-PKC-RML CLASS ACTION

DECLARATION OF VINCENT M. SERRA IN SUPPORT OF: (1) PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; (2) CLASS COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES; AND (3) CLASS REPRESENTATIVE PAYMENT

I, VINCENT M. SERRA, declare as follows:

1. I, Vincent M. Serra, am an attorney duly licensed to practice in the States of New York and California, and in the District of Columbia, a partner of the law firm Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Class Counsel"), and I represent plaintiff Dr. D. Joseph Kurtz ("Plaintiff") in this action (the "Litigation" or "Action").[1]

2. I first began working in the class action litigation field in 2004 – 20 years ago – as a legal intern in the consumer group at Robbins Geller's national headquarters in San Diego during law school.[2] Following my internship, I worked as a law clerk at Robbins Geller during my last semester of law school, and subsequently on complex securities and antitrust cases for another national class action firm, before returning to Robbins Geller as a staff attorney in July 2006. I continued in that role – litigating complex consumer, antitrust, insurance and employment cases, and participating in case development, discovery, legal research and writing, expert and client collaboration, summary judgment, trial support, and settlement – as I transferred to Robbins Geller's Melville office in late 2012. In 2014, I became an associate attorney at the firm before being elected partner effective at the beginning of 2021.

3. I have been actively involved in the prosecution and resolution of the Litigation, am familiar with its proceedings, and have knowledge of the matters set forth herein based upon my involvement in this Litigation and supervision of or communications with other lawyers and staff assigned to this Litigation. I first began working on the Litigation in late 2014 in connection with what was to be the beginning of an extensive, years-long class certification process. By this time, I

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[1] All capitalized terms that are not otherwise defined herein have the same meanings ascribed to them in the Settlement Agreement and General Release. ECF No. 469-1 (the "Settlement Agreement").

[2] Robbins Geller is a leading complex litigation firm with some of the largest recoveries in history. *See* https://www.rgrdlaw.com/.

had been working exclusively on complex consumer, insurance, antitrust and employment actions as an attorney at Robbins Geller for over eight years, including on several major antitrust and consumer actions. In 2023, I was recognized as a Best Lawyer in America: One to Watch by *Best Lawyers*®. *See* https://www.rgrdlaw.com/; Robbins Geller Decl., Ex. I at 120.

4. At the time I began working on the Litigation, the case had been pending for only ten months, but Judge Weinstein had already denied Defendants' (defined below) motions to dismiss, ordered expedited class certification-specific discovery, and set a briefing schedule for motions for and to deny class certification. My former colleague, Mark S. Reich, was the partner in charge of the Litigation at the time. Mr. Reich is a 2000 graduate of Brooklyn Law School and has been licensed to practice in New York state and federal courts since 2001. By the time Mr. Reich initiated the Litigation in 2014, he was a partner at Robbins Geller and had extensive experience in complex litigation. He has been named a New York Super Lawyer by *Super Lawyers Magazine* every year since 2013. *See, e.g.*, https://zlk.com/position/partner. Mr. Reich left Robbins Geller and began working for another national complex litigation firm in 2021.

5. Attached are true and correct copies of the following exhibits:

Exhibit A	Class Action Settlement Agreement, *Darnall v. Dude Products, Inc.*, No. 2023LA000761 (Ill. Cir. Ct.) ("*Darnall* Settlement")
Exhibit B	Declaration of Jonathan Shaffer and Post-Distribution Accounting, *Pettit v. The Procter & Gamble Co.*, No. 3:15-cv-02150-RS (N.D. Cal.) ("*Pettit* Post-Distribution Decl.")
Exhibit C	Declaration of Derek Smith Regarding Notice Procedures, dated July 25, 2024, *Kurtz v. Kimberly-Clark, et al.*, No. 1:14-cv-01142-PKC-RML (E.D.N.Y.) ("Gilardi Decl.")
Exhibit D	Declaration of Dr. D. Joseph Kurtz in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees and Expenses, and Class Representative Payment, dated, July 25, 2024, *Kurtz v. Kimberly-Clark, et al.*, No. 1:14-cv-01142-PKC-RML (E.D.N.Y.) ("Kurtz Decl.")

Exhibit E	Transcript of Hearing taken on July 23, 2020, *Belfiore v. The Procter & Gamble Co.*, No. 2:14-cv-04090-PKC-RML (E.D.N.Y.), ECF No. 363 ("*Belfiore* Final Approval Hr'g Tr.")
Exhibit F	Declaration of Matthew Insley-Pruitt in Support of Plaintiff's Unopposed Motion for Final Approval of Settlement and Application for Attorneys' Fees, Reimbursement of Out-of-Pocket Expenses and Class Representative Payment, *Belfiore v. The Procter & Gamble Co.*, No. 2:14-cv-04090-PKC-RML (E.D.N.Y.), ECF No. 358-4 ("*Belfiore* Fee Decl.")
Exhibit G	Transcript of Hearing taken on September 19, 2023, *Kurtz v. Kimberly-Clark Corporation et al*, No. 1:14-cv-01142-PKC-RML (E.D.N.Y.) ("*Kimberly-Clark* Final Approval Hr'g Tr.")
Exhibit H	Lodestar Fee Exhibit, *In re Chembio Diagnostics, Inc. Sec. Litig.*, No. 2:20-cv-02706-ARR-JMW (E.D.N.Y.), ECF No. 124-8 ("*Chembio* Fee Exhibit")
Exhibit I	Transcript of Hearing taken on June 5, 2023, *In re Chembio Diagnostics, Inc. Sec. Litig.*, No. 2:20-cv-02706-ARR-JMW (E.D.N.Y.), ECF No. 131 ("*Chembio* Final Approval Hr'g Tr.")
Exhibit J	Transcript of Hearing taken on July 17, 2024, *In re Oatly Group AB Securities*, No. 21-cv-6360 (AKH) (S.D.N.Y.) ("*Oatly* Final Approval Hr'g Tr.")
Exhibit K	Transcript of Hearing taken on June 11, 2020, *Kaess v. Deutsche Bank AG*, No. 1:09-cv-01714 (GHW) (RWL) (S.D.N.Y.) ("*Deutsche Bank* Final Approval Hr'g Tr.")
Exhibit L	Excerpt of Final Fee Declaration of Morrison & Foerster LLP for Allowance of Compensation for Services Rendered as Counsel to the Official Committee of Unsecured Creditors, *In re Westmoreland Coal Co.*., No. 18-35672 (DRJ) (S.D. Tex. Br.), ECF No. 2173 ("Morrison & Foerster S.D. Texas Fee Application")
Exhibit M	Order Granting Final Approval of Class Action Settlement, *Belfiore v. The Procter & Gamble Co.*, No. 2:14-cv-04090-PKC-RML (E.D.N.Y.), ECF No. 361 ("*Belfiore* Final Approval Order")
Exhibit N	Final Judgment and Order of Dismissal with Prejudice, *Darnall v. Dude Products, Inc.*, No. 2023LA000761 (Ill. Cir. Ct.) ("*Darnall* Final Approval Order")

6. I respectfully submit this Declaration in support of: (1) Plaintiff's Motion for Final Approval of Class Action Settlement; (2) Class Counsel's Application for an Award of Attorneys'

Fees and Expenses; and (3) Class Representative Payment. This Declaration demonstrates why the proposed Settlement is fair, reasonable, adequate, in the best interests of the Settlement Class (defined below), and warrants final approval by the Court. This Declaration also demonstrates the basis for Class Counsel's request for an award of attorneys' fees of $2,849,015.75 and expenses of $150,984.25.

I. PRELIMINARY STATEMENT

7. This Settlement is the product of a long-term litigation strategy executed from the commencement of this Action in February 2014 until July 2022, when the case was stayed to finalize the parties' settlement efforts. The Settlement – itself the result of lengthy and intensive negotiations – was reached only after Class Counsel: (i) conducted a thorough investigation and drafted a detailed complaint; (ii) successfully opposed Defendants' motions to dismiss; (iii) issued subpoenas to over a dozen non-parties and received documents from many of them; (iv) took and defended numerous depositions; (v) obtained over half a million pages of documents from Defendants; (vi) submitted expert testimony during a two-day "Science Day" tutorial hearing before the Court, the transcripts of which span 335 pages; (vii) conducted intensive motion practice on class certification, including numerous rounds of briefing, multiple hearings, and an appeal to the Second Circuit; (viii) submitted, on remand from the Second Circuit, additional expert testimony during a four-day evidentiary "trial" – the transcripts of which span 886 pages – and briefed related *Daubert* motions; (ix) responded to Defendants' second appeal to the Second Circuit upon a fuller record; and (x) engaged in four good-faith mediations or settlement sessions, in addition to copious mediator-assisted follow-up, before reaching this Settlement.

8. The gravamen of Plaintiff's claims is that Costco marketed its moist toilet wipes as "flushable" when they were not, in fact, suitable for flushing down a toilet. Costco charged more for

"flushable" wipes as compared to non-flushable wipes. Consumers such as Plaintiff were injured in that they paid extra for something they did not receive.

9. Following formal settlement discussions in 2016 and 2020, Plaintiff and Costco again attempted to reach a settlement in 2022. These discussions – which spanned over an entire year, culminating in this Settlement – were facilitated by mediator Michael Ungar, Esq. Mr. Ungar has considerable experience with the claims at issue here, having facilitated the settlements of at least two other flushable-wipes actions, one of which also involved Costco, and both of which involved defense counsel in this action.

10. The settlement talks in this Action not only encompassed dozens of telephone calls between the Settling Parties and Mr. Ungar, but also two separate mediation sessions in May 2022 and November 2022. This was a true mediator-assisted negotiation, with Mr. Ungar staying actively involved over the course of a year leading up to execution of the Settlement.

11. Under the Settlement, each Settlement Class Member who currently maintains a Costco membership, and each Settlement Class Member without a current membership but who submits a Valid Claim, will receive a minimum payment of $7.50 regardless of how many packages of the Product were purchased. Any Settlement Class Member who purchased more than five packages will receive $1.30 per package, for a maximum recovery of $55.90 (*i.e.*, for a maximum of 43 packages). The per package and guaranteed minimum payments are believed to be more than in any flushable wipes-related settlement to date.

12. Besides the excellent relief, the Settlement is noteworthy for the significant expected participation rate and ease by which most Settlement Class Members can receive payments. First, because Costco maintains contact information – including email addresses, physical addresses and purchase records – for its customers, direct notice of the Settlement (via email or U.S. mail) reached

the overwhelming majority of the Settlement Class (estimated to be roughly 95%). Second, because a majority of Settlement Class Members are current Costco members, the majority of payments will be issued ***automatically***, without the need to submit a claim.

13. In opting to settle the Action, Plaintiff and Class Counsel carefully weighed the risks of proving the claims alleged in the Complaint. For example, Costco continues to maintain that its Kirkland Signature Flushable Moist Wipes were, in fact, flushable. Further, Costco challenges Plaintiff's calculation of the price premium attributable to the allegedly deceptive flushability claim. Costco could also argue that the class period in this case can extend no further than 2014, because the Federal Trade Commission ("FTC") entered into a consent order with the manufacturer of the Product, Nice-Pak, governing flushable wipes manufactured after that time – thereby assuming "primary jurisdiction" over any claims arising thereafter. Although Plaintiff disputed (and continues to dispute) those assertions, it was clear that Defendants would attempt to marshal evidence in support of these arguments as the Action progressed, including at summary judgment and trial.

14. Class Counsel also request that the Court approve a fee and expense award (including court costs) not to exceed $3,000,000, along with a Class Representative Payment of up to $10,000 for Dr. Kurtz as compensation for his time and effort undertaken in the Action as to Costco. Settlement Agreement ¶¶6.1-6.2. To date, counsel have prosecuted this Action as to Costco on a wholly contingent basis while advancing substantial expenses. In doing so, Class Counsel shouldered the substantial risk of an unfavorable result in a challenging case and have not received any compensation for its efforts in achieving the Settlement thus far.

15. Based on the above, and as described more fully below, Class Counsel respectfully submits that the proposed Settlement, attorneys' fees, and Class Representative Payment are fair and reasonable and warrant final approval by the Court.

II. THE NATURE AND PROCEDURAL HISTORY OF THE LITIGATION

A. Summary of the Allegations

16. This is a class action lawsuit brought against Costco Wholesale Corporation ("Costco" or "Defendant") and Kimberly-Clark Corporation ("Kimberly-Clark," together with Costco, "Defendants") alleging that Defendants falsely labeled and advertised their moist toilet wipe products as "flushable."[3] As described in the Complaint, Plaintiff alleges that Defendant's "flushable" wipes products (the "Product")[4] were unsuitable for flushing, making them improperly labeled as "flushable" or "safe for sewer and septic systems." ¶¶29, 30, 86.[5] Since Costco's "flushable" wipes did not perform as represented on their packaging, Plaintiff alleged that he and members of the then-putative Classes suffered economic injury when they purchased Costco's "flushable" wipes. ¶¶89, 94, 116, 122. Specifically, Costco's false and deceptive marketing and labeling of its wipes as "flushable" caused Plaintiff and members of the Classes to pay a premium attributable to the "flushable" representation. ¶¶78-82.

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[3] The Court finally approved Dr. Kurtz' settlement with defendant Kimberly-Clark on January 17, 2024, resolving his claims in this Action and the related claims in *Honigman v. Kimberly-Clark Corp.*, No. 15-cv-2910-PKC-RML. *Kurtz v. Kimberly-Clark Corp.*, 2024 WL 184375 (E.D.N.Y. Jan. 17, 2024). This Declaration addresses Dr. Kurtz's settlement with Costco. Because Dr. Kurtz's claims against Costco and Kimberly-Clark were brought in the same action, however, this Declaration discusses Kimberly-Clark as well where relevant.

[4] The Product is defined by the Settling Parties as Costco's flushable wipes sold in New York during the Settlement Class Period under the Kirkland Signature Moist Flushable Wipes brand. Settlement Agreement ¶1.25.

[5] References to "¶__" and "¶¶__" refer to the Class Action Complaint (the "Complaint"), filed on February 21, 2014. ECF No. 1.

B. Procedural History of the Litigation and Settlement

1. Initial Investigation and Complaint

17. Class Counsel's preliminary investigation included extensive flushable wipes market research, a factual investigation that included scouring available media for developing stories about flushable wipes, interviews with consumers about their experience with flushable wipes, and legal research into possible causes of action. The Complaint alone cites about 100 different sources – dozens of company webpages, dozens of news articles, and dozens of customer reviews – demonstrating that Defendants' products did not perform as advertised. *See generally* ECF No. 1.

18. The Complaint, filed on February 21, 2014, seeks damages and injunctive relief under, *inter alia*, New York's General Business Law ("GBL") §§349 and 350, on behalf of state and nationwide classes of purchasers of Costco and Kimberly-Clark flushable wipes. This Action, to Class Counsel's knowledge, was the first of its kind to allege misrepresentations by a manufacturer or retailer regarding their "flushable" wipes products. No playbook had yet been written. Plaintiff did not simply follow in the wake of a government investigation. To the contrary, as discussed *infra*, the FTC first initiated a complaint and proposed consent order against Nice-Pak – the manufacturer of the wipes Costco sells under the Kirkland Signature label – over a year ***after*** this Action began.

2. Defendants' Motions to Dismiss and Initial Status Conferences

19. Following the filing of the Complaint, the case was assigned to Senior Judge Jack B. Weinstein and Magistrate Judge Robert M. Levy. On May 5, 2014, Costco filed its motion to dismiss, to which Dr. Kurtz responded on July 1, 2014, and Defendant filed its reply on August 1, 2014. ECF Nos. 20-21, 30, 35.

20. The Court held an initial conference on July 18, 2014, a hearing on the motion to dismiss on August 18, 2014, and a status conference in both the *Kurtz* Action and a related action, *Belfiore v. Procter & Gamble Co.*, No. 2:14-cv-04090 (E.D.N.Y.) (the "*Belfiore* Action"), on

November 14, 2014, at which expedited discovery and briefing schedules were established.[6] ECF No. 51. In advance of the November 14, 2014 status conference, Judge Weinstein instructed the parties to be prepared to "discuss potential relationships and the similarity of issues, if any, between" the *Kurtz* Action, the *Belfiore* Action, and several other actions pending throughout the country. ECF No. 43; *see also* ECF No. 39 (letter from Judge Weinstein to three other judges, observing that "similarities could lead to complications in individual adjudications"). Specifically, Judge Weinstein instructed that "the parties shall be prepared to discuss staying the class allegations and proceeding with individual bellwether trials for plaintiff *Kurtz* and plaintiff *Belfiore*. The question of the court's jurisdiction to hold individual bellwether trials should be considered, as should the effect of issue preclusion, in particular whether, if defendants lose on one or more claims, other plaintiffs in separate proceedings could invoke this court's findings." ECF No. 45.

21. On November 18, 2014, the Court denied Defendants' motions to dismiss, and referred the case to Magistrate Judge Levy for expedited discovery limited to class certification issues. ECF No. 49. Defendants filed their answers to Dr. Kurtz's complaint on December 15, 2014. ECF Nos. 58-59.

3. Preliminary Discovery, Class Certification Briefing, and Related Developments

22. Following the Court's order granting expedited class certification discovery, the parties moved quickly into the discovery phase of the litigation. The parties submitted a proposed protective order on August 15, 2014 (ECF No. 36-1) and exchanged initial disclosures, document requests and interrogatories on November 24, 2014.

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[6] The *Belfiore* Action was originally filed in the Supreme Court of the State of New York, County of Nassau, on May 23, 2014, and was subsequently removed to the Eastern District of New York on July 1, 2014, where it was coordinated with, and proceeded along a parallel track with, the *Kurtz* Action. On July 27, 2020, the Court issued an order in the *Belfiore* Action finally approving a class action settlement resolving plaintiff's claim under GBL §349. *Belfiore* Action ECF No. 361.

23. Plaintiff issued or coordinated the issuance of more than a dozen subpoenas containing requests for the production of documents on various non-parties – including wastewater districts (*e.g.*, Orange County Sanitation, Plainfield Area Regional Sewerage Authority), municipalities (*e.g.*, City of Vancouver), industry groups (*e.g.*, INDA, NACWA), market data providers (IRI) and retailers (*e.g.*, Amazon.com, Inc. ("Amazon"), Drugstore.com, Inc. ("Drugstore.com")) – between late November 2014 and early January 2015. Class Counsel reviewed and reproduced to Defendants over 12,000 documents (over 52,000 pages) that they obtained from these third parties.

24. Defendants inspected Dr. Kurtz's home plumbing systems on December 8 and 9, 2014. On December 10, 2014, the parties conducted Dr. Kurtz's deposition. Class Counsel took 30(b)(6) depositions of third party Nice-Pak on January 29, 2015 (Jeffrey Hurley) and February 9, 2015 (Kim Babusik) and Costco on February 13, 2015 (Kim Walior), in addition to four depositions relating to Kimberly-Clark.

25. In September 2014, Costco began its rolling production of documents in connection with class certification, and continued producing documents through February 2015. Costco's productions included, among other things, documents from Nice-Pak pertaining to testing protocols and results, labeling, market and consumer research, trade organizations, communications with municipalities, and customer complaints.

26. In response to Defendants' discovery requests, Dr. Kurtz completed his production of documents on December 9, 2014. Dr. Kurtz's productions included his retention letter with counsel in this action, the invoice for plumbing services rendered to his Brooklyn home, a purchase receipt from Costco, and the blue prints for his Brooklyn home.

27. In addition to the documents it produced in late 2014 through early 2015, Costco would, over the course of the litigation, make further productions in 2019, and then again in late 2021 through early 2022. In all, Costco produced 81,433 documents (236,754 pages). Kimberly-Clark produced over 54,000 documents (over 292,000 pages), many of which also proved relevant to Plaintiff's claims against Costco.

28. Between February and May 2015, the parties submitted numerous briefs in connection with their motions for and to deny class certification, along with supporting expert reports. ECF Nos. 81-92, 100-107, 115-130. Dr. Kurtz submitted an expert report from Colin B. Weir, Vice President of Economics and Technology, Inc., on the issue of damages (and relatedly, injury), while Costco submitted rebuttal expert reports from Dr. Denise Martin, Senior Vice President at National Economic Research Associates, Inc., and a report from John T. Boyer, who opined as to the condition of Plaintiff's plumbing system.

29. In June and July 2015, the Court held a two-day "Science Day" evidentiary hearing so that it could better understand how "flushable" wipes work and perform. ECF Nos. 299, 301. At the Science Day hearing, Class Counsel presented the testimony of Robert A. Villée, the former Executive Director of the Plainfield Area Regional Sewerage Authority ("PARSA") and Water Environment Federation ("WEF") Collection Systems Committee Chair, and environmental engineer Daniel H. Zitomer. On behalf of Costco, Science Day included testimony from Costco's witness, Jeffrey Hurley, Vice President for Nonwovens for Nice-Pak Products Inc. The transcripts of the Science Day hearings span 335 pages. *Id*.

30. On October 5, 2015, the Court issued a 92-page preliminary ruling on class certification in the related *Belfiore* Action. ECF No. 180. The Court concluded that the plaintiff satisfied all Rule 23 prerequisites, except for Rule 23(b)(3)'s superiority requirement because the

FTC was "better suited to protect consumers nationally as well as those in New York. Not only does the FTC's mandate encompass investigating deceptive practices in the labeling of consumer goods, the agency is *already* considering 'flushable' claims made by this defendant, and those of at least one other manufacturer." *Id*. at 77 (emphasis in original). Consequently, the Court stayed the *Belfiore* Action and referred the flushability issue to the FTC.

31. On October 9, 2015, the Court heard argument on the class certification-related motions in the present Action. *See* ECF No. 182. A few days later, however, the Court stayed the Action, along with three other related cases,[7] pending any action by, or resolution with, the FTC. ECF No. 183.

32. On October 30, 2015, the FTC entered into a consent order with Nice-Pak, Inc., the manufacturer of the wipes Costco sold under the Kirkland Signature label. Under the consent order, any tests, analyses, research, studies, or other evidence purporting to substantiate a claim of flushability must at least:

> A. demonstrate that the Covered Product disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment; and
>
> B. substantially replicate the physical conditions of the environment in which the Covered Product is claimed, directly or indirectly, expressly or by implication, to be properly disposed of; or, if no specific environment is claimed, then in all environments in which the product will likely be disposed of.

ECF No. 207-1 at 3.

33. On November 10, 2015, Dr. Kurtz moved to lift the stay of the Actions, arguing that the FTC's consent order provided an appropriate definition of "flushability" and framework for

[7] Those actions include: *Armstrong v. Costco Wholesale Corp. & Nice-Pak Products, Inc.*, No. 2:15-cv-2909 (E.D.N.Y. May 19, 2015); *Palmer v. CVS Health & Nice-Pak Products, Inc.*, No. 2:15-cv-2928 (E.D.N.Y. May 20, 2015); and *Richard v. Wal-Mart Stores, Inc. & Rockline Indus.*, No. 1:15-cv-4579 (E.D.N.Y. Aug. 5, 2015). These cases are no longer pending.

substantiating manufacturers' and marketers' "flushable" claims. ECF Nos. 205-206. After holding a hearing on the motion on December 7, 2015, the Court denied Dr. Kurtz's motion to lift the stay, noting that the FTC was continuing to investigate additional "flushable" wipes manufacturers, including two defendants in the actions over which the Court was then-presiding, and that it was possible that the FTC would take further action with respect to Plaintiff's claims. ECF No. 216.

34. The following year, in August 2016, the Court directed the parties in six related actions to submit briefing on the further administration of the litigation. ECF No. 233. In his brief, Dr. Kurtz argued that recent developments supported lifting the stay in the parallel actions, including that the FTC stated in a letter to counsel in the *Belfiore* Action that: (1) it would not respond further to the Court's referral; (2) the final consent order with Nice-Pak can provide guidance to private cases such as these; and (3) by virtue of the agency's administrative design, it is unable to conduct an aggregate adjudication of the related actions as the Court suggested. ECF No. 242. Costco submitted a brief that included additional argument on class certification. ECF No. 245.

35. The Court held various status and/or settlement-related conferences in September, October and December 2016, and invited further briefing on how the cases should proceed. *See, e.g.*, ECF Nos. 248, 262. On November 18, 2016, the Court issued an order in the Action and five related actions regarding an upcoming conference on the disposition of the cases. ECF No. 259. In the order, Judge Weinstein explained that the "litigation has now reached a critical point where it must be brought to a conclusion." *Id*. at 3. He discussed the "inherent design problem" in a product that "is a useful one of importance to a large number of people," and the related problem that "these products end up in municipal plants in large numbers. They may block the sewage disposal machinery." *Id*. at 3-4 (referencing two municipal wastewater actions relating to flushable wipes). Judge Weinstein suggested numerous avenues to proceed that would deal "with the kind of multiple-

plaintiff versus multiple-defendant national consumer problems presented in a matter such as the instant federal litigation" with "great civic importance," including, *inter alia*, aggregate agency adjudication, multidistrict consolidation, transfer and consolidation, and settlement of all cases by all parties. *Id.* at 5-11.

36. At the December 7, 2016 hearing, the Court lifted the stay to allow the parties to submit additional briefing on various issues, including "motions to terminate or transfer the instant cases." ECF No. 263.

37. On December 30, 2016, Costco renewed its motion to deny Dr. Kurtz's motion for class certification, and to thereafter dismiss all claims for injunctive relief and to stay claims for damages pending interlocutory appeals by Costco. ECF No. 270. Costco's argument against injunctive relief was based on the doctrine on "prudential mootness," as follows. The FTC's consent order required Nice-Pak to meet certain objective standards in order to market wipes as "flushable." It did not, however, forbid Nice-Pak from marketing its current (2015) iteration of wipes as "flushable." According to Costco, this signified the FTC's approval of the current iteration. *See* ECF No. 280 at 23. Plaintiff's claim for injunctive relief was therefore moot, Costco argued, because Nice-Pak was anyway bound by – and complying with – appropriate flushability standards. Judge Weinstein summarized Costco's position as follows:

> Defendants also argue injunctive relief may be "prudentially moot" because the FTC has already provided the plaintiffs with all the relief they could be accorded through an injunction. . . . Kimberly-Clark and Costco assert that the FTC's actions amount to a tacit approval from the FTC for the current Kimberly-Clark and Costco products, and this tacit approval obviates any need for an injunction impacting the current versions of their products. Without conceding that their products ever violated the law, defendants proclaim that the FTC's actions make clear that the products now on the market as packaged definitely do not contravene law.

ECF No. 296 at 107-08.

38. Plaintiff responded to Defendant's brief on January 13, 2017, including by submitting a declaration of Mr. Villée further evidencing that Defendant's wipes did not break down sufficiently to meet any definition of "flushable" considered by the Court. ECF Nos. 272-273. With respect to the mootness argument, Plaintiff responded that the FTC's *silence* on the new iteration of Nice-Pak's wipes does not necessarily signify *approval* of that iteration; and that, in any event, the new iteration was still demonstrably not flushable, regardless of what the FTC may think. Costco replied on January 20, 2017. ECF No. 280.

39. The Court held further class certification-related hearings in the *Kurtz* and *Belfiore* matters on February 2 and 3, 2017, at which the Court asked Plaintiff to submit letters defining the classes on whose behalves they sought to certify, and expressed its intent to grant class certification. On February 17, 2017, Costco and Kimberly-Clark submitted a letter and a memorandum, respectively, challenging the Court's tentative class certification ruling during the February 2-3 hearings. ECF Nos. 286-287.

40. On March 27, 2017, the Court issued a 131-page order certifying a class as to Costco consisting of "all persons and entities who purchased Kirkland Signature Flushable Wipes in the State of New York between July 1, 2011 and March 1, 2017."[8] ECF No. 296 at 130 (the "Certification Order").

41. With respect to the injunctive class, the Court acknowledged that Costco, out of all the defendants (Costco, Kimberly-Clark, and Proctor & Gamble), "has the strongest argument" for mootness, in that "Nice-Pak promised to only make flushability claims it could substantiate with 'competent and reliable evidence.'" *Id.* at 110. Nevertheless, the Court certified the injunctive class,

[8] The Certification Order also certified a class of New York purchasers of Kimberly-Clark's flushable wipes in this Action, and a class of New York purchasers of Procter & Gamble's Charmin flushable wipes in the *Belfiore* Action.

because a "mere . . . promise" to the FTC "does not assure" that Costco "will do 'the right thing' in a relabeling that might reduce sales and profits." *Id.*

4. Defendants Appeal the District Court's Class Certification Order, and the Second Circuit Remands for Further Development of the Record

42. Following the Certification Order, Defendants petitioned for appellate review of the order under Rule 23(f). ECF No. 297. The Second Circuit Court of Appeals granted their petitions. Defendants filed their opening appellate briefs on September 27, 2017, with Costco defining the statement of the issues as follows: (1) whether the District Court erred in applying a presumption in favor of class certification; (2) whether the District Court erred in certifying a Rule 23(b)(3) damages class when Dr. Kurtz failed to present evidence of common, predominating questions on the issues of misrepresentation, injury, and causation; and (3) whether the District Court erred in holding that Dr. Kurtz has Article III standing for a Rule 23(b)(2) injunctive class to enjoin the sale of products that he has no intention of repurchasing. Dr. Kurtz filed his response on December 27, 2017, and Defendants filed their reply briefs on January 24, 2018. *See Kurtz v. Kimberly-Clark Corp., et al*., No. 17-1856 (2d Cir.), ECF Nos. 61, 62, 82, 103, 104.

43. In particular, many of Defendants' arguments focused on the element of predominance, which permits class certification only if common, class-wide questions "predominate" over individualized ones. Fed. R. Civ. P. 23(b)(3). For instance, Costco argued that the advertised quality of "flushable" likely means different things to different consumers, with each consumer caring only whether the wipe will clear *her own* unique toilet and septic system. This, according to Costco, makes flushability an inherently subjective quality, precluding resolution of Plaintiff's core claim – that Costco's labeling was deceptive – on a uniform, class-wide basis. *See Kurtz v. Kimberly-Clark Corp., et al*., No. 17-1856 (2d Cir.), ECF No. 62 at 27-38. Costco also criticized Plaintiff's expert, Mr. Weir, for failing to submit "actual *evidence*" of classwide injury,

instead "simply identifying" an "as-yet undeveloped" model that "*might* be able to" show such injury. *Id.* at 38-43 (both emphases in original). Additionally, Costco challenged the District Court's certification of an injunctive class, reasoning that Dr. Kurtz lacks standing to enjoin Costco's future marketing because he personally has no intention of buying more flushable wipes anyway, so he cannot meet Article III's threshold requirement of "'imminent,' 'certainly impending' injury." *Id.* at 56 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564-67 & nn.2-3 (1992)).

44. After oral argument, heard on April 10, 2019, the Court of Appeals concluded it "cannot decide whether the Defendants' predominance argument has merit," so it remanded for "further development of the record" on predominance. *Kurtz v. Costco Wholesale Corp.*, 768 F. App'x 39, 40 (2d Cir. 2019). "In particular," the Second Circuit instructed the District Court to address – "after receiving any additional submissions from the parties and their experts" – whether Plaintiff's expert, Mr. Weir, "can apply hedonic regression[9] analysis to establish on a classwide basis whether the class members paid a price premium for Defendants' products attributable to the 'flushable' representation." *Id.* at 40-41.

5. Post-Remand Evidentiary Hearings, and the District Court's Second Class Certification Order

45. On May 16, 2019, Judge Weinstein issued an order setting an evidentiary hearing in *Kurtz* and *Belfiore* per the Second Circuit's mandate. ECF No. 311. The Court then held an in-person case management conference on June 18, 2019, where it set hearing dates beginning August 6, 2019. ECF Nos. 324, 325, 336.

[9] Hedonic regression is a tool that purports to measure the value of various product attributes. Mr. Weir used this tool "to demonstrate the existence of, and to isolate the amount of, a price premium attributable to defendants' use of 'flushable' in merchandising." *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 523-24 (E.D.N.Y. 2017) (citing *Belfiore* Weir Expert Report ¶15; *Kurtz* Weir Expert Report ¶19).

46. Plaintiff moved expeditiously to obtain data for Mr. Weir's analysis, obtaining several document productions from Costco between July 2 and 16, 2019. Mr. Weir also conducted product research, reviewing labels and other materials on various wipes on the market to understand the claims that they made on their packaging.

47. While ordinarily taking 2-3 months to conduct a hedonic regression from scratch, Mr. Weir performed his work in a few weeks to meet the court's expedited schedule. Given the compressed timeframe, he utilized the framework he established in *Pettit v. Proctor & Gamble*, No. 3:15-cv-2150 (N.D. Cal.), another "flushable" wipes case where a California district court granted class certification based on Mr. Weir's hedonic regression methodology.

48. Plaintiff served and filed Mr. Weir's supplemental expert report as to Costco on July 16, 2019. ECF No. 339-1. Mr. Weir sat for a deposition in the related *Belfiore* Action on July 26, 2019 (at which Class Counsel was present), and each defendant filed its respective rebuttal expert report on July 30, 2019. *E.g.*, ECF Nos. 342-1, 343-1. Costco produced materials in connection with Dr. Martin's report on July 31 and August 1-2, 2019.

49. Mr. Weir's hedonic regression analysis was designed to identify the effect that the "flushability" attribute had on the Product's price, isolating that effect from the effects of various other advertised attributes such as number of sheets, package type, baby & toddler/adult, travel pack, alcohol free, hypoallergenic, aloe & vitamin E, sensitive/gentle claims, etc. ECF No. 382 (the "Remand Order"), at 10 (citing Weir Suppl. Decl. Costco ¶58). After controlling for these other factors, Mr. Weir concluded that the flushability claim increased the Product's price by 8.5619%. *Id.* at 12 (citing Weir Suppl. Decl. Costco ¶82).[10]

[10] For comparison, the price premiums for Kimberly-Clark's and Proctor & Gamble's "flushable" wipes were found by Mr. Weir to be 6.215% and 7.95%, respectively. *Id.* (citing Weir Suppl. Decl. Kimberly-Clark ¶79; Weir Suppl. Decl. Procter & Gamble ¶77).

50. Defendants' experts put forward a number of challenges to Mr. Weir's methodology. For example, Costco's expert Dr. Martin noted that all of Costco's flushable wipes purport to be for adults. This, she maintained, makes it impossible to isolate the effect of the "flushable" claim, as the price premium could be due to the "adult" claim instead. *Id.* at 16 (citing Costco Martin Suppl. Decl. ¶¶7-18). Dr. Martin also criticized Mr. Weir for calculating an average price premium across all retailers and brands rather than specific to Costco, and for ignoring the possibility that the discrepancy in price between Costco's flushable and non-flushable wipes could be because of volume discounting. *Id.* at 16-17 (citing Costco Martin Suppl. Decl. ¶¶19-21, 22-24).

51. Between August 6 and 12, 2019, the Court held four days of evidentiary hearings in the *Kurtz* and *Belfiore* matters. ECF Nos. 384-387. Dr. Kurtz presented Mr. Weir's testimony, which expanded on his conclusions that hedonic regression analysis determined class-wide price premiums attributable to the "flushable" representation, and defended his work against criticisms raised by Defendants' experts. The court also received testimony from Defendants' experts: Dr. Martin for Costco, Dr. Ugone for Kimberly-Clark, and Dr. Carol A. Scott for Procter & Gamble, subject to cross-examination and re-direct. Mr. Weir gave rebuttal testimony, providing additional hedonic regressions that accounted for certain of Defendants' critiques. The transcripts of the evidentiary hearings span 886 pages.

52. Following the evidentiary hearing, the court permitted two rounds of supplemental briefing on predominance issues. ECF Nos. 358, 364, 367. Defendants' briefing added *Daubert* challenges to the admissibility of Mr. Weir's expert opinions. The court held an additional hearing on October 8, 2019 to address these issues.

53. On October 25, 2019, the Court issued an order reasserting its 2017 Certification Order. Remand Order, ECF No. 382. Judge Weinstein found, based on the newly developed

evidentiary record, that "Plaintiffs have met their burden and produced common proof of causation and injury. Individualized issues do not predominate." *Id.* at 26. As to Defendants' argument that "flushable" means different things to different people, Judge Weinstein explained that the injury alleged here arose "at the time of purchase" when Plaintiff paid an inflated price. *Id.* at 25. "Individual understanding of the term 'flushable,' experiences of flushability after purchase, or even motivations for purchase do not affect the price paid at the cash register." *Id.* Judge Weinstein also denied Defendants' motion to strike Mr. Weir's testimony, finding that he "was credible and demonstrated his methodology to be reliable." *Id*. at 2. As to Defendants' criticism that Mr. Weir calculated an average price premium across the market rather than specific to Costco, Judge Weinstein responded that "there is a *marketwide inflation of price by a particular calculable percentage*. For *every* flushable wipe product purchased, the consumer paid more because of the flushable misrepresentation." *Id.* at 25-26 (emphasis in original).

6. Second Class Certification Appeal

54. Thereafter, on November 4, 2019, the Court of Appeals granted the parties' request to reinstate the appeals in *Kurtz* and *Belfiore* and ordered further briefing. The parties filed their supplemental post-remand appellate briefs in January and March 2020, and Defendants filed reply briefs on April 24, 2020. *Kurtz v. Kimberly-Clark Corp., et al*., No. 17-1856 (2d Cir.), ECF Nos. 237-259, 274-275.

55. Costco made a number of forceful arguments in its second appeal against class certification, including the following:

(a) Mr. Weir's opinion should be excluded under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), based on multiple deficiencies;

(b) Hedonic regression works only in narrow circumstances – perfectly competitive market, cleanly defined attribute of interest, and non-collinearity – that are missing here;

(c) Because Mr. Weir's hedonic regression calculated the *average* price premium across all retailers and brands, it cannot prove that *Costco* charged a premium. It is possible that the ~8% market-wide premium is the result of high-end stores charging 16% extra and discount stores – such as Costco – charging 0% extra;

(d) Although Mr. Weir's hedonic regression controlled for factors such as package type and hypoallergenic, it failed to control for three highly salient factors: cleaning effectiveness, moistness, and thickness;

(e) Small changes to Mr. Weir's methodology – such as excluding from the dataset small, expensive travel packs that are not comparable to Costco's bulk products – yielded radically different results, even suggesting a *negative* coefficient for the "flushable" attribute; and

(f) Even if Costco did charge extra based on the "flushable" claim, it does not follow that consumers were injured. If a consumer would *anyway* have paid that much (or more) even without the flushability claim, then she was not harmed by the higher price. The question of injury, therefore, is necessarily individualized based on what each class member would have done in the absence of Defendants' alleged misrepresentations. *See generally Kurtz v. Kimberly-Clark Corp., et al*., No. 17-1856 (2d Cir.), ECF No. 237.

56. Plaintiff meticulously countered each of these arguments, explaining, once again, that hedonic regression is a widely accepted method; that Mr. Weir structured his regression carefully, and had good reasons for choosing the factors he chose and excluding certain others; that Defendants' experts' quibbles with Mr. Weir's regression cannot make up for the fact that *they* did

not perform *any* regression; and that a consumer's subjective valuation of a product does not negate the fact that she paid extra for a feature she did not receive. *See generally id.*, ECF No. 258.

57. On June 26, 2020, the Court of Appeals affirmed the Certification Order as to the damages classes under Rule 23(b)(3), noting, among other things, that "Weir's model accounts for a wide range of variables, some of which are substantial drivers of consumer purchases." *Kurtz v. Kimberly-Clark Corp., et al.*, No. 17-1856 (2d Cir. June 26, 2020), ECF No. 293-1 at 7. The Court of Appeals concluded:

> Defendants' central contention is that Weir's analysis either does not or cannot establish a price premium because of issues such as an incomplete dataset, flawed parameters of the regression, or business considerations not captured by the model. A factfinder may ultimately agree. But if that is the case, then the class claims will fail as a unit. Accordingly, the district court did not abuse its discretion in concluding that class issues predominate.

Id. at 8-9.

58. As to the injunctive relief classes under Rule 23(b)(2), however, the Court of Appeals reversed, reasoning that without "any stated intention to buy additional flushable wipes products in the future, [Dr.] Kurtz has not pleaded an injury that is 'actual and imminent, not conjectural or hypothetical.'" *Id.* at 6 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).[11]

59. Upon remand, the case was reassigned to Judge Pamela K. Chen after Senior Judge Weinstein – who oversaw *Kurtz* and other related matters since 2014 – recused himself on February 12, 2020.

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[11] During briefing of the second appeal, Defendants filed reply briefs. *Kurtz v. Kimberly-Clark Corp., et al.*, No. 17-1856 (2d Cir.), ECF Nos. 274, 275. Dr. Kurtz moved to strike Defendants' replies, as the Court of Appeals had authorized only one brief for each party: Appellants' opening brief and Appellees' answering brief. *Id.*, ECF No. 279 ¶2. The Court of Appeals granted Dr. Kurtz's motion. *Id.*, ECF No. 293-1 at 3 n.2.

7. Post-Appeal Litigation

60. On September 8, 2020, with the damages class certified and the case now back at the District Court, Defendants requested a pre-motion conference on their anticipated motions for summary judgment. ECF Nos. 403, 404. Drawing on the evidence obtained during class certification, Costco argued that Dr. Kurtz would be unable to prevail on his claims under N.Y. GBL §§349 and 350, for at least three reasons:

(a) Dr. Kurtz was not deceived by the "flushable" representation, because, as he himself understood it, that representation meant the Product could pass through *his* pipes without issue – which it did;

(b) A required element under N.Y. GBL is "causation," meaning the defendant's alleged deception must have caused the plaintiff's injury. Dr. Kurtz, however, would have bought the Product with or without Defendant's allegedly deceptive flushability claim – as evidenced by the fact that he continued buying the Product even after coming to mistrust that claim because he valued the Product's other characteristics; and

(c) There is no evidence that a price premium even existed, because "[a]s Mr. Weir admitted, his model does not purport to demonstrate that any particular class member—including [P]laintiff—actually paid a price premium. Rather, what Mr. Weir calculated was an *average* price premium that applied to *all brands and retailers* included in his data set." ECF No. 404 at 2-3 (emphasis in original).

61. Plaintiff responded on September 23, 2020 (ECF Nos. 405-406), explaining that Costco's arguments largely ignored what Judge Weinstein and the Second Circuit said at class certification. Plaintiff framed the issues as follows:

> To be clear, the District Court did not certify a damages class relating to plumbing damages. Rather, this action solely focuses on class members' payment of a price premium for so-called "flushable" wipes at the moment the consumer transaction

> takes place – ***at the cash register*** – based on the false and misleading representation, in the ***actual name*** of the product itself, that Costco's wipes were safe to flush as marketed.
>
> The scope of the certified GBL claims and available damages is significant because it obviates the need for this Court or trier of fact to consider, *inter alia*: (1) how Dr. Kurtz or class members used Costco's flushable wipes; (2) where Dr. Kurtz used Costco's flushable wipes; (3) whether or why Dr. Kurtz continued to use Costco's flushable wipes; or (4) which characteristics of Costco's flushable wipes Dr. Kurtz valued more than others.

ECF No. 406 at 1 (emphasis in original). And because merits discovery had yet to begin, Plaintiff argued that Costco's arguments were premature. *Id*. at 2.

62. This Court held a telephonic pre-motion conference on October 22, 2020. ECF No. 416. Rejecting Defendants' arguments, the Court observed that "[n]o discovery has been taken on the merits and there has only been class certification discovery[,]" so "it would be a poor use of everybody's time and certainly the Court's time to address the summary judgment motion at this stage of the proceedings." *Id.* at 28-29. Costco and Kimberly-Clark agreed to delay filing their motions for summary judgment, if at all, until the conclusion of fact and expert discovery.

63. On November 25, 2020, the Court set dates for discovery and dispositive motions, which were extended on several occasions, including to allow the parties to focus on settlement discussions. In the interim, the Action continued into fact discovery. Plaintiff and Defendants negotiated an ESI protocol in the Spring and Summer of 2021, which was finalized on July 26, 2021. ECF No. 417. Thereafter, the parties met and conferred as to the scope of discovery, and exchanged correspondence regarding discovery. As noted above, Costco has produced 81,433 documents (236,754 pages) to date.

8. Settlement Negotiations and Preliminary Approval

a. Settlement Negotiations

64. While the Court repeatedly urged settlement discussions between the parties early in the Action (*e.g.*, ECF Nos. 202 at 8-9, 249 at 7:14-24, 259 at 3-14), Plaintiff and Costco first engaged in preliminary settlement discussions with Magistrate Judge Levy in a settlement conference on January 14, 2016. The Settling Parties attended their first mediation in February 2020 with mediator David Geronemus, Esq. In connection with that mediation, the parties provided the mediator with a joint procedural statement and exchanged nearly 50 pages worth of mediation briefs. The discussion, however, ultimately proved unsuccessful. Up until this point, Costco was represented by attorneys at Morrison & Foerster LLP. By 2021, however, Costco had hired new attorneys from the law firm Tucker Ellis LLP. Class Counsel raised the prospect of settlement with Costco's new counsel in late August and September 2021, and the parties engaged in informal discussions during this time.

65. The discussions that led directly to this Settlement, however, began in approximately early March 2022, when the parties discussed the possibility of mediation. They ultimately selected mediator Michael Ungar, Esq., a respected neutral with considerable consumer mediation experience who has successfully mediated settlements in other flushable wipes cases including *Meta v. Target Corp.*, *et al.*, No. 4:14-cv-00832 (N.D. Ohio), and three settlements with five defendants in *Commissioners of Public Works of the City of Charleston v. Costco Wholesale Corp., et al.*, No. 2:21-cv-00042 (D.S.C.) (the "*Charleston* Action"). The parties participated in a virtual mediation in May 2022 with Mr. Ungar. In advance of the mediation, the parties exchanged and submitted mediation briefs and Class Counsel and Plaintiff exchanged drafts of a proposed term

sheet with Costco.[12] Following the May 2022 session, the parties made substantial progress and continued negotiations, including continuing to work on the settlement term sheet, of which they exchanged numerous drafts. During this time, the parties faced insurance coverage issues and expanded the settlement negotiations to include the injunctive relief claims at issue in the *Charleston* Action. This development broadened the negotiations to include another pending flushable wipes litigation, which included additional parties and carriers, contributing to the delay in the Settling Parties' efforts to achieve a final resolution, but allowing for the prospect of resolution of all known pending flushable wipes litigation, if successful.

66. The Settling Parties participated in a follow-up in-person mediation in New York City, again facilitated by Mr. Ungar, in November 2022. In addition to Class Counsel and Mr. Ungar, this mediation was attended by (either virtually or in-person) several attorneys representing Costco and Nice-Pak, Nice-Pak's insurance coverage counsel, representatives of Nice-Pak, and approximately a half-dozen insurance representatives. The November 2022 mediation session resulted in an agreement in principle regarding the monetary relief aspect of the Settlement, including the execution of a term sheet pending client approval. However, the Settling Parties did not finalize their agreement on attorneys' fees and costs during the mediation, and Plaintiff's counsel continued to negotiate, with the assistance of Mr. Ungar, the attorneys' fees aspect of the Settlement with Nice-Pak.

67. On January 11, 2023, the Settling Parties reported that they had obtained final client approval of the monetary terms of the Settlement, and had reached an agreement on the amount of attorneys' fees and costs. The Settling Parties then reported on March 13, 2023 that they had reached agreement on all material terms of the Settlement, including payment structure for attorneys'

[12] A follow-up mediation previously scheduled for May 20, 2022 was postponed to allow counsel further time to engage in follow-up discussions through the mediator.

fees, had exchanged a draft settlement stipulation, and had requested until April 27, 2023 to move for preliminary approval. The Settling Parties continued their negotiations of the formal Settlement terms over the following weeks, and fully executed the Settlement Agreement on April 27, 2023. *See* ECF No. 469-1. Over the course of the negotiations, the discussions between the Settling Parties and Mr. Ungar encompassed dozens of telephone calls and email exchanges in addition to the formal mediation sessions.

b. Preliminary Approval

68. Plaintiff filed the Settlement Agreement with the Court and moved for preliminary approval of the Settlement on April 27, 2023. ECF Nos. 467-469. The Court preliminarily approved the Costco Settlement on March 25, 2024, finding that it was "reached as a result of arm's-length negotiations between the Settling Parties and their counsel," who "had sufficient information to evaluate the strengths and weaknesses of the case and to conduct informed settlement discussions." ECF No. 482 (the "Preliminary Approval Order"), ¶2. The Court also considered proposed fees, including attorneys' fees and Class Representative incentive award, as part of its holistic evaluation. *Id*. n.1 (citing *Moses v. N.Y. Times Co.*, 79 F.4th 235, 243 (2d Cir. 2023)). The Court also: (i) conditionally certified the proposed Settlement Class; and (ii) found the Notice Plan to be "reasonably calculated to provide notice to the Settlement Class." *Id*. ¶¶3, 5.

c. Notice to the Settlement Class, and Claim Submission Process

69. In accordance with the Settlement Agreement and Preliminary Approval Order, the Claims Administrator – Gilardi & Co., LLC – implemented the Notice Plan. Ex. C, Declaration of Derek Smith Regarding Notice Procedures ("Gilardi Decl."). Notice went out to the Settlement Class's 131,049 Members on June 10, 2024. *Id*. ¶¶3-4. About 43,457 notices were sent by email, and the remaining 87,592 by postcard. *Id*. ¶4. 2,613 of the emails could not be delivered, so the

Claims Administrator promptly sent postcards to these 2,613 Class Members on June 26, 2024. *Id*. ¶5. 8,046 of the postcards were returned by the USPS due to undeliverable addresses; so far the Claims Administrator has found updated addresses for, and promptly re-sent postcards to, 2,162 of those 8,046. *Id*. ¶6.

70. 83,224 Class Members (64% of the Settlement Class) were listed in the Costco data as "current" Costco members, *id.* ¶3, with the remaining 36% of the Settlement Class listed "former" Costco members. For purposes of the Settlement, "current" Costco membership is determined by membership as of June 10, 2024. https://costcoflushablewipessettlement.com/faqs.aspx. As explained below, ¶84, current Costco members should receive payment automatically unless they opt out (and unless the Claims Administrator cannot find alternate addresses for any undeliverable addresses).

71. For Settlement Class Members who do not currently maintain Costco memberships, Costco and Nice-Pak have used best efforts to identify those Settlement Class Members using available data on Costco memberships and transactions. The Claims Administrator is using best efforts to identify the up-to-date contact information for Settlement Class Members who do not currently maintain Costco memberships. *See* Ex. C, Gilardi Decl. ¶3; Settlement Agreement ¶2.3.

72. The Claim Form – needed only for former Costco members – requires Settlement Class Members to provide: (a) their name and address; (b) that all information provided on the Claim Form is truthful, accurate, and complete; (c) their email (if they elect to provide that information); (d) the number of packages of the Product purchased during the Settlement Class Period; (e) the number of packages of the Product purchased during the Settlement Class Period that have been refunded or voided by Costco or any other retailer; and (f) that the purchases were not made for

purposes of resale. Settlement Agreement ¶2.4. The Claim Form can be completed in a few minutes.

73. The Claims Administrator also established a Settlement Website — https://www.costcoflushablewipessettlement.com/ — as well as a toll free information line accessible 24 hours a day, per the Court's Preliminary Approval Order. ECF No. 482 ¶6(a); Ex. C, Gilardi Decl. ¶¶7-8. The Settlement Website contains the Long Form Notice, the Summary Notice, answers to frequently asked questions, contact information for the Claims Administrator and Class Counsel, the Settlement Agreement, the signed order of Preliminary Approval, a downloadable and online version of the Claim Form, a downloadable and online version of the form by which Settlement Class Members may opt out of the Settlement Class, and other settlement-related materials filed by the Settling Parties or the Court. *See* Ex. C, Gilardi Decl. ¶7.

74. The Notice apprises Settlement Class Members of their rights to: (i) submit a claim (for non-current Costco members); (ii) opt out; or (iii) object to and/or comment upon the Settlement and/or proposed attorneys' fees and expenses. Ex. C, Gilardi Decl. at Exs. A-B. It also informs them that they have until August 9, 2024 to exercise those rights. *Id.*. Additionally, the Notice includes, *inter alia*: (i) a statement indicating the attorneys' fees and expenses that will be sought; (ii) the Settlement Class definition; (iii) the time and place of the Fairness Hearing (August 30, 2024); and (iv) further explanation of the Settlement and its benefits. *Id*.

d. Claims, Objections, and Requests for Exclusion Received to Date

75. The Claims Administrator has been providing Plaintiff's counsel with periodic updates on the claims administration and notice process. As of July 24, 2024, Settlement Class Members made 1,025 claims, with 71 requests for exclusion and zero (0) objections to any part of

the Settlement or the fee and expense application since the Court granted preliminary approval of the Settlement. Ex. C, Gilardi Decl. ¶¶9, 12-13.

76. All of the 71 Settlement Class Members who purported to opt out also submitted claims, apparently not realizing they must choose one or the other. *Id*. ¶12. The Claims Administrator will reach out to each of these Settlement Class Members to inform them that, if they truly want to be excluded from the Class, they cannot also submit claims. *Id*.

77. Of the 1,025 identifiable Settlement Class Members to submit claims, 322 were former Costco members, and 703 were current Costco members. *Id.* ¶9. These 703 current Costco members did not actually need to submit claims, as they would have received relief regardless.

78. In addition to the 1,025 claims received thus far from identifiable Settlement Class Members, the Claims Administrator also received over 847,000 claims from "unknown" claimants. *Id*. ¶9. As explained more fully in the accompanying Gilardi Decl., the receipt of these claims coincided with significant media exposure regarding the Settlement, leading the Settling Parties and Claims Administrator to suspect that many of the claims were fraudulent and generated by bots. *Id.* A very significant percentage of these unknown claimants is likely to be rejected through the Claims Administrator's fraud detection and verification process. *Id*. ¶¶10-11.

III. THE SETTLEMENT

A. The Settlement Was Fairly, Honestly, and Aggressively Negotiated by Counsel Who Endorse the Settlement

79. The terms of the Settlement were negotiated by the Settling Parties at arm's length through adversarial, good faith negotiations. The Settlement was reached only after extensive settlement negotiations on behalf of and between the Settling Parties over the course of several years, including mediation, in-person and virtual meetings with counsel and Costco personnel, countless telephone conversations and the exchange of numerous settlement proposals. *See supra*

¶¶64-67. Class Counsel were ultimately able to achieve a settlement that provides considerable monetary relief to Settlement Class Members in the form of cash payments. Settlement Agreement ¶¶2.2-2.3.

80. Counsel have extensive experience representing consumers and other entities in complex and other litigation in federal and state courts nationwide, and have achieved favorable results in a variety of important and unprecedented class actions, *see, e.g.*, https://www.rgrdlaw.com/services-litigation-consumer-fraud-privacy-litigation.html (last visited July 26, 2024), including five settlements with seven defendants – a large majority of market participants – that have contributed to transforming the flushable wipes market to truly flushable wipes supported by the wastewater industry. https://www.rgrdlaw.com/news-item-Court-Grants-Approval-of-Game-Changing-Flushable-Wipes-Settlements-on-Behalf-of-Charleston-Water-System.html (last visited July 24, 2024); *see infra* ¶¶86-88.

81. Defense Counsel throughout most of this Litigation were experienced lawyers from Morrison & Foerster LLP, a well-respected top defense firm with offices worldwide, with a reputation for vigorous advocacy in the defense of complex class action litigation. More recently, however, Costco retained Tucker Ellis LLP, another Chambers-ranked, well-respected firm. Defense Counsel continue to deny any wrongdoing or legal liability for any wrongdoing on behalf of Costco, and have vigorously pressed their client's defenses and would continue to do so.

82. The volume and substance of Class Counsel's knowledge of the merits and potential weaknesses of Plaintiff's claims are adequate to support the Settlement. It took hard and diligent work by skilled counsel to develop the facts and theories which persuaded Defendant to enter into serious settlement negotiations. As discussed above, Class Counsel engaged in hard-fought litigation and settlement negotiations over the course of more than nine years. Class Counsel also

thoroughly researched the law applicable to the claims of the Settlement Class and applicable defenses thereto, including analyzing the strengths and weaknesses of Plaintiff's claims against Defendant on appeal and after extensive work with expert consultants, and based on Robbins Geller's history of litigating "flushable" wipes-related claims against Costco and other defendants. The accumulation of these efforts permitted Plaintiff and Class Counsel to be well-informed of the strengths and weaknesses of their case and to engage in effective settlement discussions with Defendant.

83. In deciding to enter into the Settlement, Plaintiff and Class Counsel considered, among other things, the substantial immediate benefit to Settlement Class Members under the terms of the Settlement Agreement, and the risks of continued litigation, including the legal hurdles and risks involved in opposing a motion for summary judgment, as well as the further risk, delay, and expense in ultimately proving liability and damages, particularly in cases such as these where expert economic issues are highly contested. *See infra* ¶¶89-95.

B. The Terms of the Settlement

84. As outlined in the Settlement Agreement, ¶2.5, each Settlement Class Member who currently maintains a Costco membership and who does not opt out of the settlement, and each Settlement Class Member who does not currently maintain a Costco membership but submits a Valid Claim, shall receive a payment of one dollar and thirty cents ($1.30) for each Product unit purchased during the Settlement Class Period, regardless of the price the Settlement Class Member paid for the Product or the number of wipes contained in each package, subject to the following: (i) a minimum of seven dollars and fifty cents ($7.50) will be paid to each Settlement Class Member, regardless of the number of Product units purchased by that Settlement Class Member; (ii) a maximum of fifty-five dollars and ninety cents ($55.90) (*i.e.*, a maximum of 43 Product units) shall be paid to any one Household for such purchases; and (iii) only one claim may be submitted per Household (Household

is determined based on residential address). Settlement Class Members will be eligible to receive their settlement sums regardless of whether their claims are corroborated by proofs of purchase.

85. Costco and Nice-Pak will fund up to, but not in excess of, $2 million for the relief to Settlement Class Members, inclusive of Settlement administration costs. Settlement Agreement ¶2.6. If the Valid Claims exceed $2 million including Settlement administration costs, the Claims Administrator shall fulfill all Valid Claims on a *pro rata* basis so that the total amount of payments and administration costs does not exceed $2 million. *Id*. The Claims Administrator shall be responsible for processing Claim Forms and administering the Settlement Website, opt-out process, and Settlement Benefits claims process described herein, while Costco and Nice-Pak shall be responsible for administering automatic payments to current Costco members. *Id.* ¶2.7.

86. Besides for the considerable monetary relief obtained in this Settlement, Class Counsel's diligent investigation, prosecution, and negotiation of this and related actions led to an agreement by Costco to ensure that its flushable wipes are ***truly*** flushable moving forward. As part of the settlement of the *Charleston* Action – litigated by Class Counsel in tandem with this one – Costco committed to purchasing flushable wipes that meet the current International Water Services Flushability Group Publicly Available Standards 3 Disintegration Test ("IWSFG 2020: PAS 3") for products manufactured on or after April 1, 2024. *Charleston* Action, ECF No. 198-2 at 8. The IWSFG 2020: PAS 3 is widely considered the wastewater industry's gold standard for flushability.

87. Importantly, the IWSFG 2020: PAS 3 is stricter and more concrete than the FTC's 2015 consent order, which simply requires wipes to "disperse[] in a sufficiently short amount of time" to avoid causing problems. As Judge Weinstein noted, that "definition is bland, written in generalities with no precision as to time of breakdown of the wipes once they are flushed or the extent of their break down into discrete pieces or shreddings." ECF No. 296 at 8. The FTC never

took action against the post-2014 iterations of Nice-Pak's wipes; Class Counsel did. Thus, the *Charleston* Action settlement delivered a benefit to homeowners and municipalities beyond what the FTC achieved. This is especially significant with respect to Costco, whose purportedly flushable wipes were considered the "poster child" of ***un***-flushable wipes by wastewater professionals. ECF No. 406 at 2.

88. The public-policy benefit of the *Charleston* Action settlement did not happen in a vacuum. It was part of a broader, coordinated litigation strategy which began in 2014 with the filing of this Action – the first of its kind, predating the *Charleston* Action by seven years. Although the injunctive relief class in this Action was not certified (*supra* ¶58), this Action supplied the momentum that led Defendants to accept the *Charleston* Action settlement. *See, e.g.*, ECF No. 450-3 ¶8; *cf.* Ex. G, Hr'g Tr. at 31:10-33:12.

C. The Settlement Eliminates the Risks and Any Potential Delay of Relief for Plaintiff and the Settlement Class

89. The *Kurtz* Action, to Class Counsel's knowledge, was the first action of its kind to allege misrepresentations by a manufacturer or retailer regarding their "flushable" wipes products. Accordingly, there was no litigation roadmap, no settlements had yet been achieved, and the prospects of recovery were uncertain. During the course of the Litigation, Defendant previewed many of its forthcoming arguments at various stages of the Action, including in its motion to dismiss, numerous class certification-related briefs, and pre-motion letter in connection with summary judgment. For example, Defendants lodged relentless criticisms about Mr. Weir's expert analysis and testimony on price premium analysis, damages, injury and causation, even moving to have his testimony excluded. *See supra* ¶¶49-56. While those analyses survived scrutiny at the class certification stage, there is no guarantee that they would hold up to similar – and likely even more severe – scrutiny at trial. Indeed, the Second Circuit explicitly acknowledged this risk, noting that a

"factfinder may ultimately agree" with Costco that Mr. Weir's analysis "either does not or cannot establish a price premium" due to "incomplete dataset, flawed parameters of the regression," or other issues. *Kurtz v. Kimberly-Clark Corp., et al*., No. 17-1856 (2d Cir. June 26, 2020), ECF No. 293-1 at 8-9.

90. The process of ultimately proving liability and entitlement to relief requires further expert work in examining the performance of Defendant's "flushable" wipes, exchanging expert reports and rebuttal reports, taking expert depositions, briefing *Daubert* motions and/or holding *Daubert* hearings, briefing summary judgment and preparing for and prevailing at trial. This is a costly and time-consuming process that is not guaranteed to enhance the relief the Settlement Class is currently expected to receive under the Settlement terms described above.

91. The availability of statutory damages, in particular, "presents serious substantive legal questions controlling the litigation." Remand Order, ECF No. 382 at 30. Plaintiff seeks "statutory, compensatory and punitive damages" under New York law (ECF No. 1 at 44), but, under New York law, such damages cannot be recovered via class action (N.Y. CPLR §901(b)). *See* Remand Order, ECF No. 382 at 28. Whether a recovery of this nature is permitted in ***federal*** court, then, raises "[c]omplex *Erie* problems" which "will need thorough consideration as this class action proceeds." *Id*. at 29. The Court, in approving the related Kimberly-Clark settlement, observed the same complexity:

> New York law clearly states that class actions cannot proceed unless specifically authorized by the relevant statute. Here, Plaintiffs have pursued a federal class-action lawsuit and invoked New York General Business Law—despite its lack of explicit provision for collective recovery. These factual and legal complexities convince the Court that Plaintiffs would face substantial risks if they proceed either to summary judgment or trial.

ECF No. 471 at 25-26 (citation omitted).

92. Summary judgment is another distinct risk. In addition to the arguments Costco previewed in its September 8, 2020 pre-motion letter, *see supra* ¶¶60-61, there is at least one other argument it might make based on a recent shift in its litigation strategy. That letter was drafted by Costco's then-counsel, Morrison & Foerster LLP. ECF No. 404. Now, however, Costco is represented by a different firm, Tucker Ellis LLP. *See, e.g.*, ECF No. 429. This change is significant, because Tucker Ellis is the same firm that represented the defendants – including Costco – in the *Charleston* Action (the "*Charleston* Defendants").

93. One of the arguments advanced by the *Charleston* Defendants was based on "primary jurisdiction." *Charleston* Action, ECF No. 109-1. Along the lines of the "prudential mootness" argument Costco made during class certification in this Action (*supra* ¶¶37-38, 41), the *Charleston* Defendants argued, in essence, that because the FTC is already supervising Nice-Pak's flushability claims, it would be improper for a court to get involved. The primary jurisdiction doctrine, they explained, "is designed to coordinate administrative and judicial decision-making" by allowing agencies to take the lead in their particular spheres of expertise. *Id.* at 8 (citation omitted). According to the *Charleston* Defendants, that doctrine precludes courts from "second-guessing" the FTC by opining on flushability:

> As part of the Consent Order, the FTC assumed jurisdiction over Nice-Pak's labeling, packaging, and advertisements for a 20-year period and publicly committed to "closely monitor Nice-Pak's future activities to determine whether any violations occur."
>
> * * *
>
> By asking this Court to impose a different definition for "flushability" than that selected by the FTC—one which would enjoin Costco, CVS, and Target from selling Nice-Pak's flushable wipes even though permitted under the FTC standard—Plaintiff effectively challenges the FTC's decision-making by asserting that the post-[2014] iterations of Nice-Pak product those retailers sell should not be on the market, notwithstanding the Consent Order.

Id. at 1, 9.

94. Although the issue in the *Charleston* Action was injunction whereas here the only certified class is for damages (*supra* ¶58), it is likely that Costco repurposes the primary-jurisdiction argument for this context. For instance, Costco might argue that the damages class – which currently extends through May 2017 – must be shortened to no later than mid-2014, when it improved the iteration of its flushable wipes that was initially scrutinized by the FTC. This would drastically reduce damages for the Class, and could disqualify many class members entirely depending when they made their purchases.

95. Based on their extensive experience in "flushable" wipes-related litigation, class action litigation, and in the Action, and after weighing the substantial benefits of the Settlement against the numerous obstacles to recovery after continued litigation, Class Counsel maintains that the Settlement is fair, reasonable, and in the best interest of the Settlement Class.

IV. CLASS COUNSEL'S REQUESTED AWARD OF ATTORNEYS' FEES AND EXPENSES IS REASONABLE

96. Class Counsel have substantial experience representing consumers and other entities in complex cases, including in this District and in district courts throughout the country. As described above, counsel brought their substantial experience to bear, working efficiently, and diligently and persistently, to obtain an exceptional result for the Settlement Class on a wholly contingent basis. The negative lodestar multiplier for the requested fee based on historical rates is .83, and the total requested fee and expense award of $3,000,000 is reasonable in light of the extensive and contentious Litigation and the result obtained. Class Counsel's experience and advocacy were required in presenting the strengths of the case throughout the Litigation and settlement process, in an effort to achieve the best possible settlement and to convince Defendant, its insurers, and Defense Counsel of the risks Defendant faced from continuing to litigate Plaintiff's claims. The Settlement represents a substantial recovery for the Settlement Class, attributable to the

diligence, determination, hard work and reputation of Class Counsel. In light of Class Counsel's significant efforts in the face of numerous risks, we respectfully submit that the fee request is reasonable and warrants approval.

V. CONCLUSION

97. Given that the Settlement will result in substantial monetary relief, and the uncertainty surrounding whether Plaintiff would have ultimately prevailed, Class Counsel respectfully submits that the Settlement is fair, reasonable, and adequate, and warrants final approval. Class Counsel also submit that their request for an award of attorneys' fees of $3,000,000 (inclusive of expenses), as well as Dr. Kurtz's Class Representative Payment, are reasonable and warrant this Court's approval.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of July, 2024.

/s/ Vincent M. Serra
VINCENT M. SERRA

EXHIBIT A

IN THE CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS
18TH JUDICIAL CIRCUIT

JOSEFINA DARNALL, GEORGE WYANT, DEXTER COBB, and CHERYL RUTKOWSKI individually and on behalf of all others similarly situated, Plaintiffs, v. DUDE PRODUCTS, INC., Defendant.	Case No. 2023LA000761

CLASS ACTION SETTLEMENT AGREEMENT

This Agreement ("Agreement" or "Settlement Agreement") is entered into by and among (i) Plaintiffs George Wyant, Josefina Darnall, Cheryl Rutkowski, and Dexter Cobb ("Plaintiffs"); (ii) the Settlement Class (as defined herein); and (iii) Defendant, Dude Products, Inc. ("Defendant" or "Dude Products"). The Settlement Class and Plaintiffs are collectively referred to as the "Plaintiffs" unless otherwise noted. The Plaintiffs and the Defendant are collectively referred to herein as the "Parties." This Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Released Claims (as defined herein), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

RECITALS

A. This putative class action was filed on July 20, 2023, in the Circuit Court of DuPage County, Illinois, 18th Judicial Circuit, and brought claims on behalf of a nationwide class for violations of consumer protection laws, including those of Illinois, New York, and California; and breach of express warranty, regarding Dude Products' allegedly false and

misleading advertising concerning the use of the term "flushable" on the labeling of its Dude Wipes Product.

B. Prior to filing the instant Action, the Parties agreed to engage in private mediation.

C. As part of the mediation, and to competently assess their relative negotiating positions, the Parties exchanged discovery pertaining to issues such as the size and scope of the putative class. This information was sufficient to assess the strengths and weaknesses of the claims and defenses.

D. On June 14, 2022, the Parties conducted a full-day mediation before the Hon. Wayne R. Andersen (Ret.) of JAMS, an experienced class action mediator. At the conclusion of the mediation, the Parties were unable to reach an agreement.

E. The Parties continued to negotiate with the assistance of Judge Andersen for more than a year, including a second mediation on May 22, 2023, until they reached an agreement on all material terms of a class action settlement and executed a term sheet.

F. At all times, Defendant has denied and continues to deny any wrongdoing whatsoever and has denied and continues to deny that it committed, or threatened or attempted to commit, any wrongful act or violation of law or duty alleged in the Action. Defendant believes that the claims asserted in the Action do not have merit and that Defendant would have prevailed at summary judgment or trial. Nonetheless, taking into account the uncertainty and risks inherent in any litigation, Defendant has concluded that it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement. This Agreement is a compromise, and the Agreement, any related documents, and any negotiations resulting in it will not be construed as or deemed to be evidence of or an admission or concession of liability or wrongdoing on the part of

Defendant, or any of the Released Parties (defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever or with respect to the certifiability of a litigation class.

G. Plaintiffs believe that the claims asserted in the Action against Defendant have merit and that they would have prevailed at summary judgment and/or trial. Nonetheless, Plaintiffs and Class Counsel recognize that Defendant has raised factual and legal defenses that present a risk that Plaintiffs may not prevail. Plaintiffs and Class Counsel also recognize the expense and delay associated with continued prosecution of the Action against Defendant through class certification, summary judgment, trial, and any subsequent appeals. Plaintiffs and Class Counsel also have taken into account the uncertain outcome and risks of litigation, especially in complex class actions, as well as the difficulties inherent in such litigation. Therefore, Plaintiffs believe that it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice. Based on its evaluation, Class Counsel has concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Agreement.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiffs, the Settlement Class, and each of them, and Defendant, by and through its undersigned counsel that, subject to final approval of the Court after a hearing or hearings as provided for in this Settlement Agreement, in consideration of the benefits flowing to the Parties from the Agreement set forth herein, that the Action and the Released Claims will be finally and fully compromised, settled, and released, and the Action will be dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

AGREEMENT

1. DEFINITIONS.

As used in this Settlement Agreement, the following terms have the meanings specified below:

1.1 "Action" means *Darnall, et al. v. Dude Products, Inc.*., Case No. 2023LA000761, pending in the Circuit Court of DuPage County, Illinois, 18th Judicial District.

1.2 "Approved Claim" means a Claim Form submitted by a Settlement Class Member that: (a) is submitted timely and in accordance with the directions on the Claim Form and the provisions of the Settlement Agreement; (b) is fully and truthfully completed by a Settlement Class Member with all of the information requested in the Claim Form; (c) is signed by the Settlement Class Member, physically or electronically; and (d) is approved by the Settlement Administrator pursuant to the provisions of this Agreement.

1.3 "Claim Form" means the document to be submitted by Settlement Class Members seeking a benefit pursuant to this Settlement Agreement. The Claim Form will be available online at the Settlement Website (defined at Section 1.37 below) and the contents of the Claim Form will be substantially in the form attached hereto as Exhibit A, approved by the Court.

1.4 "Claimant" means a Settlement Class Member who submits a claim for payment benefit as described in Section 2 of this Settlement Agreement.

1.5 "Claims Deadline" means the date by which all Claim Forms must be postmarked or received to be considered timely and will be set as a date no later than sixty (60) days after the Notice Date. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Class Notice and the Claim Form.

1.6 **"Class Counsel"** means the law firms of Bursor & Fisher, P.A., and Milberg Coleman Bryson Phillips Grossman, PLLC.

1.7 **"Class Notice"** means the Court-approved "Notice of Class Action Settlement."

1.8 **"Class Period"** means the period of time from February 5, 2015, to and through the date of the Preliminary Approval Order.

1.9 **"Class Representatives"** mean the named Plaintiffs in this Action, specifically, Josefina Darnall, George Wyant, Cheryl Rutkowski, and Dexter Cobb.

1.10 **"Court"** means the Circuit Court of DuPage County, Illinois, 18th Judicial District, the Honorable Timothy J. McJoynt, presiding, or any judge who will succeed him as the Judge in this Action.

1.11 **"Defendant"** means Dude Products, Inc.

1.12 **"Defendant's Counsel"** means the law firm of Barnes & Thornburg LLP.

1.13 **"Dude Wipes Products"** means all Dude Wipes-brand individual and multi-pack "flushable" wipe products.

1.14 "**Fee Award"** means the amount of attorneys' fees and reimbursement of expenses and costs awarded by the Court to Class Counsel, which will be paid by Defendant pursuant to the terms set forth herein.

1.15 **"Final Approval Hearing"** means the hearing before the Court where the Parties will request the Settlement Approval Order and Final Judgment to be entered by the Court approving the Settlement Agreement, and where Plaintiffs will request the Court to approve the Fee Award and the Service Awards to the Class Representatives.

1.16 **"Final Settlement Approval Date"** means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court's Settlement Approval Order and Final Judgment approving the Settlement

Agreement, if no appeal has been filed; (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to the Fee Award, the date of completion, in a manner that finally affirms and leaves in place the Settlement Approval Order and Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari*.

1.17 "Household" means those Persons who occupy the same residential housing unit, whether they are related to each other or not.

1.18 "Material Modification" means a non-trivial modification of the settlement, by the Court or on appeal or remand, which includes but is not limited to: (1) any change to the scope of the released claims and/or settlement class; (2) any non-trivial increase in the cost of the settlement to be borne by Defendant; or (3) any non-trivial change to the benefit, class notice, claim form, or claim process.

1.19 "Media Plan" means the Settlement Administrator's plan to disseminate Class Notice to Settlement Class Members. The Media Plan will include an email notice, a long form notice that will be available on the Settlement Website, and internet banner notice. *See also* Section 4.

1.20 "Notice and Other Administrative Costs" means all costs and expenses actually incurred by the Settlement Administrator in the publication of Class Notice, establishment of the Settlement Website, the processing, handling, reviewing, and paying of valid claims made by Claimants, and paying taxes and tax expenses related to the Settlement Fund (including all federal, state, or local taxes of any kind and interest or penalties thereon, as well as expenses

incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants).

1.21 "Notice Date" means the date of publication of notice pursuant to Section 4 of this Agreement.

1.22 "Objection/Exclusion Deadline" means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a Person within the Settlement Class must be made, which shall be designated as a date no later than forty-five (45) days after the Notice Date, or such other date as ordered by the Court.

1.23 "Person" means a natural person, or the estate, legal representative, trust, heir, successor, or assign of any such natural person, and excludes, without limitation, any corporation, partnership, limited partnership, limited liability company, association, joint stock company, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entitys. "Person" is not intended to include any governmental agency or governmental actor, including, without limitation, any state Attorney General office.

1.24 "Plaintiffs" means George Wyant, Josefina Darnall, Cheryl Rutkowski, Dexter Cobb, and the Settlement Class Members.

1.25 "Preliminary Approval" means the Court's entry of an order preliminarily approving the terms and conditions of this Settlement Agreement, including the manner of providing, and content of, the Settlement Class Notice.

1.26 "Preliminary Approval Date" means the date on which the Court enters an order entering the Preliminary Approval Order.

1.27 "Preliminary Approval Order" means the order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes only, and directing notice thereof to the Settlement Class, which will be agreed upon by the Parties and

submitted to the Court in conjunction with Plaintiffs' motion for preliminary approval of this Agreement.

1.28 "Proof of Purchase" means a receipt, removed UPC code, or other documentation that establishes the fact and date of the Dude Wipes Product purchase during the Class Period in the United States.

1.29 "Released Claims" means the claims released pursuant to Section 6.1 of this Agreement.

1.30 "Released Parties" means Dude Products, Inc., as well as any and all of its current, former, and future parents, predecessors, successors, affiliates, assigns, subsidiaries, divisions, or related corporate entities, and all of their respective current, future, and former employees, officers, directors, shareholders, assigns, agents, trustees, administrators, executors, insurers, attorneys, vendors, contractors, and distributors.

1.31 "Releasing Parties" means Plaintiffs, those Settlement Class Members who do not timely opt out of the Settlement Class, and all of their respective present or past heirs, executors, estates, administrators, successors, assigns, insurers, legal representatives, trusts, and anyone claiming through them or acting or purporting to act on their behalf.

1.32 "Service Awards" means any award approved by the Court that is payable to the Plaintiffs by the Defendant pursuant to the terms set forth herein.

1.33 "Settlement Administrator" means Kroll Settlement Administration LLC, or any such other reputable administration company that has been selected jointly by the Parties and approved by the Court to perform the duties set forth in this Agreement, including but not limited to overseeing the distribution of Notice, as well as the processing and payment of Approved Claims to the Settlement Class as set forth in this Agreement, and disbursing all approved payments out of the Settlement Fung, and handling the determination, payment, and filing of

forms related to all federal, state, and or local taxes of any kind (including any interest or penalties thereon) that may be owed on any income earned by the Settlement Fund.

1.34 "Settlement Class Members" or **"Settlement Class"** means:

> All Persons in the United States (including its states, districts, or territories) who purchased one or more units of Dude Wipes "flushable" wipes products (the "Dude Wipe Products") from February 5, 2015, to and through the date of the Preliminary Approval Order, excluding Persons who purchased for the purpose of resale. Excluded from the Settlement Class are (1) any Judge presiding over this Action and members of their families; (2) the Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) Persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors, or assigns of any such excluded Persons.

1.35 "Settlement Fund" means the total cash commitment of Defendant for purposes of this settlement, as described in Section 2 of this Settlement Agreement, with a total value of up to nine million dollars ($9,000,000.00 USD), which shall be the maximum amount of money that Defendant shall be obligated to pay for the benefit of the Settlement Class, inclusive of all Approved Claims, all Settlement Administrator costs, any Fee Award and Service Awards, and any other costs, expenses, and fees associated with the Settlement pursuant to the terms set forth in this Agreement. Any monies from the Settlement Fund not paid for Approved Claims, all Settlement Administrator costs, any Fee Award and Service Awards, and any other costs, expenses, and fees associated with the Settlement pursuant to the terms set forth in this Agreement, shall be retained by Defendant and shall not otherwise be considered "Residual Funds" under 735 ILCS 5/2-807.

1.36 "Settlement Approval Order and Final Judgment" means an order and judgment issued and entered by the Court, approving the Settlement Agreement as binding upon the Parties and the Settlement Class Members, dismissing the Action with prejudice, and setting

any Fee Award to Class Counsel by the Court, and the amount of any Service Awards to Plaintiffs by the Court. The Settlement Approval Order and Final Judgment will constitute a final judgment of dismissal of the Action with prejudice.

1.37 "Settlement Website" means a website, referenced in Section 4(d) below, to be established, operated, and maintained by the Settlement Administrator for purposes of providing notice and otherwise making available to the Settlement Class Members the documents, information, and online claims submission process referenced in.

1.38 "Unknown Claims" means claims that could have been raised in the Action and that any or all of the Releasing Parties do not know or suspect to exist, which, if known by him or her, might affect his or her agreement to release the Released Parties or the Released Claims or might affect his or her decision to agree, object, or not to object to the Settlement. Upon the Final Settlement Approval Date, the Releasing Parties will be deemed to have, and will have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of § 1542 of the California Civil Code, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Upon the Final Settlement Approval Date, the Releasing Parties also will be deemed to have, and will have, waived any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code. The Releasing Parties acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever settle and release

the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this paragraph.

2. SETTLEMENT RELIEF.

2.1 Payments to Settlement Class Members.

(a) Defendant will pay a total of up to nine million dollars ($9,000,000.00) for payment of the following: (i) Approved Claims for benefits submitted by Settlement Class Members pursuant to Section 2.3 below; (ii) the Notice and Other Administrative Costs actually incurred by the Settlement Administrator as described in Section 4.3 below; (iii) the Fee Award, as may be ordered by the Court and as described in Section 3.1 below; and (iv) any Service Award to the Plaintiffs, not to exceed five thousand dollars ($5,000.00) each, as may be ordered by the Court and as described in Section 3.3 below.

2.2 Schedule of Payments into Settlement Fund. Defendant will make payments in accordance with the following schedule:

(a) *Notice and Other Administrative Costs*. Amounts for the Notice and Other Administrative Costs, to be paid within thirty (30) days of when such amounts are invoiced to Defendant and become due and owing.

(b) *Fee Award*. An amount equal to the Fee Award as ordered by the Court, to be paid as described at Section 3.1, below.

(c) *Service Awards*. An amount equal to Plaintiffs' Service Awards as ordered by the Court, to be paid as described at Section 3.3, below.

(d) *Payment of Valid Approved Claims.* An amount not to exceed nine million dollars ($9,000,000.00) for valid Approved Claims is to be paid by the later of (i) sixty (60) days after the Claims Deadline, (ii) thirty (30) days after the Settlement Administrator provides a pay deck, or (iii) the Final Settlement Approval Date, less the sum of (i) the payments

for Notice and Other Administrative Costs, (ii) the Fee Award paid by Defendant, and (iii) any Service Awards paid by Defendant.

2.3 Claims Process. Each Settlement Class Member will be entitled to submit a Claim Form for payment, consistent with this paragraph and as determined by the Court.

(a) *Payment.* Each Settlement Class Member may file a Claim Form that will, if valid after it is completed by the Settlement Class Member submitting the Claim Form, entitle him or her to a benefit payment based on Dude Wipes Products purchased during the Settlement Class Period. Settlement Class Members with Proof of Purchase will be entitled to submit a claim for a refund of up to $0.50 per Household for each Dude Wipes Product purchased during the Class Period, up to a maximum of $20.00 (*i.e.* a maximum of forty (40) packages). Settlement Class Members without Proof of Purchase will be entitled to submit a claim up to $0.50 per Household for each Dude Wipes Product purchased during the Class Period, up to a maximum of $2.50 (*i.e.* a maximum of five (5) packages). Settlement Class Members may not submit a claim for refund for products bought both with and without proofs of purchase.

(b) *Method of Payment*. Each Settlement Class Member may choose to receive his or her payment via check, Venmo, PayPal, or other electronic payment methods. Payment by check will be the default payment method in the event that a Settlement Class Member does not state a preferred method of payment.

(c) *Pro Rata Adjustment*. If the total value of all Approved Claims exceeds the funds available for distribution to Class Members, then the amounts of the payments will be reduced *pro rata*.

2.4 Proof of Claim. A maximum of one claim, submitted on a single Claim Form, may be submitted by each Settlement Class Member's Household. A Claimant must include information in the Claim Form – completed online or in hard copy mailed to the Settlement

Administrator – confirming under penalty of perjury the following: (i) the number of qualifying Dude Wipes Product purchased, and (ii) that the purchase(s) were made within the Settlement Class Period.

2.5 Review of Claims. The Settlement Administrator will be responsible for reviewing all Claim Forms to determine their validity. The final determination of whether a claim is valid or not will rest solely with the Settlement Administrator. The Settlement Administrator will reject any Claim Form that does not comply in any material respect with the instructions on the Claim Form or the terms of Sections 2.3 and 2.4, above, or is submitted after the Claims Deadline. The Settlement Administrator shall send one (1) notice of deficiency and give the Settlement Class Member one (1) reasonable opportunity to cure any deficiency. The Settlement Class Member shall have twenty-one (21) days to provide further information or cure the deficiency identified by the Settlement Administrator. If the Settlement Class Member does not cure the deficiency within twenty-one (21) days after the date the notice of deficiency is sent to the satisfaction of the Settlement Administrator, in its sole discretion, then any such claim shall be denied.

2.6 Benefit Payment – Uncleared Checks. Those Settlement Class Members whose benefit checks are not cleared within one hundred eighty (180) days after issuance will be ineligible to receive a settlement benefit, and Defendant will have no further obligation to make any payment pursuant to this Settlement Agreement or otherwise to such Settlement Class Members. Unpaid funds from uncleared checks will not revert back to the Defendant. Any unpaid funds from uncleared checks remaining after administration of the Settlement Agreement will be donated as *cy pres* to the Chicago Bar Foundation; a non-sectarian, not-for-profit *pro bono* legal organization; or another non-sectarian, not-for-profit organization(s) recommended by the Parties and approved by the Court.

3. CLASS COUNSEL'S ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND EXPENSES; INCENTIVE AWARD.

3.1 Class Counsel may receive, subject to Court approval, attorneys' fees, costs, and expenses not to exceed one-third (1/3) of the Settlement Fund, *i.e.*, three million dollars ($3,000,000). Class Counsel will petition the Court for an award of such attorneys' fees and Defendant agrees to not object to or otherwise challenge, directly or indirectly, Class Counsel's petition for reasonable attorneys' fees and for reimbursement of costs and expenses if limited to this amount. Class Counsel, in turn, agrees to seek no more than this amount from the Court in attorneys' fees and for reimbursement of costs and expenses.

3.2 The Fee Award will be payable by Defendant within ten (10) days after entry of the Court's Settlement Approval Order and Final Judgment, subject to Class Counsel executing the Undertaking Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit D, and providing all payment routing information and tax I.D. numbers for Bursor & Fisher, P.A., as agent for Class Counsel. Payment of the Fee Award will be made by wire transfer to Bursor & Fisher, P.A., as agent for Class Counsel, for distribution to and among counsel for Plaintiffs and the Settlement Class, in accordance with wire instructions to be provided by Bursor & Fisher, P.A., and completion of necessary forms, including but not limited to W-9 forms. Notwithstanding the foregoing, if for any reason the Settlement Approval Order and Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, then any Persons or firms who shall have received the funds shall be severally liable for payments made pursuant to this subparagraph, and shall return funds to the Defendant. Additionally, should any parties to the Undertaking dissolve, merge, declare bankruptcy, become insolvent, or cease to exist prior to the final payment to Class Members, those parties shall

execute a new undertaking guaranteeing repayment of funds within fourteen (14) days of such an occurrence.

3.3 Subject to Court approval, the Plaintiffs may be paid Service Awards by the Defendant, in addition to any settlement payment as a result of an Approved Claim pursuant to this Agreement, and in recognition of their efforts on behalf of the Settlement Class, in the amount of five thousand dollars ($5,000.00) each. Defendant will not object to or otherwise challenge, directly or indirectly, Class Counsel's application for the service awards to the Class Representatives if limited to this amount. Class Counsel, in turn, agrees to seek no more than this amount from the Court as the service awards for the Class Representatives. Such awards will be paid by Defendant (in the form of checks to the Class Representatives that are sent care of Class Counsel) within twenty-one (21) days after Settlement Approval Order and Final Judgment becomes final if no appeal is taken, or, if an appeal is taken, within ten (10) days after all appeals have expired or been exhausted in such manner as to affirm the Court's order.

4. NOTICE TO THE CLASS AND ADMINISTRATION OF SETTLEMENT.

4.1 Class Notice. The Class Notice will conform to all applicable requirements of the Illinois Code of Civil Procedure, the United States and Illinois Constitutions (including the Due Process Clauses), and any other applicable law, and will otherwise be in the manner and form approved by the Court.

4.2 Notice Terms. The Class Notice shall consist of at least the following:

(a) *Settlement Class List*. No later than ten (10) days after the entry of the Preliminary Approval Order, Defendant shall produce an electronic list from its records that includes all of the names, last known email addresses, to the extent the foregoing exists in Defendant's records, belonging to Persons within the Settlement Class. This electronic document shall be called the "Class List," and shall be provided to the Settlement Administrator;

(b) *Direct Notice via Email*. No later than thirty-five (35) days from the entry of the Preliminary Approval Order, the Settlement Administrator will send Class Notice via email substantially in the form attached as Exhibit B, along with an electronic link to the Claim Form and Settlement Website, to all Settlement Class Members for whom a valid email address is in the Class List. This shall be the only direct notice provided via email, unless transmission of the email notice results in any "bounce-backs," in which case the Settlement Administrator will, if possible, correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice.

(c) *Settlement Website*. Within thirty (30) days from entry of the Preliminary Approval Order, Notice will be provided on a website at an available settlement URL which will be obtained, administered, and maintained by the Settlement Administrator and will include the ability to file Claim Forms online, provided that such Claim Forms, if signed electronically, will be binding for purposes of applicable law and contain a statement to that effect. The Class Notice provided on the Settlement Website will be substantially in the form of Exhibit C hereto.

(d) *Online Notice*. Within thirty-five (35) days from the entry of the Preliminary Approval Order, Online Notice will be provided according to the Media Plan.

4.3 Responsibilities of Settlement Administrator. The Parties will retain a Settlement Administrator (including subcontractors) to help implement the terms of the proposed Settlement Agreement. The Settlement Administrator will be responsible for administrative tasks, including, without limitation, (a) arranging, as set forth in the Media Plan, for distribution of Class Notice (in the form approved by the Court) and Claim Forms (in a form approved by the Court) to Settlement Class Members, (b) designing appropriate safeguards on the claim form and in the claims process to minimize waste, fraud, and abuse, (c) requesting additional information to validate suspicious or potentially fraudulent claims, and claims may also be validated against

Proof of Purchase, (d) answering inquiries from Settlement Class Members and/or forwarding such written inquiries to Class Counsel or their designee, (e) receiving and maintaining on behalf of the Court and the Parties any Settlement Class Member correspondence regarding requests for exclusion from the settlement, (f) establishing the Settlement Website that posts notices, Claim Forms, and other related documents by the Notice Date, (g) receiving and processing claims and distributing payments to Settlement Class Members, and (h) otherwise assisting with implementation and administration of the Settlement Agreement terms.

4.6 Performance Standards of Settlement Administrator. The contract with the Settlement Administrator will obligate the Settlement Administrator to abide by the following performance standards:

(a) The Settlement Administrator will accurately, objectively, and neutrally describe, and will train and instruct its employees and agents to accurately, objectively, and neutrally describe, the provisions of this Agreement in communications with Settlement Class Members;

(b) The Settlement Administrator will provide prompt, accurate, and objective responses to inquiries from Class Counsel and Defendant's Counsel and will periodically report on claims, objectors, etc.

5. CLASS SETTLEMENT PROCEDURES.

5.1 Exclusions and Objections. The Class Notice will advise all Settlement Class Members of their rights to be excluded from the Settlement or to object to the Settlement.

(a) Any Person who falls within the definition of the Settlement Class but wishes to be excluded from the Settlement may do so by timely mailing a valid opt-out notice, as described in the Class Notice. Any Person who is excluded from the Settlement will not be bound by this Settlement Agreement, will not be eligible to make a claim for any benefit under

the terms of this Settlement Agreement, and will not be permitted to object to the Settlement or to intervene in the Action. At least seven (7) calendar days before the Final Approval Hearing, Class Counsel will prepare or cause the Settlement Administrator to prepare a list of the Persons who have excluded themselves in a valid and timely manner from the Settlement Class (the "Opt-Outs"), and Class Counsel will file that list with the Court.

(b) Any Person who is a Settlement Class Member and who wishes to object to this Agreement must timely serve a written objection, which must be personally signed by the objector, on the Settlement Administrator, Defendant's Counsel, and Class Counsel postmarked on or before the date specified in the Class Notice. The objection must contain a caption or title that identifies it as "Objection to Class Settlement in *Darnall v. Dude Products, Inc.*," and must include: (a) contact and address information for the objecting Settlement Class Member; (b) documents sufficient to establish the Person's standing as a Settlement Class Member (either verification under oath of the date and location of a purchase of Dude Wipes Products within the Settlement Class Period or a receipt reflecting such purchase); (c) the facts supporting the objection, the legal grounds on which the objection is based, including all citations to legal authority and evidence supporting the objection, (d) the name and contact information of any and all attorneys representing, advising, or in any way assisting the objector in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection (the "Objecting Attorneys"); and (e) a statement indicating whether the objector intends to appear at the Final Approval Hearing (either personally or through counsel who files an appearance with the Court). If an objecting Person chooses to appear at the Final Approval Hearing, a notice of intention to appear must be filed with the Court no later than the Objection/Exclusion Deadline.

(c) If a Settlement Class Member who is objecting to the Settlement Agreement or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption and amount of payment received.

(d) Any Settlement Class Member who does not, in accordance with the terms and conditions of this Agreement, submit and Approved Claim or seek exclusion from the Settlement Class shall not be entitled to receive any payment or benefits pursuant to this Agreement but will otherwise be bound by all of the terms of this Agreement, including the terms of the Final Judgment to be entered in this Action and the Releases provided in the Agreement and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

5.2 The Final Approval Hearing shall be on a date to be determined by the Court.

5.3 Stay of the Action. The Parties will request that the Court, in connection with Preliminary Approval, issue an immediate stay of the Action.

5.4 Effect If Settlement Not Approved. This Settlement Agreement was entered into only for purposes of settlement, subject to and without waiver of the Parties' respective rights.

(a) If the Court does not enter the Preliminary Approval Order or does not enter the Settlement Approval Order and Final Judgment, or if the Final Settlement Approval Date does not occur, Class Counsel and Defendant's Counsel will endeavor in good faith, consistent with the Settlement Agreement, to cure any defect identified by the Court; provided, however, that Defendant will not be obligated to accept such cure if, in Defendant's sole view, it

increases the cost or burden of the Settlement Agreement to Defendant or any of the other Released Parties in a non-trivial way. The Parties shall have the right to terminate the Settlement Agreement by providing written notice of their election to do so to the other Party if: (i) the Court rejects the Parties' attempt to cure any defect in the proposed Settlement Approval Order and Final Judgment identified by the Court; (ii) the Court makes a Material Modification to the settlement; (iii) the Settlement Approval Order and Final Judgment is vacated, modified, or reversed in a way that results in a Material Modification.

(b) Notwithstanding anything herein, the Parties agree that the Court's failure to approve, in whole or part, the attorneys' fees payment to Class Counsel set forth in Section 3.2 above and/or the incentive award set forth in Section 3.3 above shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination.

(c) If the Settlement Agreement is terminated for any reason, the Settlement Approval Order and Final Judgment is not entered by the Court, or the Final Settlement Approval Date does not occur, then no term or condition of the Settlement Agreement, or any draft thereof, or any discussion, negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for any purpose in the Action, or in any other proceeding, and the Parties will be restored to their respective positions immediately preceding execution of this Settlement Agreement. If the Settlement Approval Order and Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, then within thirty (30) days, Class Counsel will return to Defendant all attorneys' fees, costs, and other payments received by Class Counsel under the Settlement Agreement, as set forth in Section 3.2 above. The Parties agree that all drafts, discussions, negotiations, documentation, or other information prepared in relation to the

Settlement Agreement and the Parties' settlement discussions shall be treated as strictly confidential and may not be disclosed to any person other than the Parties' counsel, and only for purposes of the Action. Defendant's rights with respect to class certification expressly are reserved and preserved.

5.5 Execution. The Settlement Agreement will have no effect unless and until this Settlement Agreement is fully executed by all Parties.

6. RELEASE.

6.1 Release by Settlement Class Members. Effective as of the Final Settlement Approval Date, each and all of the Settlement Class Members will release and forever discharge and will be forever barred from asserting, instituting, or maintaining against any or all of the Released Parties, to the extent allowable under the law, any and all past, present, or future, actual, potential, asserted or unasserted, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, causes of action, suits, claims, liens, demands, judgments, expenses, costs, damages, punitive, exemplary or multiplied damages, obligations, attorney fees (except as provided for in the Class Settlement), and all other legal responsibilities in any form or nature, including but not limited to, all claims relating to or arising out of state, local, or federal statute, ordinance, regulation, or claim at common law or in equity, arising out of or in any way allegedly related to purchases of the Dude Wipes Products, including all claims that were brought or could have been brought in the Action. Nothing herein shall be construed to release any claims for bodily injury related to the use of the Dude Wipes Products.

6.2 Effectuation of Settlement. None of the above releases includes releases of claims to enforce the terms of the Settlement Agreement or affects the rights granted by the Settlement Agreement.

6.3 No Admission of Liability. This Settlement Agreement reflects, among other things, the compromise and settlement of disputed claims among the Parties, and neither this Settlement Agreement nor the releases given herein, nor any consideration therefor, nor any actions taken to carry out this Settlement Agreement, are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, defense, or of any point of fact or law on the part of any party. Defendant denies the material allegations of the complaint filed in this Action. Neither this Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor the settlement negotiations, nor any related document, will be used as an admission of any fault or omission by any or all of the Released Parties (including Defendant), or be offered or received in evidence as an admission, concession, presumption, or inference of any wrongdoing or liability by any or all of the Released Parties (including Defendant) in any proceeding, other than such proceedings as may be necessary to consummate, interpret, or enforce this Settlement Agreement.

7. PRELIMINARY APPROVAL ORDER AND SETTLEMENT APPROVAL ORDER AND FINAL JUDGMENT.

7.1 Promptly after the execution of this Settlement Agreement, Class Counsel will submit this Agreement together with its exhibits to the Court and will move the Court for Preliminary Approval of the settlement set forth in this Agreement; certification of the Settlement Class for settlement purposes only; appointment of Class Counsel and the Class Representatives; and entry of a Preliminary Approval Order, which order will set a Final Approval Hearing date and approve the Media Plan. The Preliminary Approval Order will also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications, and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material

respects with the terms of the Settlement Agreement and do not limit or impair the rights of the Settlement Class, or expand the obligations of Defendant without Defendant's consent.

7.2 At the time of the submission of this Agreement to the Court as described above, Class Counsel will request that, after notice is given, the Court hold a Final Approval Hearing and approve the settlement of the Action as set forth herein.

7.3 After Class Notice is given, and at or before the Final Approval Hearing, the Class Representatives will request and seek to obtain from the Court a Settlement Approval Order and Final Judgment, which will (among other things):

(a) approve the Settlement Agreement and the proposed settlement as fair, reasonable, and adequate as to, and in the best interests of, the Settlement Class Members; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in, all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and Releasing Parties;

(b) find that the Class Notice and Media Plan implemented pursuant to the Agreement (1) constituted the best practicable notice under the circumstances; (2) constituted notice that was reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing; (3) was reasonable and constituted due, adequate, and sufficient notice to all Persons entitled to receive notice; and (4) met all applicable requirements of the Illinois Code of Civil Procedure, the Due Process Clauses of the United States and Illinois Constitutions, and the rules of the Court;

(c) find that the Class Representatives and Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Agreement;

(d) dismiss the Action (including all individual claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any party except as provided in the Settlement Agreement;

(e) incorporate the Release set forth above in Section 6, make the Release effective as of the Final Settlement Approval Date, and forever discharge the Released Parties as set forth herein;

(f) permanently bar and enjoin all Releasing Parties from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on the Released Claims;

(g) without affecting the finality of the Settlement Approval Order and Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Settlement Approval Order and Final Judgment, and for any other necessary purpose; and

(h) incorporate any other provisions as the Court deems necessary and just.

8. MISCELLANEOUS PROVISIONS.

8.1 Change of Time Periods. The time periods and/or dates described in this Settlement Agreement with respect to the giving of notices and hearings are subject to approval and change by the Court or by the written agreement of Class Counsel and Defendant's Counsel, without notice to Settlement Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Settlement Agreement.

8.2 Time for Compliance. If the date for performance of any act required by or under this Settlement Agreement falls on a Saturday, Sunday, or court holiday, that act may be

performed on the next business day with the same effect as if it had been performed on the day or within the period of time specified by or under this Settlement Agreement.

8.3 Governing Law. This Settlement Agreement will be governed by the laws of the State of Illinois.

8.4 Entire Agreement. The terms and conditions set forth in this Settlement Agreement constitute the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Settlement Agreement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Settlement Agreement constitutes the complete and exclusive statement of its terms as between the parties, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial proceeding, if any, involving this Settlement Agreement. Any modification of the Settlement Agreement must be in writing signed by Class Counsel and Defendant's Counsel.

8.5 Advice of Counsel. The determination of the terms and the drafting of this Settlement Agreement have been by mutual agreement after negotiation, with consideration by and participation of all parties and their counsel.

8.6 Binding Agreement. This Settlement Agreement will be binding upon and inure to the benefit of the respective heirs, successors, and assigns of the Parties, the Settlement Class Members and other Released Parties.

8.7 No Waiver. The waiver by any party of any provision or breach of this Settlement Agreement will not be deemed a waiver of any other provision or breach of this Settlement Agreement.

8.8 Execution in Counterparts. This Settlement Agreement will become effective upon its execution by all of the undersigned. The parties may execute this Settlement Agreement

in counterparts, and execution of counterparts will have the same force and effect as if all parties had signed the same instrument. The parties further agree that signatures provided by portable document format (PDF) or other electronic transmission will have the same force and effect as original signatures.

8.9 Enforcement of this Settlement Agreement. The Court will retain jurisdiction, and will have exclusive jurisdiction, to enforce, interpret, and implement this Settlement Agreement and the terms of any order entered pursuant to this Settlement Agreement.

8.10 Notices. All notices to the Parties or counsel required by this Settlement Agreement will be made in writing and communicated by email and mail to the following addresses: Frederick J. Klorczyk III, Bursor & Fisher, P.A., 1330 Avenue of the Americas 32nd Floor, New York, NY 10019, fklorczyk@bursor.com; Paul Olszowka and Christine E. Skoczylas, Barnes & Thornburg LLP, One North Wacker Dr., Ste 4400, Chicago, IL 60606, paul.olszowka@btlaw.com, christine.skoczylas@btlaw.com.

IT IS SO AGREED TO BY THE PARTIES:

Dated: _____

JOSEFINA DARNALL

By:_____
Individually and as representative of the Class

Dated: _____

GEORGE WYANT

By:_____
Individually and as representative of the Class

Dated: _____

CHERYL RUTKOWSKI

By:_____
Individually and as representative of the Class

Dated: _____

DEXTER COBB

By:_____
Individually and as representative of the Class

Dated: _____

DUDE PRODUCTS, INC.

By:_____

Name: _____

Title: _____

IT IS SO STIPULATED BY COUNSEL:

Dated: _____

BURSOR & FISHER, PA

By: _____
Frederick J. Klorczyk III*
1330 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel: (646) 837-7150
Fax: (212) 989-9163
Email: fklorczyk@bursor.com

Neal J. Deckant
ndeckant@bursor.com
Brittany S. Scott
bscott@bursor.com
BURSOR & FISHER, PA
1990 North California Blvd.
Walnut Creek, CA 94596
Tel: (925) 300-4455

Dated: _____

MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC

By: _____
Nick Suciu III
nsuciu@milberg.com
6905 Telegraph Rd., Ste 115
Bloomfield Hills, MI 48301
Tel: (313) 303-3472

Gary M. Klinger
gklinger@milberg.com
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
Tel. (847) 208-4585

Attorneys for Plaintiffs and the Settlement Class

Dated: _____

BARNES & THORNBURG LLP

By:_____

Paul Olszowka
Christine E. Skoczylas
paul.olszowka@btlaw.com
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One North Wacker Drive
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Chicago, IL 60606
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Attorneys for Defendant Dude Products, Inc.

EXHIBIT B

EXHIBIT C

GUTRIDE SAFIER LLP
ADAM J. GUTRIDE (State Bar No. 181446)
SETH A. SAFIER (State Bar No. 197427)
100 Pine Street, Suite 1250
San Francisco, California 94111
Telephone: (415)-639-9090
Facsimile: (415)-449-6469

SPANBERG SHIBLEY & LIBER LLP
STUART E. SCOTT (pro hac vice admission)
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Cleveland, OH 44114
Telephone: (216)-600-0114
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TYCKO & ZAVAREEI LLP
HASSAN A. ZAVAREEI (State Bar No. 181547)
1828 L Street, N.W., Suite 1000
Washington, DC 20036
Telephone: (202)-973-0900
Facsimile: (202)-973-0950

Counsel for Plaintiff and the Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAMIE PETTIT, et al.,

Plaintiffs,

v.

PROCTER & GAMBLE COMPANY,

Defendant.

Case No. 3:15-cv-2150 RS

DECLARATION OF JONATHAN SHAFFER AND POST-DISTRIBUTION ACCOUNTING

Judge: Hon. Richard Seeborg

I, Jonathan Shaffer, hereby declare as follows:

1. I am a Client Services Manager for Heffler Claims Group ("Heffler") in Philadelphia, Pennsylvania. I am over twenty-one years of age and am authorized to make this declaration on behalf of Heffler and myself. The following statements are based on my personal knowledge and information provided by other experienced Heffler employees working under my supervision. This declaration and the post-distribution accounting reflected herein is being filed in accordance with the Court's Order Granting Final Approval of Class Action Settlement (*see* Dkt. No. 135, ¶ 30) and this district's Procedural Guidance for Class Action Settlements.

2. Heffler has extensive experience in class action matters, having provided services in class action settlements involving antitrust, securities fraud, employment and labor, consumer, and government enforcement matters. Heffler has provided notification and/or claims administration services in more than 1,000 cases.

3. In the Court's order granting preliminary approval, *see* Dkt. No. 117, Heffler was appointed as the Claim Administrator to provide notification and administration services in connection with a settlement of this action. Heffler's duties leading up to and following Final Approval of the settlement included: (a) filing a declaration in support of Final Approval; (b) completing the validation of all claims submitted; (c) calculating payment amounts to eligible claimants; (e) sending rejection letters to claimants who submitted deficient and/or invalid clams; (f) printing and mailing distribution payments; and (g) performing such other tasks as counsel for the Parties or the Court ordered Heffler to perform.

4. On March 14, 2019, Heffler submitted a declaration in support of Final Approval that detailed the administrative services Heffler provided leading up to Final Approval. *See* Dkt. No. 130-4.

5. As of June 28, 2019, which was the deadline for Heffler to pay valid claims, Heffler had received 187,795 timely claims and 65 late claims. Of the 187,860 claims received, Heffler determined 137,068 were valid and 50,792 were invalid. Claims could be found invalid for

various reasons, including (for example) if they exceeded the limits set forth in the settlement agreement or were for purchases in New York State, which are not covered by this settlement.

6. On May 24, 2019, Heffler sent rejection notices via email to the 50,015 claimants who provided an email address and submitted invalid claims.

7. Heffler has calculated the payment amount for each eligible claimant following the allocation guidelines in Section 4.4 of the Settlement Agreement.

8. On June 26, 2019, Heffler sent distribution payments to the 137,068 claimants who submitted valid claims. A copy of the payment letter is attached as **Exhibit A**.

9. There is no Gross Settlement Fund, because this is a claims-made settlement where P&G paid directly all valid claims, as well as the attorneys' fees and costs awarded by the Court along with the costs of settlement notice and administration.

10. The table below sets forth a post-distribution accounting.

Total Class Members	Approximately 3,884,000
Types of Notice	Publication; online and social media advertising; press releases
Notices mailed and not returned as undeliverable	N/A
Notice emailed and not returned as undeliverable	N/A
Opt-outs filed	58
Opt-outs as a percent of the Class	0.00149%
Objections filed	0
Objections as a percent of the Class	0%
Total (valid) Claim Forms submitted	187,860 (137,068)
Total (valid) claims received as a percent of the Class	4.84% (3.53%)
Administrative fees/costs	$677,122.48 (Estimated)

Class Counsel fees/cost	$2,150,000.00 (as awarded by the Court)
Payment/distribution type	Checks
Number of payments	137,068
Total distributed	$537,879.00
Average payment	$3.92
Median payment	$4.20
Smallest payment	$0.60
Largest payment	$30.00
Checks/payments not cleared	TBD
Amount of checks/payments not cleared	TBD
Cy pres recipient payment	N/A

I declare under penalty of perjury under the laws of the United States that the above is true and correct to the best of my knowledge. This declaration is executed on July 16, 2019 in Philadelphia, Pennsylaviania.

Jonathan Shaffer

Exhibit A

Pettit v Procter & Gamble
c/o Claims Administrator
P.O. Box 58280
Philadelphia, PA 19102-8280

Class Member ID: [redacted]

Check No: [redacted]
Check Amount: [redacted]
Check Date: 06/26/2019
Class Member ID: [redacted]

[redacted]

Thank you for submitting a claim in connection with the Court-approved settlement in *Pettit v. Procter & Gamble Company, Case No. 3:15-cv-2150-RS* in the United States District Court for the Northern District of California. The attached check represents the full and final settlement payment to you as an eligible member of the Settlement Class and is based on the claim you submitted.

Please be advised that you have until September 24, 2019 to deposit the check. After that date, your check shall be deemed void and you will not be entitled to receive any payment under the settlement.

You should consult with your tax advisor to determine the tax consequences, if any, of this settlement payment to you.

All inquiries and address changes should be in writing, reference your name, check number or Class Member ID, and be forwarded to Pettit v. Procter & Gamble c/o Claims Administrator, P.O. Box 58280, Philadelphia, PA, 19102-8280.

Pettit v Procter & Gamble
c/o Claims Administrator
P.O. Box 58280
Philadelphia, PA 19102-8280

[redacted]

CHECK NO. [redacted]

DATE: 06/26/2019 **AMOUNT:** [redacted]

PAY: [redacted]

PAY TO THE ORDER OF: [redacted]

CASH PROMPTLY, NON-NEGOTIABLE AFTER September 24, 2019

[redacted]

AUTHORIZED SIGNATURE

[redacted]

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. KIMBERLY-CLARK CORPORATION, et al., Defendants.	Civil Action No. 1:14-cv-01142-PKC-RML CLASS ACTION

DECLARATION OF DEREK SMITH REGARDING NOTICE PROCEDURES

I, Derek Smith, declare as follows:

1. I am employed as a Director by Gilardi & Co. LLC ("Gilardi"), located at 1 McInnis Parkway, Suite 250, San Rafael, California 94903. Gilardi was appointed as the Settlement Administrator in this matter and is not a party to this action. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. On May 29, 2024, Gilardi received from Defendant a list of names, addresses, current Costco card member information, units purchased, and any available email addresses for 134,231 persons identified as possible Class Members.

3. Gilardi examined the list for duplicate records and ineligible class members. Gilardi formatted the list for mailing purposes and processed the names and addresses through the National Change of Address Database ("NCOA") to update any addresses on file with the United States Postal Service ("USPS"). Gilardi updated its proprietary database with the Class List, which included 131,049 potential class members – of which 83,224 were listed as current Costco card members.

4. On June 10, 2024, Gilardi caused the Email Notice to be emailed to the 43,457 records with email addresses available in the Class List. Also on June 10, 2024, Gilardi caused the Notice Postcard to be printed and mailed to the 87,592 records without email addresses in the Class List. True and correct copies of the Email Notice and Notice Postcard are attached hereto as Exhibit A.

5. Since emailing the Email Notices to the Class Members, Gilardi has received 2,613 Email Notices returned. On June 26, 2024, Gilardi caused the Notice Postcard to be printed and mailed to the 2,613 records with returned Email Notices.

6. Since mailing the Notice Postcards to the Class Members, Gilardi has received 8,046 Notice Postcards returned by the USPS with undeliverable addresses. Through credit bureau and/or other public source databases, Gilardi performed address searches for these undeliverable Notice Postcards and was able to find updated addresses for 2,162 Class Members. Gilardi promptly re-mailed Notice Postcards to the updated addresses.

7. On or before April 8 2024, Gilardi established a website www.CostcoFlushableWipesSettlement.com, dedicated to this matter to provide information to the Class Members, allow Class Members to file online claims, submit online opt outs, and to allow Class Members to download copies of the Long Form Notice and case related documents. The website URL was set forth in the Email Notice, Notice Postcard, and Long Form Notice. A true and correct copy of the Long Form Notice and Claim Form are attached hereto respectively as Exhibits B and C.

8. On or before April 8, 2024, Gilardi established a toll-free telephone number (1-877-514-0201) dedicated to answering telephone inquiries from Class Members.

9. The receipt deadline for Class Members to file claims in this matter is August 9, 2024. As of July 24, 2024, 848,206 Claim Forms have been filed. Of those, 1,025 were submitted by Class Members listed in the data, of which 703 were listed as current card members and 322 were listed as previous card members. Beginning in late June (after the Settlement headlined national news sites), the case website was bombarded with claims. The online claims were being received in the tens of thousands per hour. The majority of claims appeared to be mass bot submissions, with many of the rest legitimate Costco shoppers who likely did not understand that the Settlement involves only Costco card members who purchased units in New York state.

10. On July 3, 2024, Gilardi upgraded the reCAPTCHA parameters in an attempt to filter out bots. Shortly thereafter, in order to further slow the influx of likely bot-generated or otherwise invalid claims, Gilardi added a clarifying question to access the Claim Form to ensure claimants were in fact class members (i.e., current or former Costco members who made purchases at a Costco in New York state between July 1, 2011 through May 31, 2017). Unknown claims slowed somewhat for a few days, but then by July 10, 2024, online claim submissions began to speed up again. Because of the web traffic congestion caused by the mass claim filing, Gilardi asked Counsel if the online portal could be shut down. After ascertaining that Gilardi's web team could implement no further measures to limit the claims coming in through the unknown online path, Counsel agreed to allow Gilardi to shut down the online portal only for these unknown class members without credentials (i.e., class members who do not have a claim number and pin from their Email Notice or Notice Postcard). On July 11, 2024, Gilardi shut down the online claim portal for potential class members who do not have or did not receive credentials.

11. This shutdown for non-credentialed claimants is not expected to materially impact the submission of eligible claims. The online portal remains active for class members who were

included in the notice data and received credentials. Class members without credentials may still download PDF versions of the Claim Form to submit via mail. Gilardi will thoroughly review the online submission from class members without credentials to identify possibly eligible submissions.

12. The receipt deadline for Class Members to request to be excluded from the class is August 9, 2024. As of the date of this declaration, Gilardi has received 71 requests for exclusion. The class members who submitted requests for exclusion also submitted claims. Gilardi will notify the class members that the exclusion requests will take precedence unless confirmation of the intention to be included in the Settlement is submitted.

13. The receipt deadline for Class Members to object to the settlement is August 9, 2024. As of the date of this declaration, Gilardi has received no objections to the settlement.

DATED: July 25, 2024

DEREK SMITH

EXHIBIT A

Claim Number: <<Claim Number>>
PIN: <<PIN>>

Purchasers of Kirkland Signature Moist Flushable Wipes Between July 1, 2011 and May 31, 2017
A Proposed Class Action Settlement May Affect Your Rights

WHO IS AFFECTED?

A settlement (the "Settlement") has been reached in a class action lawsuit involving Costco Wholesale Corporation's ("Costco") flushable wipes sold under the Kirkland Signature Moist Flushable Wipes brand (the "Product"). The lawsuit claims that the Product is not actually flushable. Costco denies this allegation and maintains that the Product performs as advertised. You may be included in a class certified by the Court for purposes of settlement only (the "Settlement Class") if you purchased the Product in the State of New York between July 1, 2011 and May 31, 2017.

WHAT DOES THE SETTLEMENT PROVIDE?

In connection with this Settlement, each Settlement Class Member who currently maintains a Costco membership and who does not opt out of the Settlement, and each Settlement Class Member who does not currently maintain a Costco membership but submits a valid claim, shall receive a payment of one dollar and thirty cents ($1.30) for each Product unit purchased during the Settlement Class Period (July 1, 2011 and May 31, 2017), regardless of the price the Settlement Class Member paid for the Product or the number of wipes contained in each package, subject to the following: (i) a minimum of seven dollars and fifty cents ($7.50) will be paid to each Settlement Class Member, regardless of the number of Product units purchased by that Settlement Class Member; (ii) a maximum of fifty-five dollars and ninety cents ($55.90) (*i.e.*, a maximum of 43 Product units) shall be paid to any one Household ("Household" means, without limitation, all persons who share a single physical address) for such purchases; and (iii) only one claim may be submitted per Household (Household shall be determined based on residential address). Settlement Class Members will be eligible to receive their settlement sums regardless of whether their claims are corroborated by proofs of purchase. Because there is a $2 million cap on payments to Settlement Class Members, inclusive of class settlement administration costs, depending on the number of Valid Claims, individual cash payment amounts may be reduced *pro rata* (proportionately) so that the total amount of all payments to Settlement Class Members and class settlement administration costs does not exceed the cap.

WHAT ARE MY OPTIONS?

If you are not a current Costco member, you must **submit a claim** online by **August 9, 2024** or by mail so that it is received (not merely postmarked) no later than **August 9, 2024** to receive a payment. You can **opt out of the Settlement Class** and keep your right to sue Costco on the released claims by submitting an opt-out request by **August 9, 2024**. The Settlement will release all claims related to Plaintiff's contentions that Costco's marketing, advertising, and sale of the Product was false or misleading. There is no release of claims for personal injury arising out of the use of the Product. You can also **object to the Settlement** by filing an objection by **August 9, 2024**, which does not affect your ability to file a claim. If you opt out, you may not submit a claim or object to the Settlement and you will receive no payment from this Settlement. For details on how to opt out, object, or to file a claim, please visit www.costcoflushablewipessettlement.com or contact the Claims Administrator. If you **do nothing,** you will not receive a payment and you will be bound by the decisions of the Court.

FINAL APPROVAL HEARING AND ATTORNEYS' FEES

On **August 30, 2024, at 10:00 a.m. ET,** the Court will hold a hearing to consider whether to finally approve the Settlement. If the Settlement is approved, the attorneys for the Settlement Class will ask the Court for an award from Costco and non-party Nice-Pak Products, Inc. of up to $3,000,000 in attorneys' fees and expenses, and a payment of $10,000 for Plaintiff Dr. D. Joseph Kurtz. Note that the hearing date may change without further notice to you although any such change will be reflected on the Settlement website (www.costcoflushablewipessettlement.com). You may attend the hearing, but you do not have to. Plaintiff's motion for final approval of the Settlement and Settlement Class Counsel's application for an award of

attorneys' fees and expenses and award to Plaintiff will be posted on the Settlement website after they are filed.

MORE INFORMATION

This is only a summary. For more information, please visit: www.costcoflushablewipessettlement.com or contact the Claims Administrator by calling 1-877-514-0201 or writing to P.O. Box 301134, Los Angeles, CA 90030-1134. You may also contact Class Counsel Vincent M. Serra at Robbins Geller Rudman & Dowd LLP, 58 South Service Road, Suite 200, Melville, New York 11747. The case name is *Kurtz v. Kimberly-Clark Corp., et al*., 1:14-cv-1142-PKC-RML (E.D.N.Y.).

Purchasers of Kirkland Signature Moist Flushable Wipes Between July 1, 2011 and May 31, 2017

A Proposed Class Action Settlement May Affect Your Rights

VISIT THE SETTLEMENT WEBSITE BY SCANNING THE PROVIDED QR CODE

KIU

Kurtz v. Kimberly-Clark Corp.
Claims Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

«3of9 Barcode»
«BARCODE»
Postal Service: Please do not mark barcode

Claim Number: «Claim Number»
PIN: «PIN»

KIU «Claim Number»
«FIRST1» «LAST1»
«ADDRESS LINE 2»
«ADDRESS LINE 1»
«CITY», «STATE»«PROVINCE» «POSTALCODE»
«COUNTRY»

WHO IS AFFECTED? A settlement (the "Settlement") has been reached in a class action lawsuit involving Costco Wholesale Corporation's ("Costco") flushable wipes sold under the Kirkland Signature Moist Flushable Wipes brand (the "Product"). The lawsuit claims that the Product is not actually flushable. Costco denies this allegation and maintains that the Product performs as advertised. You may be included in a class certified by the Court for purposes of settlement only (the "Settlement Class") if you purchased the Product in the State of New York between July 1, 2011 and May 31, 2017.

WHAT DOES THE SETTLEMENT PROVIDE? In connection with this Settlement, each Settlement Class Member who currently maintains a Costco membership and who does not opt out of the Settlement, and each Settlement Class Member who does not currently maintain a Costco membership but submits a valid claim, shall receive a payment of one dollar and thirty cents ($1.30) for each Product unit purchased during the Settlement Class Period (July 1, 2011 and May 31, 2017), regardless of the price the Settlement Class Member paid for the Product or the number of wipes contained in each package, subject to the following: (i) a minimum of seven dollars and fifty cents ($7.50) will be paid to each Settlement Class Member, regardless of the number of Product units purchased by that Settlement Class Member; (ii) a maximum of fifty-five dollars and ninety cents ($55.90) (*i.e.*, a maximum of 43 Product units) shall be paid to any one Household ("Household" means, without limitation, all persons who share a single physical address) for such purchases; and (iii) only one claim may be submitted per Household (Household shall be determined based on residential address). Settlement Class Members will be eligible to receive their settlement sums regardless of whether their claims are corroborated by proofs of purchase. Because there is a $2 million cap on payments to Settlement Class Members, inclusive of class settlement administration costs, depending on the number of Valid Claims, individual cash payment amounts may be reduced *pro rata* (proportionately) so that the total amount of all payments to Settlement Class Members and class settlement administration costs does not exceed the cap.

WHAT ARE MY OPTIONS? If you are not a current Costco member, you must **submit a claim** online by **August 9, 2024** or by mail so that it is received (not merely postmarked) no later than **August 9, 2024** to receive a payment. You can **opt out of the Settlement Class** and keep your right to sue Costco on the released claims by submitting an opt-out request by **August 9, 2024**. The Settlement will release all claims related to Plaintiff's contentions that Costco's marketing, advertising, and sale of the Product was false or misleading. There is no release of claims for personal injury arising out of the use of the Product. You can also **object to the Settlement** by filing an objection by **August 9, 2024**, which does not affect your ability to file a claim. If you opt out, you may not submit a claim or object to the Settlement and you will receive no payment from this Settlement. For details on how to opt out, object, or to file a claim, please visit www.costcoflushablewipessettlement.com or contact the Claims Administrator. If you **do nothing,** you will not receive a payment and you will be bound by the decisions of the Court.

FINAL APPROVAL HEARING AND ATTORNEYS' FEES. On **August 30, 2024, at 10:00 a.m. ET,** the Court will hold a hearing to consider whether to finally approve the Settlement. If the Settlement is approved, the attorneys for the Settlement Class will ask the Court for an award from Costco and non-party Nice-Pak Products, Inc. of up to $3,000,000 in attorneys' fees and expenses, and a payment of $10,000 for Plaintiff Dr. D. Joseph Kurtz. Note that the hearing date may change without further notice to you although any such change will be reflected on the Settlement website (www.costcoflushablewipessettlement.com). You may attend the hearing, but you do not have to. Plaintiff's motion for final approval of the Settlement and Settlement Class Counsel's application for an award of attorneys' fees and expenses and award to Plaintiff will be posted on the Settlement website after they are filed.

MORE INFORMATION. This is only a summary. For more information, please visit: www.costcoflushablewipessettlement.com or contact the Claims Administrator by calling 1-877-514-0201 or writing to *Kurtz v. Kimberly-Clark Corp.* Claims Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134. You may also contact Class Counsel Vincent M. Serra at Robbins Geller Rudman & Dowd LLP, 58 South Service Road, Suite 200, Melville, New York 11747. The case name is *Kurtz v. Kimberly-Clark Corp., et al.*, 1:14-cv-1142-PKC-RML (E.D.N.Y.).

EXHIBIT B

CLASS ACTION SETTLEMENT NOTICE

Your legal rights are affected whether you act or do not act. Read this notice carefully.

Attention Purchasers of Kirkland Signature Moist Flushable Wipes Between July 1, 2011 and May 31, 2017: You may be entitled to payment from a proposed class action settlement.

A federal court has authorized this notice. This is not a solicitation from a lawyer.

- A settlement (the "Settlement") has been reached in the class action case of *Kurtz v. Kimberly-Clark Corp., et al*., No. 1:14-cv-1142-PKC-RML ("Action"), pending in federal court in the Eastern District of New York (the "Court").
- You may be included in a class certified by the Court for purposes of settlement (the "Settlement Class") if you are an individual over the age of 18 who resides in the United States and who purchased in the State of New York any Kirkland Signature Moist Flushable Wipes (the "Product"), not for the purpose of resale, between July 1, 2011 and May 31, 2017.
- This Settlement will resolve claims of all Settlement Class Members against Costco Wholesale Corporation ("Costco" or "Defendant") involving the Product. The lawsuit contends that the Product was inappropriately labeled and marketed as "flushable" and safe for sewer or septic systems. Costco denies these allegations and maintains that the wipes performed as advertised.
- In connection with this Settlement, each Settlement Class member who currently maintains a Costco membership and who does not opt out of the Settlement, and each Settlement Class member who does not currently maintain a Costco membership but submits a valid claim may be entitled to: one dollar and thirty cents ($1.30) per package of Product purchased, with a minimum recovery of seven dollars and fifty cents ($7.50) per Household ("Household" means, without limitation, all persons who share a single physical address), provided at least one Product package was purchased, and a maximum recovery of fifty-five dollars and ninety cents ($55.90) per Household (Household shall be determined based on residential address). Recovery is limited to one claim per Household, regardless of how many persons reside at an address.
- Plaintiff's counsel ("Class Counsel") who brought the lawsuit will ask the Court for up to $3,000,000 to be paid to them by Costco and non-party Nice-Pak Products, Inc. ("Nice-Pak") as attorneys' fees and expenses for investigating the facts, litigating the lawsuits, and negotiating the Settlement. They will additionally ask for $10,000 for the named plaintiff, Dr. D. Joseph Kurtz ("Plaintiff"), who initially brought this lawsuit, to compensate him for taking on this litigation on behalf of the Settlement Class.
- The Settlement has been preliminarily approved by the Court. This notice summarizes the Settlement. For the precise terms and conditions of the Settlement, please: (i) see the Settlement Agreement, which is available at www.costcoflushablewipessettlement.com; (ii) contact the Claims Administrator by calling 1-877-514-0201 or writing to *Kurtz v. Kimberly-Clark Corp.* Claims Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134; or (iii) contact Class Counsel, Vincent M. Serra at Robbins Geller Rudman & Dowd LLP, 58 South Service Road, Suite 200, Melville, New York 11747.
- **PLEASE DO NOT CALL THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.**

YOUR RIGHTS AND OPTIONS IN THIS SETTLEMENT		DEADLINE
SUBMIT A CLAIM FORM	Submit a claim for payment online or by mail, if you do not currently maintain a Costco membership. Be bound by the Settlement and give up your right to sue or continue to sue Costco for the claims released by the Settlement. This is the only way to receive a payment from the Settlement, if you do not currently maintain a Costco membership.	Must be received or submitted online by August 9, 2024
EXCLUDE YOURSELF (or "OPT OUT")	Remove yourself from the Settlement Class and receive no payment by submitting a request for exclusion (or "opt out"). This is the only option that allows you to bring or join another lawsuit against Costco related to the Product. You may not submit a claim or object to the Settlement if you exclude yourself, and will receive no payment from this Settlement if you exclude yourself.	Must be received by August 9, 2024
OBJECT OR COMMENT	Write to the Court about what you do or do not like about the Settlement, the amount of attorneys' fees and expenses, or the awards to Plaintiff. You may still submit a claim even if you object or comment and/or receive Settlement benefits. If you submit a claim and/or receive Settlement benefits, you will still be bound by the Settlement even if you object or comment. You cannot both request exclusion and also object.	Must be received by August 9, 2024
GO TO THE FINAL APPROVAL HEARING	Ask to speak in Court about the fairness of the Settlement, the amount of attorneys' fees, or the awards to the Plaintiff. You may still submit a claim and/or receive Settlement benefits, even if you go to the hearing. If you want your own attorney to represent you, you must pay for that attorney.	Hearing is August 30, 2024 If you want to speak, you must submit a request to speak by August 9, 2024
DO NOTHING	If you are a current Costco member and Settlement Class Member, you will automatically receive a payment. If you do not currently maintain a Costco membership, you will receive no payment. You will release your claims, and have no right to sue later for the claims released by the Settlement.	

- These rights and options—and the deadlines to exercise them—are explained in this notice. The deadlines may be moved, canceled, or otherwise modified, so please check the Settlement website at www.costcoflushablewipessettlement.com regularly for updates and further details.
- The Court in charge of this lawsuit still has to decide whether to finally approve the Settlement. Settlement payments will be made only if the Court approves the Settlement and after any appeals are resolved in favor of upholding the Settlement. This can take time. Please be patient.

Final Approval Hearing

On **August 30, 2024, at 10:00 a.m.**, the Court will hold a hearing (the "Final Approval Hearing") to determine: (1) whether the Settlement is fair, reasonable, and adequate and should receive final approval; (2) whether the application for an award of attorneys' fees and expenses brought by Class Counsel should be granted; and (3) whether the application for an award to Plaintiff who brought the lawsuit should be granted. The hearing will be held in a Courtroom to be determined at the United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, before the Honorable Pamela K. Chen. This hearing date may change without further notice to you. Consult the Settlement website at www.costcoflushablewipessettlement.com, or the Court docket in this lawsuit at ecf.nyed.uscourts.gov (perform a case number query using 1:14-cv-1142), for updated information on the hearing date and time.

Important Dates

August 9, 2024 Objection Deadline

August 9, 2024 Exclusion Deadline

August 9, 2024 Claim Form Deadline

August 30, 2024 Final Approval Hearing

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How Do I Know If I Am Affected By The Litigation And The Settlement?

The lawsuit involves wipes labeled as "flushable" and sold under the brand name Kirkland Signature Moist Flushable Wipes. For purposes of Settlement only, the Court has certified the Settlement Class. You are a member of the Settlement Class ("Settlement Class Member") if, between July 1, 2011 and May 31, 2017, you (a person, not a commercial entity) reside in the United States and purchased one or more units of the Product in the State of New York, not for purpose of resale.

The Settlement Class excludes: (1) the Honorable Pamela K. Chen, the Honorable Robert M. Levy, mediator David Geronemus, mediator Michael Ungar, Esq., and any member of their immediate families; (2) any of Costco's and Nice-Pak's officers, directors, employees, or legal representatives; (3) Product purchases that have already been refunded or voided by Costco, Nice-Pak, or any other retailer; (4) Product purchases that were made for the purpose of resale, including purchases made by Costco business or commercial members; and (5) any person who timely opts out of the Settlement Class.

If you are a Settlement Class Member, you will be bound by the Settlement and judgment in this lawsuit, unless you request to be excluded, regardless of whether you submit a claim for monetary payment.

If the Settlement does not become effective (for example, because it is not finally approved, or the approval is reversed on appeal), then this litigation will continue on behalf of purchasers in New York. Specifically, a class of people who purchased the Product in New York between February 21, 2008 and March 1, 2017 (the "Certified Class") has already been certified by the Court. To be clear, the Certified Class is somewhat different than the Settlement Class. The New York Class is defined as "All persons and entities who purchased Kirkland Signature Flushable Wipes in the State of New York between July 1, 2011 and March 1, 2017." Members of the Certified Class have the same rights as all Settlement Class Members, as explained in this notice, except that they will remain part of the Action even if this Settlement is not approved, as specified in the section "Special Notice for Members of the Certified Class."

What Is The Lawsuit About?

Plaintiff asserts that labeling on the Product that stated that the Products were "flushable" and were safe for sewer or septic systems, is false or misleading, and that the Product damaged or clogged plumbing pipes, septic systems, and sewage lines and pumps. Plaintiff alleges that Costco is liable for violation of New York General Business Law §349. Plaintiff seeks to pursue his claims on behalf of himself and others who purchased the Products in New York.

Costco denies that there is any factual or legal basis for Plaintiff's allegations. Costco contends that the labeling of the Product was truthful and not misleading, and that the Product did not cause property damage in well-maintained plumbing systems. Costco therefore denies any liability. Costco also denies that Plaintiff or any other members of the Settlement Class have suffered injury or are entitled to monetary or other relief. Costco further contends that, following a two-year investigation, the U.S. Federal Trade Commission finalized a Consent Order with Nice-Pak on October 30, 2015, which permits Costco and Nice-Pak to continue labeling, advertising, and marketing the Product as "flushable."

The Court has not determined the merits of these arguments, or whether Plaintiff or Costco are correct.

What Does Plaintiff Seek To Recover In The Lawsuit?

The lawsuit contends that, if Costco had not engaged in the labeling, marketing, and advertising that Plaintiff challenges, the price of the Product would have been lower. Plaintiff seeks to recover, on behalf of a class of individuals who purchased the Product in New York (except for purchases made for resale), the dollar amount of the price "premium" that is attributable to the alleged misrepresentations, or statutory damages under New York General Business Law §349, and Plaintiff originally sought to pursue claims for property damage that he allegedly incurred as a result of using Costco's flushable wipes.

Costco denies that there is any legal entitlement to a refund, damages, or any other monetary relief.

Why Is This Lawsuit Being Settled?

Class Counsel has investigated the manufacturing, marketing, labeling, and performance of the Product. Costco has produced thousands of pages of documents for review by Class Counsel. Class Counsel have taken depositions of Costco and Nice-Pak employees. The parties also have exchanged written responses to questions posed by the other party. Class Counsel have also obtained documents from third parties, including wastewater treatment professionals and INDA (the trade association for manufacturers of flushable wipes). Class Counsel also retained two experts to evaluate the Product and the Class's damages, and have had extensive consultations with wastewater professionals. Plaintiff and his expert witnesses have been deposed. One of Plaintiff's expert witnesses submitted six separate expert declarations, and both expert witnesses and a wastewater professional provided testimony before the Court at evidentiary hearings.

Since the initiation of this litigation, Plaintiff and Costco, through their counsel, have participated in substantial settlement discussions, both formal and informal, including before a third-party mediator. This Settlement was reached following those efforts.

After taking into account the risks and costs of further litigation, Plaintiff and his counsel believe that the terms and conditions of this Settlement are fair, reasonable, adequate, and equitable, and that this Settlement is in the best interest of the Settlement Class Members. This Settlement provides immediate monetary relief to the Settlement Class without the cost, time, and expense of litigating, which can take years.

What Is The Settlement?

Costco and Nice-Pak will provide monetary payments to Settlement Class Members and to Class Counsel and Plaintiff, as described in the next sections.

What Can I Get In The Settlement?

Each Settlement Class Member who currently maintains a Costco membership and who does not opt out of the Settlement, and each Settlement Class Member who does not currently maintain a Costco membership but submits a valid claim, shall receive a payment of one dollar and thirty cents ($1.30) for each Product unit purchased during the Settlement Class Period (July 1, 2011 and May 31, 2017), regardless of the price the Settlement Class Member paid for the Product or the number of wipes contained in each package, subject to the following: (i) a minimum of seven dollars and fifty cents ($7.50) will be paid to each Settlement Class Member, regardless of the number of Product units purchased by that Settlement Class Member; (ii) a maximum of fifty-five dollars and ninety cents ($55.90) (*i.e.*, a maximum of 43 Product units) shall be paid to any one Household for such purchases; and (iii) only one claim may be submitted per Household (Household shall be determined based on residential address). Settlement Class Members will be eligible to receive their settlement sums regardless of whether their claims are corroborated by proofs of purchase.

There is a $2 million cap on cash payments to Settlement Class Members, inclusive of class settlement administration costs, and thus individual cash payment amounts may be reduced *pro rata* (proportionately) so that the total amount of all payments to Settlement Class Members and administration costs does not exceed the cap.

How Do I Make A Claim?

To make a claim, if you do not currently maintain a Costco membership, you must fill out the claim form available at www.costcoflushablewipessettlement.com. You can print the claim form and mail it to the Claims Administrator at *Kurtz v. Kimberly-Clark Corp.* Claims Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134, or you can submit the claim form online. Claim forms must be submitted online or received, not just postmarked, by August 9, 2024. If you currently maintain a Costco membership, you do not need to submit a claim. Costco will identify Settlement Class Members and the number of Product units purchased and issue the appropriate check to the mailing address on file.

What Does Plaintiff And Their Counsel Get?

To date, Class Counsel have not been compensated for their work on this with respect to Costco. As part of the Settlement, Class Counsel may apply to the Court to award them up to $3,000,000.00 from Costco and Nice-Pak to pay their attorneys' fees and expenses. The Court will determine how much to award Class Counsel.

In addition, Plaintiff Dr. Kurtz may apply to the Court for an award of $10,000. This award is designed to compensate Plaintiff for his time and effort in pursuing the lawsuit against Costco on behalf of the Settlement Class. The Court will determine how much to award Plaintiff.

Neither an award of attorneys' fees and expenses to Class Counsel nor any awards to Plaintiff will affect compensation to Settlement Class Members from the Settlement.

Plaintiff and their counsel will file a motion with the Court on or before **July 26, 2024**, in support of their applications for attorneys' fees and expenses and awards to Plaintiff. A copy of that motion will be available on the Settlement website (www.costcoflushablewipessettlement.com).

The Court will determine the amount of fees and expenses awarded to the attorneys and the amount of Plaintiff's award.

What Claims Are Released By The Settlement?

This Settlement releases all "Plaintiff's Released Claims" by Settlement Class Members (whether or not they file a valid claim) against Costco and its affiliates. "Plaintiff's Released Claims" is defined in the Settlement Agreement as any and all claims, suits, debts, liens, demands, rights, causes of action, continuing prosecutions, obligations, controversies, damages, costs, expenses, attorneys' fees, or liabilities, of any nature, whether arising under local, state, federal, or foreign law, whether by statute, regulation, contract, common law, or equity, that arise from or relate to the claims and allegations in the Complaint, including, but not limited to, unknown claims, and the acts, facts, omissions, or circumstances that were or could have been alleged by Plaintiff in the lawsuit related to any wipe products (flushable and non-flushable) currently or formerly manufactured, marketed, or sold by Costco or any of its affiliates. Plaintiff's Released Claims shall in all respects be construed as broadly as possible as to the claims asserted, including but not limited to all property damage, consistent with all applicable law, to effect complete finality over the lawsuit with respect to Costco. Once the Settlement is approved, the Settlement Class Members will also be bound to the same release. Plaintiff's Released Claims does not include the release of claims for personal injury arising out of the use of the Product. For further information regarding the releases, please see Section VII of the Settlement Agreement, available at www.costcoflushablewipessettlement.com.

Can I Exclude Myself From The Settlement?

You can exclude yourself (or "opt out") from the Settlement Class if you wish to retain the right to sue Costco separately for the claims released by the Settlement. If you exclude yourself, you cannot file a claim or object to the Settlement, and will not be entitled to any monetary payments from the Settlement. You do not need to exclude yourself if you merely want to retain a right to sue for personal injury arising out of your use of the Product.

To exclude yourself, you must complete and submit the online exclusion request form at the Settlement website (www.costcoflushablewipessettlement.com), or download and submit the online exclusion request form to the Claims Administrator via first-class mail at *Kurtz v. Kimberly-Clark Corp.* Claims Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134. Exclusion requests must be made online or received (not postmarked) by mail by **August 9, 2024**.

So-called "mass" or "class" opt outs shall not be allowed.

Can I Object To or Comment on The Settlement?

You can ask the Court to deny approval of the Settlement by submitting an objection. If the Court denies approval to the entire Settlement, no Settlement payments will be made, and the lawsuit will continue. If that is what you want to happen, you must object.

You can also ask the Court to disapprove the requested payments to Plaintiff and to their counsel. Even if those payments are disapproved or adjusted, no additional money will be paid to Settlement Class Members.

You can also tell the Court what you like about the Settlement.

You can exercise any of the above options regardless of whether or not you file a claim, but not if you exclude yourself from the Settlement Class. If you exclude yourself from the Settlement Class by submitting an opt-out request, you cannot object or comment on the Settlement.

Any objection must include: (1) the case name and number, *Kurtz v. Kimberly-Clark Corp., et al*., No. 1:14-cv-1142-PKC-RML (E.D.N.Y); (2) your name, address, and telephone number and, if available, your email address, and if you are represented by counsel, the name of your counsel; (3) a statement of all grounds for the objection, accompanied by any legal support for such objection; (4) a statement as to whether you intend to appear and be heard at the Final Approval Hearing, either with or without counsel; (5) a statement of your membership in the Settlement Class, including all information required by the claim form; (6) a detailed list of any other objections submitted by you or your counsel to any class actions submitted in any court, whether state or otherwise, in the United States in the previous five (5) years. If you and/or your counsel have not objected to any other class action settlement in any court in the United States in the previous five (5) years, you shall affirmatively state so in the written materials provided in connection with the objection to this Settlement; and (7) your signature and the signature of your duly authorized counsel or other duly authorized representative (along with documentation setting forth such representation). Failure to include this information and documentation may be grounds for overruling and striking your objection.

All written objections, requests to appear, and supporting papers must be mailed to the Claims Administrator or counsel for Plaintiff at the addresses shown on the Settlement website (www.costcoflushablewipessettlement.com), who will then file all objections, requests to appear, and supporting papers with the Court. Documents must be *received*, not merely postmarked, on or before **August 9, 2024**.

You may also appear at the Final Approval Hearing, either in person or through your own counsel. If you appear through your own counsel, you are responsible for paying that counsel. To appear at the Final Approval Hearing, you need to file a written objection to the Settlement and a written request to the Court for permission to appear, which must be filed with or received by the Court before **August 9, 2024**.

When Will The Court Decide If The Settlement Is Approved?

The Court will hold a Final Approval Hearing on **August 30, 2024, at 10:00 a.m.** to consider whether to finally approve the Settlement. The Final Approval Hearing will be held in the United States District Court, Eastern District of New York, before the Honorable Pamela K. Chen, in a Courtroom to be determined. The hearing is open to the public. However, only persons who have filed an objection and a request to appear at the hearing—due 21 days before the Final Approval Hearing—may actually address the Court. This hearing date may change without further notice to you.

Consult www.costcoflushablewipessettlement.com or the Court docket in this lawsuit at ecf.nyed.uscourts.gov (perform a case number query using 1:14-cv-1142) for updated information on the Final Approval Hearing date and time.

Special Notice For Members Of The Certified Class

As noted above, the Certified Class is different than the Settlement Class and includes "[a]ll persons and entities who purchased Kirkland Signature Flushable Wipes in the State of New York between July 1, 2011 and March 1, 2017." This section provides further information about the rights specific to members of the Certified Class.

All sections of this notice apply to you. You have the right to make a claim under this Settlement, object to the Settlement, or exclude yourself, just like other members of the Settlement Class. If the Settlement is not approved, or if the Effective Date does not occur for any other reason, as further explained in the Settlement Agreement, and you have not excluded yourself from the Settlement Class, the litigation will continue on your behalf as a member of the Certified Class in the Action. The Court has already appointed Plaintiff Dr. D. Joseph Kurtz and Class Counsel to represent the interests of the Certified Class.

If the litigation continues, and a judgment is obtained against the Certified Class in favor of Costco, that judgment will prevent you from bringing a separate lawsuit against Costco for the claims that were or could have been litigated in this lawsuit. If the litigation continues, and a judgment is obtained against Costco in favor of the Certified Class, and you are entitled to any portion of that judgment, you will receive further notification about your rights.

How Do I Get More Information?

You can inspect many of the court documents connected with this lawsuit at www.costcoflushablewipessettlement.com. Other papers filed in this lawsuit are available by accessing the Court docket in this lawsuit at ecf.nyed.uscourts.gov (perform a case number query using 1:14-cv-1142), or by visiting the office of the Clerk of the United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY, 11201, from 8:30 a.m. to 4:45 p.m., Monday through Friday, excluding federal holidays.

You can also obtain additional information by contacting the Claims Administrator through the Settlement website (www.costcoflushablewipessettlement.com) or by calling 1-877-514-0201 or writing to *Kurtz v. Kimberly-Clark Corp.* Claims Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134 or by emailing to info@costcoflushablewipessettlement.com.

EXHIBIT C

Kurtz v. Kimberly-Clark Corp.
Claims Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

KIU

VISIT THE SETTLEMENT WEBSITE BY
SCANNING THE PROVIDED QR CODE

Kurtz v. Kimberly-Clark Corp., et al.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 1:14-cv-1142-PKC-RML

**Must Be Received
No Later Than
August 9, 2024**

Costco Class Action Settlement
Claim Form

To make a claim under the Settlement, if you do not currently maintain a Costco membership, you must complete this form, print it, and mail it to the address below. Alternatively, you can complete and submit the online claim form at www.costcoflushablewipessettlement.com. All information will be kept private. Your claim form must be received, not just postmarked, by August 9, 2024. It will not be disclosed to anyone other than the Court, the Claims Administrator, and the Settling Parties in this case, and their counsel, and will be used only for purposes of administering this Settlement.

This Settlement involves flushable wipes sold under the Kirkland Signature Moist Flushable Wipes brand name (the "Product"). After the Settlement's Effective Date, each Settlement Class Member who currently maintains a Costco membership and who does not opt out of the Settlement, and each Settlement Class Member who does not currently maintain a Costco membership but submits a Valid Claim, shall receive a payment of one dollar and thirty cents ($1.30) for each Product unit purchased during the Settlement Class Period, regardless of the price the Settlement Class Member paid for the Product or the number of wipes contained in each package, subject to the following: (i) a minimum of seven dollars and fifty cents ($7.50) will be paid to each Settlement Class Member, regardless of the number of Product units purchased by that Settlement Class Member, (ii) a maximum of fifty-five dollars and ninety cents ($55.90) (*i.e.*, a maximum of 43 Product units) shall be paid to any one Household ("Household" means, without limitation, all persons who share a single physical address) for such purchases, and (iii) only one claim may be submitted per Household (Household shall be determined based on residential address). Settlement Class Members will be eligible to receive their settlement sums regardless of whether their claims are corroborated by proofs of purchase.

Because there is a $2 million cap on payments to Settlement Class Members, inclusive of class settlement administration costs, depending on the number of Valid Claims, individual cash payment amounts may be reduced *pro rata* (proportionately) so that the total amount of all payments to Settlement Class Members and class settlement administration costs does not exceed the cap.

Please save a copy of this completed form for your record. **For further information, visit www.costcoflushablewipessettlement.com. In order to receive a payment, you must complete all of the information below and on the following pages, as well as sign and date the form.**

FOR CLAIMS PROCESSING ONLY	OB	CB	DOC LC REV	RED A B

First Name M.I. Last Name

Primary Address

Primary Address Continued

City State ZIP Code

— —

Area Code Telephone Number

Email Address

While providing your email address and phone number are optional, it will facilitate processing your claim in the event of any deficiencies.

Number of packages of the Product you purchased between July 1, 2011 and May 31, 2017:

Number of these Product purchases that have been refunded or voided by Costco or any other retailer:

These purchases were not made for purpose of resale to others.

I certify under penalty of perjury under the laws of the United States that all of the foregoing is true and correct.

Signature: _____ Date (mm/dd/yyyy): _____

Print Name: _____

Mail to:

Kurtz v. Kimberly-Clark Corp. Claims Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. KIMBERLY-CLARK CORPORATION, Defendant.	:	Civil Action No. 1:14-cv-01142-PKC-RML CLASS ACTION

DECLARATION OF DR. D. JOSEPH KURTZ IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND CLASS REPRESENTATIVE PAYMENT

I, Dr. D. Joseph Kurtz, declare as follows:

1. I am a plaintiff in the above-captioned matter (the "Litigation").[1] The following facts are true and correct to my knowledge, and if called upon to testify, I could and would testify competently thereto.

2. I submit this declaration in support of: (i) final approval of the Settlement with Costco; (ii) Settlement Class Counsel's request for an award of attorneys' fees and litigation expenses not to exceed $3,000,000; and (iii) my application for a class representative payment of $10,000 ("Class Representative Payment").

3. Since becoming involved in the Litigation, I have assisted Settlement Class Counsel with its investigation and prosecution of the class action claims against Costco. I have spent a considerable amount of time performing actions that benefitted the Settlement Class at large, including, for example: (a) detailing my experience with the products at issue to Settlement Class Counsel and the Court; (b) consulting with my attorneys about the progress of the Litigation and this Court's orders; (c) reviewing on my own and/or with Settlement Class Counsel various pleadings, motions, briefs, orders, and correspondence related to the Litigation, including the initial complaint, status updates, the opposition to Defendant's motion to dismiss the complaint, briefs submitted in connection with class certification and the appeal, and numerous district and appellate court orders; (d) searching for and producing documents; (e) preparing and sitting for my deposition; (f) reviewing and responding to Defendant's interrogatories; (g) making my homes (and their plumbing systems) in Brooklyn and New Jersey available over the course of two days for physical inspection by Defendant's consultant; (h) attending an important status and scheduling hearing presided over by

[1] All capitalized terms that are not otherwise defined in this declaration have the same meanings ascribed to them in the Settlement Agreement and General Release ("Settlement Agreement"). ECF No. 469-1.

Magistrate Judge Levy; and (i) conferring with my attorneys throughout the case on a variety of issues relating to the status of the Litigation and settlement negotiations.

4. Before authorizing Settlement Class Counsel to enter into the Settlement Agreement, I reviewed, considered, and discussed the merits of this case with my attorneys, was kept apprised of the scheduling and progress of the Litigation, and understood the risks and benefits of the decision to settle the Litigation. I consider the Settlement to be a very good result for the Settlement Class that would not have been possible without Settlement Class Counsel's diligent efforts. I believe the Settlement provides a fair, reasonable, and adequate recovery for the Settlement Class, and that its approval is in the best interest of Settlement Class Members.

5. While I recognize that the Court will determine the appropriate amount of attorneys' fees, I fully support Settlement Class Counsel's request for an award of attorneys' fees and litigation expenses and charges in an amount not to exceed $3,000,000. In concluding that the requested fee and expense awards are reasonable, I have considered the quality and diligence with which Settlement Class Counsel prosecuted this Litigation and the significant relief that the Settlement will provide.

6. Additionally, I believe that my request for a $10,000 Class Representative Payment is reasonable given the extensive time and effort that I have dedicated to this matter since 2014, as described above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Brooklyn, NY, this 25th day of July, 2024.

DR. D. JOSEPH KURTZ

EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

ANTHONY BELFIORE, on behalf of himself and all others situated,	:	14-CV-4090(PKC)
Plaintiffs,	:	United States Courthouse
-against-	:	Brooklyn, New York
THE PROCTER & GAMBLE COMPANY,	:	July 23, 2020
Defendant.	:	11:00 o'clock a.m.

- - - - - - - - - - - - - - - - - X

TRANSCRIPT OF MOTION HEARING VIA TELECONFERENCE
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs:	WOLF POPPER LLP 845 Third Avenue, 12th Floor New York, NY 10022 BY: MATTHEW INSLEY-PRUITT, ESQ. CHET B. WALDMAN, ESQ. PHILIP BLACK, ESQ.
For the Defendant:	KRAMER LEVIN NAFTALIS & FRANKEL, LLP 1177 Avenue of the Americas New York, NY 10036 BY: HAROLD P. WEINBERGER, ESQ.
Court Reporter:	Charleane M. Heading 225 Cadman Plaza East Brooklyn, New York (718) 613-2643

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

(All present by telephone conference.)

THE CLERK: Civil cause for motion hearing, docket 14-CV-4090, Belfiore versus The Procter & Gamble Company. Before asking the parties to state their appearances, I would like to note the following.

Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings or any other sanctions deemed necessary by the Court.

Would the parties please state their appearances for the record starting with plaintiff.

MR. INSLEY-PRUITT: Good morning. This is Matthew Insley-Pruitt from Wolf Popper LLP on behalf of plaintiff Anthony Belfiore. I'm joined here today by my partner Chet Waldman and associate Philip Black also of my firm.

THE COURT: Good morning, Mr. Pruitt, Mr. Waldman and Mr. Black.

MR. WALDMAN: Good morning, Your Honor.

THE COURT: For the defense?

MR. WEINBERGER: Yes, Your Honor. Thank you. Harold Weinberger from the firm of Kramer Levin Naftalis & Frankel for the defendant The Procter & Gamble Company.

THE COURT: Good morning to you as well.

MR. WEINBERGER: Thank you, Your Honor.

THE COURT: So as everyone is aware, we are here for a final approval hearing of the settlement that has been reached in this matter. The way we are going to proceed is it is going to be fairly streamlined in light of the written submissions that I have seen so far and what appears to be a settlement without any objectors although I will confirm that in a moment.

I have just one general question I wanted to ask about the terms of the settlement and then I will allow the parties to provide any update or supplementation of their written submissions that may be relevant to the approval of the settlement and then we will talk about the mechanics of payment in light of the fact that there are claims forms still forthcoming. Then I will give some instruction about the completion of the or recent submission and completion of the proposed final order.

So is there anything that either side wants to say before I just ask one general question?

Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: No, Your Honor.

THE COURT: Okay. Can everyone hear me?

Mr. Pruitt.

MR. PRUITT: Yes, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: Yes. Yes.

THE COURT: And the court reporter, can you hear me?

THE COURT REPORTER: Yes, Your Honor. Thank you.

THE COURT: So my one question I have, obviously the parties have done a very good job of explaining all aspects of the settlement, is can you explain, and I guess we'll start with Mr. Pruitt, the difference in how or, rather, the amount of damages that are being awarded to consumers or purchasers who either have a proof of purchase and don't have a proof of purchase. Obviously, someone who has a proof of purchase is getting more than someone who does not. What's the rationale behind that?

MR. INSLEY-PRUITT: Well, Your Honor, this is Matthew.

THE COURT: Mr. Pruitt?

MR. INSLEY-PRUITT: Yes.

The rationale is simply that a person who has a proof of claim has the stronger case and were this to proceed to trial, it would have a better case for recovery and there are all sorts of related issues with respect to applicability and other arguments as to why one with a proof of claim has a stronger claim than one who does not. So we thought that a

settlement that reflected that difference would more appropriately reflect the different situation of the class members.

THE COURT: Okay. So the ability to recover is different or the potential ability to recover is different as between those two groups?

MR. INSLEY-PRUITT: Yes, Your Honor.

THE COURT: Okay. Can I ask you a question? This is more by way of curiosity.

Is there any notion too that it protects against fraudulent claims in some way or someone who's, I guess, inclined to just fraudulently claim they bought it is disincentivized by the fact that the recovery is lower?

MR. INSLEY-PRUITT: Well, that's always a part of the back and forth between the parties when negotiating a settlement with respect to the risk of a fraudulent submission and how to strike the balance between incentivizing people to actually file a claim in the first place and disincentivizing someone to file a fraudulent claim.

The other issue you have is as you get more requirements with respect to the claim forms, it's more burdensome, it takes longer and it disincentivizes people. So one of the things that people discuss is the certification or the requirements that are submitted in the claim form. We think that this strikes a balance of incentivizing someone to

submit a claim and not submit a false claim. And, furthermore, the claim administrator has a process of by which they review all the claims and there is a cap on a per household basis. So if somebody goes in there and says I bought a billion packages --

THE COURT: Right.

MR. INSLEY-PRUITT: -- that will not happen. They're going to put a household cap on per claim --

THE COURT: Right, of course.

MR. INSLEY-PRUITT: -- to disincentivize fraudulent submissions.

THE COURT: Can I ask you a question, Mr. Pruitt. If you're on a speakerphone or using a headset, could you actually just use the handheld receiver?

MR. INSLEY-PRUITT: Is that better?

THE COURT: Yes, much. Thank you. And the same for everyone.

MR. INSLEY-PRUITT: Is that better?

THE COURT: Yes. As we use this phone system more and more, it's become clear to me that, to repeat the phrase, you're clearer if you actually use a handset instead of either speakers or most headsets.

Okay. Thank you for that explanation, Mr. Pruitt.

Did you want to add anything, Mr. Weinberger?

MR. WEINBERGER: No, I think Mr. Pruitt has done an

admirable job explaining the rationale.

THE COURT: Okay. Now, generally, is there anything to update or supplement? I imagine maybe there's some more claim forms that have been submitted.

So, first, Mr. Pruitt, is there anything that the plaintiffs want to report beyond what is contained in the written submission?

MR. INSLEY-PRUITT: Yes, Your Honor. This is, again, Matthew Insley-Pruitt.

So we got an update from the claim administrator. That is, I believe, as of Tuesday, they received 63,000 claim forms. If after the process of going through those claim forms all of those were to be valid claims, then there would be approximately $350,000 worth of claims distributed.

Now, obviously, this number is going to go up because as you noted, the final date for submitting a claim is August 22nd, but the number also might go down if, as I said before, the claim administrator goes through those claims and finds that some were inappropriate or should not be members of the class. So we don't really know where we're going to land but the numbers have been going up.

THE COURT: Okay. That's to be expected. That's good. Obviously, your efforts to publicize it have been effective as well as the notice.

Okay. Anything else that I should note?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger, did you want to add anything?

MR. WEINBERGER: No, nothing to add, Your Honor. Thank you.

THE COURT: Okay. So let me mention as well since I had raised this issue as well that the two recent decisions, Kurtz and Berni, in which the Circuit has ruled that a 12(b) -- I'm sorry -- 23(b)(2) class of customers who were prior purchasers could not seek or be awarded injunctive relief even in a settlement context which was true in the Berni case, so I had *sua sponte* raised the question to the parties what effect, if any, that would have on the settlement and the plaintiffs responded that it shouldn't have any effect or impact because this case is distinguishable and has been certified previously by Judge Weinstein as a 23(b)(3) class as well as a 23(b)(2) class, but the parties have stipulated to the dismissal of the appeal with respect to the 23(b)(2) class and I am prepared to rule favorably on that issue as well but I did want to mention that I resolved that and neither side need to address that any further.

So I will now turn to my ruling and this is obviously based on everything I have before me in this case including the written submissions, the supplementation just now by Mr. Pruitt. So bear with me. I am going to read into

the record the ruling.

So to start off, the legal standard that applies here is well known. Approval of a class action settlement in this Circuit has the following legal standard.

Under Rule 23(e) of the Federal Rules of Civil Procedure, a settlement of a class action requires approval of the court. The court may approve the settlement that is binding on the class only if it determines that the settlement is fair, adequate and reasonable and not a product of collusion. This evaluation requires the court to consider both the settlement's term and the negotiating process leading to settlement. Presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiation between experienced capable counsel after meaningful discovery.

That is a quote from Wright versus Stern, 553 FedSupp.2d 337, at 343 to 44, a Southern District of New York decision from 2008.

In order to determine whether the class action settlement is fair, reasonable and adequate, courts in this Circuit traditionally have considered the following factors commonly referred to as the Grinnell factors: First, the complexity, expense and likely duration of the litigation; second, the reaction of the class to the settlement; third, the stage of the proceedings and the amount of discovery

completed; fourth, the risks of establishing liability; fifth, the risks of establishing damages; sixth, the risk of maintaining a class action through trial; seventh, the ability of defendants to withstand greater judgment; eighth, the range of reasonableness of a settlement fund in light of the best possible recovery; and, ninth, the range of reasonableness of the settlement fund in light of the attendant risks of litigation.

And that is, again, a quote from Wright versus Stern, at page 343 which, in turn, cites among other cases City of Detroit versus Grinnell Corp., 494 F.2d 448, at 463, the Second Circuit's decision from 1974 which obviously established the "Grinnell" factors.

I will further note that the Grinnell factors substantially overlap with the Rule 23(e)(2) factors, but includes three factors not addressed by Rule 23(e)(2). A case that explains that is In Re Payment Card Interchange Fee and Merchandise Discovery Antitrust Litigation, 330 F.R.D. 11, at 29, footnote 22, which is an Eastern District decision from 2019.

The weight to be given any particular factor will vary based on the facts and circumstances of the case and that, again, is a proposition cited in Wright versus Stern.

Now, applying the Grinnell factors and Rule 23(e)(2) to this case, I find as follows.

The information presented at today's hearing, the parties' filings and my knowledge in this case lead me to the conclusion that the settlement is fair, reasonable and adequate. While I cannot yet ascertain the settlement class size due to the fact that, as has been discussed, the claim forms are still being submitted and can be submitted up until August 22, 2020, thus far, based on the representation of Mr. Pruitt which is, in turn, based on information from the settlement administrator, 63,000 claim forms have been submitted as of July 20, 2020 which is, I believe, a Tuesday.

The deadline to file exclusions and objections was June 25, 2020, and no class members have objected. In addition, only nine class members have excluded themselves from the settlement. This indicates that the vast majority of class members approve of the settlement agreement.

In addition, I will note that the settlement as per Mr. Pruitt's statements a moment ago could lead to the payment of claims for monetary awards totaling $350,000. The information of Mr. Shaffer which is docketed at 359-3 and is contained in paragraphs 13 through 16, and obviously that information had just been supplemented by Mr. Pruitt based on additional information from Mr. Shaffer.

The parties have litigated this action since 2014 and have appeared more than 30 times before Judge Weinstein and the Magistrate Judges who presided over this matter for

oral argument, evidentiary hearings, settlement conferences and status conferences. The defendant filed a motion to dismiss, docketed as number 17, a motion to deny class certification, docket 59, a renewed motion to dismiss or, alternatively, motion for summary judgment, docket 222, and two motions to decertify the class, dockets 222 and 294. The parties have engaged in extensive discovery prior to discussing settlement.

The settlement discussions were the product of extensive arm's length negotiation between experienced class action attorneys. Settlement discussions first began in 2015 under the supervision of Judge Robert M. Levy and that is noted in the August 12, 2015 minute entry in this case and those discussions were recently renewed with mediation before Judge Steven M. Gold and that was noted in the November 25, 2019 minute entry.

The settlement provides for a monetary benefit of actual damages that is higher than the maximum afforded to the settlement class members in Pettit versus Procter & Gamble, docketed at 15-CV-2150 in the Northern District of California and in that case, a settlement was approved on March 29, 2019.

In addition, per a regression analysis by plaintiff's expert, a grander recovery than might be expected at trial is being achieved via the settlement and that's based on the supplemental declaration of Colin Weir which is docket

329 and I'm referring to paragraph 78.

The availability of statutory damages which were heavily litigated in this case and remained uncertain would at most allow a maximum recovery of $50 per class member in which case the maximum recovery of $50.20 for settlement class members with proofs of purchase exceed their potential maximum statutory recovery.

Procter & Gamble's agreed upon changed labeling practices which extended the injunctive relief granted as part of the Pettit settlement, I believe, for an additional two years are likely to benefit settlement class members and certainly will benefit the public in general.

Now, with regard to attorneys' fees, costs and expenses, regardless of the method used to calculate reasonable attorneys' fees, the Goldberger factors ultimately determine the reasonableness of an attorneys' fee award in a class action settlement. That's a proposition I'm quoting from in Simerlein versus Toyota Motor Corp., number 17-CV-1091, reported at 2019 Westlaw 2417404, and that was a quote at page 24 of the decision which is a District of Connecticut decision dated June 10, 2019.

The Simerlein case, in turn, cites Walmart Stores Inc. versus Visa USA, Inc., 396 F.3d 96, at 121, a Second Circuit decision from 2005.

Now, these factors are, and I quote: First, the

time and labor expended by counsel; second, the magnitude and complexities of the litigation; third, the risk of the litigation; fourth, the quality of the representation; fifth, the requested fee in relation to the settlement; and, sixth, public policy considerations.

That is from Goldberger versus Integrated Resources Inc., 209 F.3d 43, at page 50, a Second Circuit decision from 2000.

In a case where the attorneys' fees are to be paid directly by defendant and, thus, money paid to the attorneys is entirely independent of money awarded to the class, the court's fiduciary rule in overseeing the award is greatly reduced because there is no conflict of interest between attorneys and class members.

And that is a quote from Pearlman versus Cablevision Systems Corp., 2019 Westlaw 3974358, at page 3, an Eastern District of New York decision dated August 20, 2019.

Here, I find that the requested attorneys' fee is reasonable under the lodestar method and per the Goldberger factors because class counsel requests roughly 44 percent less than the market value of their time because the case was of significant magnitude and complexity and because the procedural history of the case shows the high amount of litigation risk associated with the case as well as a significant expenditure of fees and resources litigating this

case to the point of settlement.

The Court also grants an award of the plaintiffs' requested litigation expenses of $202,838.27 which represents the litigation expenses and costs and that's per the Mip declaration, docket 358-3, at pages, sorry, at paragraphs 32 to 34, and those expenses are ones regularly granted by courts in evaluating similar settlement classes as here and that is a citation to or based on a citation to Pearlman, 2019 Westlaw 3974358, at page 7.

Regarding the class representative payment that's requested, I'll say the following. Courts in this Circuit regularly approve service awards ranging from as low as $1,000 to as high as $25,000 in consumer class action settlements, generally, however, awards between $1,000 and $10,000 are more typical.

That's essentially a quote from McLaughlin versus IDT Energy, number 14-CV-4107, a case before Judge Vitaliano, reported at 2018 Westlaw 364627, at page 6. That was a decision issued on July 30, 2018 in which Judge Vitaliano collects cases on that proposition.

The Court agrees that the $10,000 award to Mr. Belfiore, the representative plaintiff in this case, is within the typical range of class representative awards in that it serves to compensate him for the time and effort he expended in assisting the prosecution of this litigation as

well as the risks incurred by coming and continuing as a litigant as well as any other burden sustained by him.

I base that finding on the McLaughlin decision as well. In that part of the decision, McLaughlin quotes Beckman versus T Bank, NA, a decision of the Southern District from 2013 reported at 293 F.R.D. 467, at 483.

Lastly, I will set forth my ruling regarding the injunctive relief issue that I mentioned a moment ago and that I *sua sponte* raised with the parties shortly before this hearing.

On July 8, 2020, the Second Circuit held in Berni versus Varilla, SpA, reported at 2020 Westlaw 3815523, that an equitable exception to Rule 23(b)(2) simply does not exist and courts cannot create one to achieve a policy objective no matter how commendable that objective. That is because, as many other district courts in this Circuit have already noted, courts cannot permit injunctive relief through class settlement when plaintiff would otherwise lack standing to seek such relief under Article III of the constitution.

Where there's no likelihood of future harm, there is no standing to seek an injunction and so no possibility of being certified as a Rule 23(b)(2) class. As such, the district courts in many cases involving past purchasers of such very products as skin cream, vodka, and satellite radio subscriptions have come to the conclusion that past purchasers

cannot be certified as a class under Rule 23(b)(2).

As the parties are aware, the facts in Berni were different than here because there, only a 23(b)(2) class was certified even though the class was made up of or at least could have been made up of past purchasers of the product which was pasta in that case. So there, there was an objector to the settlement who raised this issue and the Circuit made clear that the settlement could not be approved because the class was defective from the outset as a 23(b)(2) only class made up of potential past purchasers who could not benefit from the injunctive relief and thus lack standing. That is from page 6 of the decision that I just read.

Certainly, one interpretation of this holding could be that even plaintiffs in a class certified under both 23(b)(3) and 23(b)(2) would lack standing to obtain the injunctive relief portion of a settlement which is why I had asked the parties to address the potential impact of the Berni decision.

In supplemental briefing ordered by me, plaintiff explained that the holding at Berni does not apply to the settlement class largely because the settlement in Berni was certified, as I mentioned a moment ago, only under 23(b)(2) and would not have been afforded any monetary damages.

Here, in contrast, the settlement class members are properly certified under 23(b)(3) and were certified by

Judge Weinstein earlier in the case. The plaintiff also notes that the settlement class here does not include sub classes or separate definitions based on the Rule 23(b)(2)/Rule 23(b)(3) distinction and that courts, and I quote, "regularly approve settlements that are solely certified pursuant to Rule 23(b)(3) but also include injunctive relief." I'm quoting from the plaintiffs' letter docketed as 360.

The plaintiffs' argument, I believe, does adequately explain why this case is different and why approval of the settlement is not barred by the ruling in Berni of the Second Circuit.

The plaintiffs' letter also summarizes the Second Circuit decision in Kurtz as, and I quote from the letter, "sustaining Judge Weinstein's prior decision certifying the class pursuant to 23(b)(3) in the joint opinions" without discussing that the same decision decertified Kurtz's ruling -- I'm sorry -- Kurtz's Rule 23(b)(2) class, and this is from page 2 of the plaintiffs' letter.

While it seems as though the settlement class in this case is distinguishable because it did not have separate definitions based on the (b)(2)/(b)(3) distinction, as do the non-settlement classes in Kurtz, it is, to me, Kurtz does not necessarily address the situation that we have here.

So because there are no separate class definitions of (b)(2) versus (b)(3) and in sub classes along those lines,

for purposes of settlement in this case, I find that to the extent the settlement provides for injunctive relief in addition to monetary damages, it does not run afoul of the Circuit's recent holding in Kurtz or in Berni.

By order dated October 25, 2019, Judge Weinstein properly certified a class for monetary damages under Rule 23(b)(3) and the settlement class before me is nearly identical to that class for all relevant purposes. Here, the settlement also provides for injunctive relief, mainly that the defendant will continue to implement certain changed practices in its product packaging which had previously been agreed to in the Pettit litigation. A settlement class may be certified solely under 23(b)(3) even if it provides for both monetary and injunctive relief.

As I have previously noted in a case before me, Calibuso versus Bank of America Corp., where injunctive relief is sought in addition to substantial monetary damages, the court may proceed in at least one of three ways: First, certifying the class under Federal Rule of Civil Procedure or FRCP 23(b)(3) for all proceedings; second, certifying separate FRCP 23(b)(2) and (b)(3) classes addressing equitable relief and damages respectively or, third, certifying the class under 23(b)(2) for both equitable and monetary relief but providing all class members with notice and opportunity to opt out.

That's a quote from Calibuso, 299 F.R.D.359 and 367,

and that's from 2014. In that decision, I was quoting Sykes versus Mel Harris and Associates, LLC, 285 Federal Reporter Decision 279 and 288 to 89, which is a Southern District decision from 2012 by Judge Denny Chin.

In Calibuso, I further noted that, and I quote, "Nothing required the court to separately certify settlement class and sub classes to preserve settlement class members' right to object to the programmatic relief, which is the injunctive relief, while still permitting that opt-out of the monetary relief." And that's a quote from pages 367 to 68 of Calibuso. That is, if Rule 23(b)(3) preserves notice and opt-out rights, separate certification of a 23(b)(2) class is not necessary and that's what I ruled in Calibuso.

The Second Circuit has previously noted consistent with this finding, I think, that members of a settlement class certified under 23(b)(3), because they're guaranteed mandatory notice, an opt-out right obviates the need for the court to continue to, and I quote from that decision, "delve into the thorny question" of whether 23(b)(2) certification would also apply where 23(b)(3) certification is appropriate.

That was the Circuit's discussion in In Re Visa Check/MasterMoney Antitrust Litigation versus Visa, and that's reported at 280 F.3d 124, and that's a quote from 146 to 147. The Second Circuit ruled or issued that ruling in 2001. Notably in that case, the Circuit found that the district

court appropriately certified the class under Rule 23(b)(3) where the class had requested both injunctive relief and monetary damages.

So in light of all this precedent and even my own prior ruling related to this issue and based on what I have read and heard from the parties today related to this case, especially the fact that the class members have been given full notice and opportunity to opt out with respect to any aspects of the settlement or based on any aspects of the settlement including the injunctive relief, I find it is permissible to certify the 23(b)(3) settlement class in which class members are being afforded both monetary and injunctive relief.

So that is my ruling and what we will do now is I am going to ask, this is the last part of what I wanted to accomplish today which is to instruct the parties to fill in all the blanks that can be filled in on the current proposed final approval order and submit that to our chambers or via our chambers e-mail in Word form so that it can be reviewed and finalized. So there are a number of blanks that have yet to be filled in but the parties have the information to do so and then that will be issued.

Then, I guess, the last question I have is about the mechanics then in terms of payment. What will happen after August 22nd, I think, which is the date on which the last

claim form can be submitted?

MR. INSLEY-PRUITT: Your Honor, this is Matt Insley-Pruitt from Wolf Popper.

So the claim administrator will review all the claims that have been submitted. As I said before, they need to go through those claims and make sure that there are no obviously incorrect forms and remove any of those that do not represent class members and also do the process we call householding which I represent that only $36.30 total returned for claim members for persons who do not have proof of purchase and 50.20 for those who do have proof of purchase. So it's just a process of making sure that everything is right and we will be able to submit the correct costs.

THE COURT: Okay. Good.

Is there anything that I failed to address from the perspective of the plaintiff in my ruling just now, Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. And Mr. Weinberger?

MR. WEINBERGER: Nothing, Your Honor.

THE COURT: Okay. Is there anything else we need to address at this time? Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: No. No, Your Honor.

THE COURT: Okay. Well, that concludes this hearing and I appreciate all the hard work and diligence that went into this matter. Perhaps timing is everything. I think this case has managed to get to the finish line whereas the other case has obviously reached a certain stumbling block, but I congratulate you on the settlement which seems to be to achieve at least some measure of compensation as well as programmatic change or some injunctive relief.

All right. So everyone, stay well. Thank you very much.

MR. WEINBERGER: Thank you, Your Honor.

MR. INSLEY-PRUITT: Thank you, Your Honor.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Charleane M. Heading July 30, 2020

CHARLEANE M. HEADING DATE

EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY BELFIORE, on behalf of himself and all others similarly situated, Plaintiff, vs. THE PROCTER & GAMBLE COMPANY, Defendant.	14 Civ. 4090 (PKC)(RML) **DECLARATION OF MATTHEW INSLEY-PRUITT IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF OUT-OF-POCKET EXPENSES AND CLASS REPRESENTATIVE PAYMENT**

I, MATTHEW INSLEY-PRUITT, declare as follows:

1. I am a member of the bars of the State of New York and of this Court. I am a partner at Wolf Popper LLP, counsel for plaintiff Anthony Belfiore. I make this declaration in support of Plaintiff's Unopposed Motion for Final Approval of Settlement and Application for Attorneys' Fees and Reimbursement of Out-Of-Pocket Expenses and Class Representative Payment.

2. Based on our reasoned judgment, Class Counsel[1] believe the proposed Settlement is fair and reasonable.

3. I and my firm have been thoroughly involved in litigating this Action for six years. The action was originally filed in the Supreme Court of the State of New York in Nassau County on May 23, 2014. Defendant removed it to this Court on July 1, 2014. ECF No. 1.

4. On October 3, 2014, Defendant's fully-briefed motion to dismiss and strike class allegations was filed. ECF Nos. 17, 18, 19. Defendant raised arguments in this motion that were

[1] Unless otherwise indicated, capitalized terms are defined in the Settlement Agreement attached to my prior declaration as Exhibit 1. ECF No. 351-3.

repeated throughout the litigation, such as the appropriateness of class certification—particularly with respect to the availability of damages—and Plaintiff's ability to seek injunctive relief under Article III. ECF No. 17.

5. On November 14, 2014, Judge Weinstein held a conference with this case and the coordinated case, *Kurtz v. Kimberly-Clark Corp., et al.*, 14-cv-01142 (the "*Kimberly-Clark* Action"), which Mr. Belfiore attended in person. Judge Weinstein denied the motion to dismiss from the bench, and allowed limited expedited discovery for class certification, with opposing motions to grant and deny class certification due within 60 days. ECF No. 33. A written decision on the motion dismiss was filed on March 25, 2015. ECF No. 78.

6. The parties acted quickly to accomplish the necessary discovery. They exchanged initial disclosures within ten days, submitted a proposed protective order on December 1, 2014 (ECF No. 34), responded to discovery requests by December 8, and began producing documents a few days later. By the time the settlement was reached, Defendant had produced, and Plaintiff had reviewed, more than 80,000 pages of documents.

7. Within this time frame, the parties also had several discovery disputes, and there were two conferences before Magistrate Judge Levy regarding the scope of Defendant's production. *See* ECF Nos. 55, 56.

8. Defendant took the depositions of the plaintiff (Mr. Belfiore) as well as his wife (Alison Belfiore) and even Mr. Belfiore's plumber (Luis Sudberg). Plaintiff also allowed Defendant's plumber to come and inspect his home, including running a camera through the pipes under his floor. Plaintiff's counsel was present at this inspection.

9. Plaintiff's counsel also took the depositions of four of Defendant's employees pursuant to Rule 30(b)(6) in Cincinnati, Ohio, in advance of class certification.

10. Plaintiff issued fifteen subpoenas to third parties seeking information relevant to class certification, including consumer advocates (such as Consumers Union of United States, Inc., publisher of Consumer Reports); industry groups (such as INDA and NACWA); wastewater organizations (such as PARSA and the City of Kirkland, WA); entities with sales information (such as Nielson and IRI); retailers (such as Amazon, Walgreens, and Walmart); and manufacturers. In addition to dealing with these third parties, Plaintiff's counsel also had to contend with the objections lodged by the defendants in the *Kimberly-Clark* Action and their effort to quash the subpoenas. *See* ECF No. 52. Plaintiff eventually moved to compel some third parties to produce documents pursuant to the issued subpoenas. *See* ECF No. 123.

11. The parties then filed their opposing motions on class certification on February 27, 2015. ECF Nos. 58, 59. The motions included expert reports in support and opposition of both sides' motions. Plaintiff's damages expert, Mr. Colin Weir, prepared his report based in part on the data sets received in discovery, but he did not run the model to actually produce a result at that time.

12. After the class certification motions were fully briefed and before the oral argument, Judge Weinstein conducted evidentiary hearings to determine the technology underlying flushable wipes (the "Science Day Hearings") on June 19 and July 21, 2015. On the first hearing date, Plaintiff's counsel presented the expert opinion of Harold Zitimor (who was deposed previously in Milwaukee, Wisconsin) and cross-examined the multiple witnesses presented by P&G and the defendants in the *Kimberly-Clark* Action. On the second Science Day Hearing, Plaintiff's counsel presented the testimony of Robert Villee, the Executive Director of the Plainfield Area Regional Sewer Authority, who has performed multiple independent

examinations of the performance of flushable wipes at both his own facilities and at the invitation of several manufacturers.

13. Around the same time, the Federal Trade Commission (the "FTC") entered into an agreement with Nice-Pak Products, Inc., one of the manufacturers of flushable wipes at issue in the *Kimberly-Clark* Action. The parties made several submissions regarding the impact of this and similar agreements. *See, e.g.*, ECF Nos. 94, 96, and 100.

14. The Court heard oral argument on Plaintiff Belfiore's motion for class certification on August 12, 2015. ECF No. 126. At the request of Judge Weinstein, the parties also submitted additional briefing on the application of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), to Section 901(b) of the C.P.L.R. and the statutory damages provision of N.Y.G.B.L. § 349(h). ECF Nos. 129, 130. The parties then submitted more briefing on the issue of whether the Court should stay the case and refer it to the FTC pursuant to the primary jurisdiction doctrine. ECF Nos. 146, 148. Plaintiff's counsel also moved to amend the Protective Order in order to share relevant documents with the FTC. ECF No. 171.

15. Judge Weinstein issued an opinion on the class certification motion that stayed the case and referred the matter to the FTC. ECF No. 149. The parties then appeared at additional hearings before Judge Weinstein (ECF 150), where Plaintiff Belfiore made an oral motion for reconsideration, which was fully briefed. The Court then held additional oral argument on the motion for reconsideration on October 21, 2015, which was denied the following day. ECF Nos. 159, 160. The plaintiff in the *Kimberly-Clark* Action also made a motion to lift the similar stay in that case, and Plaintiff's counsel also attended that hearing per the Court's order. ECF No. 166. This motion was also denied in an opinion by Judge Weinstein. ECF No. 170.

16. After the FTC responded to Plaintiff Belfiore's inquiry in July 2016, the Court invited additional briefing on how the case should proceed, and had a series of status conferences in the fall of 2016.

17. Following the FTC's response, P&G filed a new motion to dismiss, deny class certification, or for summary judgment. ECF No. 222. Plaintiff opposed this motion as well.

18. At related hearings on February 2 and 3, 2017, Judge Weinstein indicated that he would grant class certification, and his opinion later issued on March 27, 2017. ECF No. 252.

19. Defendant then moved for leave to appeal the class certification decision pursuant to Rule 23(f), which the Second Circuit granted over Plaintiff's opposition. ECF No. 253. The parties briefed the appeal in the Second Circuit and participated in the oral argument on April 10, 2019. After the argument, the Second Circuit issued its mandate directing Judge Weinstein to receive additional evidence and consider the predominance issues relating to the class certification motion. ECF No. 274.

20. Judge Weinstein then ordered the parties to appear at a three-day evidentiary hearing to address the issues in the mandate. The parties appeared again before Judge Weinstein on June 18, 2019, to discuss the proposed evidentiary hearing and the impact of P&G's 49-state *Pettit* Settlement. ECF No. 287.

21. The parties then conducted additional expert discovery at a rapid pace, including preparing additional expert reports that included the actual implementation by Plaintiff's damages expert—Mr. Weir—of his proposed hedonic regression analysis performed on the new data set received pursuant to a third-party subpoena. *See* ECF No. 295. Defendant's expert also prepared her own supplemental report criticizing the work performed by Mr. Weir. Defendant deposed Mr. Weir in Boston on July 26, 2019.

22. In the middle of these preparations for the evidentiary hearing, Defendant moved once more to decertify the class based in large part on the settlement in the *Pettit* Action and a repetition of other prior arguments, which Plaintiff opposed. ECF Nos. 294, 302.

23. On August 6, 7, 8, and 12, 2019, the Court held evidentiary hearings on the Plaintiff's ability to determine damages on a classwide basis. Plaintiff's counsel presented the testimony of Mr. Weir, and Defendants in this action and the *Kimberly-Clark* Action presented three different expert witnesses to attack Mr. Weir's analysis.

24. Based on the discussions in the hearing, Plaintiff also moved to modify the class definition to bring the class period to the present. ECF No. 307.

25. The parties then filed detailed post-evidentiary hearing briefing, reviewing the testimony presented at the hearing. ECF Nos. 320, 321. Further oral argument was held to discuss the hearing on October 8, 2019. On October 25, 2019, Judge Weinstein reaffirmed the decision to certify the class. ECF No. 335.

26. As expected, Defendant renewed their appeal of the class certification decision in the Second Circuit, and Plaintiff filed an opposition brief.

27. Settlement discussions in this matter were conducted over the course of several years. For example, the parties met with Magistrate Judge Levy to discuss a potential settlement as early as August 12, 2015 and continuing into 2016. Many of these discussions in that time period included counsel for plaintiffs in the *Pettit* Action in an effort to resolve the dispute on a nationwide basis. Judge Weinstein not only repeatedly encouraged the parties to engage in settlement discussions, he also encouraged them to consider whether aggregate agency resolution would be appropriate. ECF No. 179. The parties renewed settlement discussions in 2019, including under the supervision of Chief Magistrate Judge Steven M. Gold.

28. The schedule attached hereto as Exhibit 1 is a detailed summary indicating the amount of time spent by each attorney and professional support staff employee of my firm—Wolf Popper LLP—who was involved in this Action, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates of such person in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm. Because Plaintiff's counsel's lodestar is so large, timekeepers with fewer than 40 hours recorded have been removed.

29. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this request. As the Settlement approval process proceeds, my firm will spend a substantial amount of time preparing for the final approval hearing, addressing any objections, and overseeing the administration of the Settlement funds. This additional time will not be separately compensated.

30. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit 1 are the same as current rates charged for their services in noncontingent matters and/or which have been utilized in the lodestar cross-check accepted in other securities or shareholder litigation.

31. The total number of hours expended on this Action by my firm from its inception through and including May 31, 2020, is 7,596. The total lodestar for my firm for that period is $5,407,974.50.

32. My firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

33. As detailed in Exhibit 2, my firm has incurred a total of $202,838.07 in unreimbursed expenses in connection with the prosecution of this Action.

34. The expenses incurred in this Action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred. The most significant expenses were incurred in connection with the retention and use of experts/consultants, travel and depositions, legal research and copying. Overhead expenses of the firm are not included in Exhibit 2 and Plaintiff's counsel are not seeking reimbursement for such overhead expenses.

35. With respect to the standing of my firm, attached hereto as Exhibit 3 is a brief biography of my firm and attorneys in my firm who were principally involved in this Action.

36. The Claim Administrator (Heffler Claims Group) has been providing Plaintiff's Counsel with updates on the claims administration and notice process. As of June 5, 2020, Settlement Class Members have made 39,238 total claims, with only five (5) requests for exclusion and zero (0) objections to any part of the Settlement or the fee and expense application since the Court granted preliminary approval of the Settlement.

37. Attached as Exhibit 4 is the Declaration of Anthony Belfiore.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of June, 2020 at Baltimore, Maryland.

/s/ Matthew Insley-Pruitt
Matthew Insley-Pruitt

EXHIBIT 1

Wolf Popper LLP Time Report

From Inception Through May 31, 2020[2]

Timekeeper	Position	Hours	Rate	Lodestar
Melissa Gianfagna	Paralegal	156.5	$320	$50,080.00
Roy Herrera Jr.	Associate	628.0	$515	$323,420.00
Matthew Insley-Pruitt	Partner	1,618.9	$825	$1,335,592.50
Lester L. Levy	Partner	1,473.7	$990	$1,458,963.00
Emily Madoff	Partner	97.3	$695	$67,623.50
Robert S. Plosky	Associate	1,245.8	$555	$691,419.00
Michele F. Raphael	Partner	784.3	$800	$627,440.00
Sandra Vidal Pellon	Of Counsel	130.6	$435	$56,811.00
Chet B. Waldman	Partner	183.7	$895	$164,411.50
Sean Zaroogian	Associate	1,277.2	$495	$632,214.00
Grand Total		**7,596.0**		**$5,407,974.50**

[2] Does not include timekeepers with fewer than 40 hours or time spent on the final approval of the Settlement and fee application.

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

D. JOSEPH KURTZ,

Plaintiff,

-against-

KIMBERLY-CLARK CORPORATION, et al.,

Defendants.

- - - - - - - - - - - - - - - - - X

14-CV-1142 (PKC)

United States Courthouse
Brooklyn, New York

September 19, 2023
2:00 p.m.

- - - - - - - - - - - - - - - - - X

GLADYS HONIGMAN,

Plaintiff,

-against-

KIMBERLY-CLARK CORPORATION, et al.,

Defendants.

- - - - - - - - - - - - - - - - - X

15-CV-2910 (PKC)

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: ROBINS GELLER RUDMAN & DOWD
58 S Service Road, Suite 200
Melville, New York 11747
BY: SAMUEL RUDMAN, ESQ.
VINCE SERRA, ESQ.
FRANCIS KARAM, ESQ.

APPEARANCES: (Continued)

For the Defendants: SIDLEY AUSTIN, LLP
787 Seventh Ave
New York, New York 10019
BY: EAMON JOYCE, ESQ.
BRIANNA GALLO, ESQ.

For the Objector Theodore H. Frank: HAMILTON LINCOLN LAW INSTITUTE
1629 K St. NW, Suite 300
Washington, DC 20006
BY: ANNA ST. JOHN, ESQ.

Court Reporter: Michele D. Lucchese, RPR, CRR
E-mail: MLuccheseENDY@gmail.com
225 Cadman Plaza East
Brooklyn, New York
(718) 613-2272

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

* * *

(In open court.)

THE LAW CLERK: All rise.

THE COURT: Have a seat everyone. Good to see you all.

This is Docket No. 14-cv-1142 and 15-CV-2910, Kurtz versus Kimberly-Clark and Honigman versus Kimberly-Clark.

Let's have the parties state their appearances for

the record, starting with the plaintiffs.

MR. SERRA: Good afternoon, Your Honor. Vince Serra with Robins Geller on behalf of the plaintiffs.

MR. RUDMAN: Good morning, Your Honor. Samuel Rudman from Robins Geller on behalf of the plaintiffs.

THE COURT: Good afternoon.

MR. KARAM: Francis Karam from Robins Geller, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. JOYCE: Eamon Joyce of Sidley Austin on behalf of Kimberly-Clark.

THE COURT: Good afternoon.

MS. GALLO: Brianna Gallo from Sidley Austin on behalf of Kimberly-Clark.

THE COURT: Good afternoon.

MS. ST. JOHN: Good afternoon. Anna St. John on behalf of Objector Ted Frank.

THE COURT: Good afternoon. As I said before, good to see everybody again.

So let me start off by addressing the elephant in the room, as they say, and I thank plaintiff's counsel for sending, or putting me on notice about the *Moses* case, and that it would appear to be a bit of a game changer in a certain way, but I think in this case it will probably not have a huge impact, and I will explain at least my

interpretation of the case and how it applies here, and then forecast in a way how I think this will turn out in this case. And obviously, you should all chime in if you disagree with anything I say, especially, I guess, Ms. St. John.

So it appears to me that the Second Circuit has now changed its mind a bit about the presumption of fairness that pre-2018 courts regularly applied pursuant to circuit precedent when there was a showing of arm's length dealing and also the other factor in 23(e)2, the A factor, that class representatives and class counsel adequately represented the class. And that obviously was the procedure I followed or the analysis I followed in this case when I finally approved the settlement in my Memorandum and Order, but now the Circuit says in *Moses* that courts should not apply that presumption but rather should evaluate all of the 23(e)2 factors, here that would mean additionally analyzing C little I through little four, and then D.

Now, I think I have to revisit, in effect, my prior ruling about substantive fairness in light of *Moses* to avoid any argument on any appeal, if there is one, of the final order, and to avoid having that vacated under what is now the clearly established rule in this Circuit. So I will undertake to do so.

The other thing that *Moses* said, which I didn't do at the time either because it wasn't clear that we had to do

so, was to consider the attorney's fees and incentive award requests, or service award requests, in tandem with that substantive fairness analysis.

Perhaps fortuitously, the case was decided at a point where I can now do that, so I will do so, I will predict for you that it is very unlikely that I will now find that the settlement agreement is not substantively fair and not only because we've already gone through the preliminary approval and notice process and because claims have already been submitted, but because, as the Court noted in *Moses*, the Grinnell factors that I did analyze largely overlap with the 23(e)2 factors and I think my analysis of those factors and based on my understanding of the case overall where it has been and what's contained in the settlement, I think I will come out to find that the 23(e)2 factors are all satisfied with respect to substantive fairness.

So I think, fortunately, the *Moses* decision will not, I will say, almost surely undue that fairness finding. But let me say the open question still remains about the attorney's fees because I do have to consider them in tandem now.

So the discussion we will have today will in some way play into or will be factored in that revisiting of the fairness analysis as must be done post *Moses*. So when we are discussing the attorney's fees request, I will have that in

mind because the idea is to balance overall the fairness of the settlement giving due consideration to how much attorney's fees and the percentage I guess relative to the recovery for the class members will ultimately be approved.

So that's a somewhat long preamble. But I'm happy to hear from plaintiff's counsel first, defendants and then objector counsel if you disagree with anything I've said so far.

MR. SERRA: Your Honor, I don't really have anything to add. You've pretty much covered everything I was going to go over with *Moses* and I agree with your analysis.

THE COURT: Okay. Mr. Joyce.

MR. JOYCE: I'm pretty similar, Your Honor. I think just to be clear, procedurally, we would want to reopen that prior ruling, right, and your hands are untied, and I think they would be untied even if *Moses* had come down because you could do this under 60(b), but it's purely interlocutory, and the way I read it, yes, you just need to open it back up.

And I will be I think even more complimentary of your fairness presumption than you give it credit for, because I've read your opinion to cabin it on slip op 21 to 22 to the procedural fairness, which it seemed to me part of what was going in *Moses* is it became a thumb on the scale toward the substantive fairness, if I understand Judge Lynch's opinion correctly. And cabining it to procedural fairness

particularly with the procedural track record we have here where this was a case that was litigated for eight years or nine years, it just makes it a fairly different case from *Moses* with respect to those procedural fairness factors.

THE COURT: That's right. I do agree with you.

I'm not particularly, or I feel like *Moses* in some way is a bit of a glancing blow on this case. I don't think it squarely upends anything that's happened before, but I do think, out of an abundance of caution, it does make sense to reopen my prior decision and do exactly what the circuit says, as I'm fortunately able to do, which is to consider in tandem the attorney's fees request as I'm considering the substantive fairness.

And to the parties' credit, you all address those issues in your initial submissions. I just chose to address the attorney's fees later. And, obviously, now the Second Circuit clearly does not want courts to do that. That prescriptive I will certainly follow.

Ms. St. John, do you want to add anything, because I know that in your initial submission part of the argument you made was that the amount of the attorney fees and the disproportionality was one of the reasons you thought the settlement wasn't fair.

MS. ST. JOHN: That's correct, Your Honor. So this is consistent with I think that argument that we made.

And I also just want to add that *Moses* does discuss the actual relief delivered to the class is a relevant issue for attorney's fees which of course is relevant to settlement fairness, and I'm not sure we have seen a validated claims numbers. Perhaps that is something we can discuss today.

THE COURT: That's exactly what I wanted to ask next. So thank you for that alley-oop, if you will.

Well, that was actually one of the first questions I wanted to ask because I've obviously studied the question of the attorney's fees and the different structures that can be applied in terms of the analysis, obviously the lodestar, the modified lodestar method versus the percentage of fund approach, right. So I want to find out from the plaintiffs or defendants, whoever wants to answer, what the claims numbers are, both in terms of number of claimants and then amount anticipated to be paid out.

MR. SERRA: Your Honor, I have that information here. We have an update from the claims administrator who has conducted an initial review for duplication and invalid claims, and there are now 147,645 valid claims, and the breakdown on that is 144,977 without proof of purchase.

THE COURT: Okay.

MR. SERRA: 2,688 with proof of purchase.

THE COURT: Okay.

MR. SERRA: And the total value of that is

$993,958.70. And I can also break that down between with proof and without proof, the number.

THE COURT: No. I'm more interested in the aggregate amount.

It's interesting because just sort of on my napkin calculation was about a million dollars, but I based it on the earlier report about the New York claimant and then just multiplied it by fifty, and it came out roughly to a million. So that's the anticipate full payout, would be roughly a million dollars; is that right?

MR. SERRA: That's correct.

And I could also give you the average claim is $6.73 and the breakdown on that is, without proof of purchase, the average claim is $6.28 and $30.90 with proof of purchase. And that's actually, Your Honor, if you take a look I think one of the comparable flushable settlements was the 49-state *Pettit* action in California, the average claim payout in that case was $3.92. So this was a 70 percent increase over the numbers there. And it's about a 20 percent reduction in claims from the initial number, but that was pretty much right in line with where we had expected it. In the *Pettit* case, it was actually 27 percent reduction. So it actually came in a little bit lower than what we had envisioned.

THE COURT: Okay. So educate me a little bit on your thinking or maybe the general practice, because obviously

the potential fund was $20 million and that's separate from the attorney's fees to be paid. When you negotiated that number, did you assume or were you concerned about a percentage fund approach being applied, percentage of the fund approach being applied for the attorney's fees and that's why it was set so high? Because it happens to be, the amount you're asking is about 20 percent of the total fund.

MR. SERRA: Right.

THE COURT: And because if, as you said just now, you anticipated a number of about million to be recovered, it seems -- no? Okay. Go ahead.

MR. SERRA: I just wanted to say the reduction in the number of claims was about what we imagined, around the 20 percent number. Actually, based on post COVID, from our information the claims administrator gave us, that there's actually been a higher volume of duplication of fraud recently, so the reduction in claims actually is a little bit lower than we had expected.

THE COURT: Okay.

But to go back to the original question, you know, there is obviously many schools of thought on this topic and which is the best approach and which incentivizes the plaintiff's counsel to act in a way consistent with the goals of class-action settlement, and we don't need to have an academic debate about it, but I am curious about why or how

you arrive at 20 million. And anyone can jump in if you want.

MR. SERRA: So from plaintiff's perspective, we wanted to have the highest cap possible because we didn't want pro rata reduction, and the class period here, Your Honor, for the settlement purposes is 14 years and it's a nationwide settlement.

Kimberly-Clark is the largest market player by far for flushable wipes. And the claims administrator gave an estimate of what the class size was, but really didn't know because we didn't have that sales data, so there was some real exposure from defendant's perspective of paying a large chunk of that settlement funds that we created through the settlement.

THE COURT: Okay. Did you want to say something?

MR. JOYCE: Yeah. If I may, Judge Chen, a few things. I think I've covered some of these in prior hearings. But, look, we negotiated this against the backdrop of an earlier feminine care product settlement pretty contemporaneous in time, claims made where the fund was exhausted in no time. It was actually pro rata reductions, I think that was -- I think Kimberly-Clark, if memory serves, had a 7.5 million cap on that one, and claims came in very high. I think within a month had exhausted that amount. So Kimberly-Clark had that in the background, consistent with what Mr. Serra says. Figure there was a large class size. So

the $20 million cap was a heavily-negotiated term. Kimberly-Clark certainly went into the settlement thinking it may well pay $20 million based on past experience.

And then to Your Honor's point about how to incentivize, Kimberly-Clark has strong feelings in cases like this about not going common fund. It thinks that those can create really perverse incentives. You know, imagine this case, the same kind of claims rate. If you had done this as a common fund, then suddenly you're giving people free money for what exactly from Kimberly-Clark's perspective. You know, you're giving them money if you had the same claims rate far in excess of anything they had expended. So it has a strong thumb on the scale for claims made but really negotiated this out thinking that's the exposure.

And I think consistent with everything I've just said, you know, we structured this quite unlike the settlement in *Moses*. We didn't bake in attorney's fees into that, into a single kitty of funds. We have made that 20 million available to the class, plus paid settlement expenses to the side, plus paid awards to the plaintiff. And here, I want to say that I don't view these as incentive awards. They're real service awards, in that we deposed plaintiff, plaintiff was in the courtroom, et cetera, and then made available separate arm on attorney's fees, none of which would be affected by claims rate.

THE COURT: Let me just be candid what my concern is and what my thought process has been thus far, and then I want to hear from everybody. I found appealing the approach that Judge Gleeson applied in a case called *Faican*, but he did use a percentage of fund approach and this is consistent, quite frankly, with what the objectors is saying should be used, or this should be the way to calculate it, but it's based on the actual claims made and paid, and this is just my terminology. So it would be a percentage of, in this case, about a million dollars. That was before I knew what the actual number was. Obviously, even at 33 percent that would be a very, very low attorneys' fee. So that's problematic, I think, quite frankly.

So that brings me back -- and the reason I was attracted to that approach -- and this again goes to what kind of incentives or policies one wants to vindicate in a certain way -- and the idea, at least as expressed, I think, by Judge Gleeson in that case is to -- and I think this is the objectors' point as well -- is to ensure that the plaintiff's counsel have a motivation, an incentive to get as many claims processed and paid. And I know that one of the concerns raised by the objector in their fairness objections was that the claim process was unduly burdensome. And I recall that there were some complaints about the system not necessarily working the way it was supposed to or there not being an

efficient way for people to make claims.

So I think, to me at least, there's something to be said for trying to ensure that even if a situation like this, where the fund, the claims fund is separate from the attorney's fees fund, so the attorneys are clearly not fighting or potentially at odds with the claimants about the money that's available to pay to both groups, there's a separate, I guess, or a different kind of concern about whether or not plaintiff's counsel will do whatever they can to try to ensure that class members, as many as class members as possible, recover something because at that point the attorney's fees don't in any way depend on it. The idea being if I were to use a lodestar method or modified lodestar, the attorney's fees get some percentage of whatever they ask for and it doesn't really matter how much gets paid out. And if we are obviously keyed off of the entire fund, then it also doesn't matter. If there are no funds available, it doesn't matter how much actually gets paid. So that was, at least to me, one policy that seemed to be a good one to consider when deciding how to calculate the attorney's fees.

In this case, and perhaps unexpectedly, the rate of claims or money being paid is pretty low compared to what was -- what motivated the $20 million amount or the -- it's far less than the $20 million that was set aside to pay for claims. So I don't think it would be appropriate here because

it's obvious to me that that would be far lower than the attorneys deserve in terms of the amount of work they spent on the case.

Now, in this first instance, I do want to hear from you, Ms. St. John, because I know that you had advocated for a percentage of fund but based on only the amounts paid out as opposed to the entire fund of $20 million. Do you have any thoughts? I mean, now that we know what the actual number is, do you disagree that even giving a third for attorney's fees of a million dollars would be unreasonable?

MS. ST. JOHN: Well, I do disagree with that point. I agree with all of your discussion of the policies reasons and legal support for calculating based on the actual relief provided to the class. And, you know, the parties are the ones who are in a position to structure the settlement to get the relief to the class. You know, there is no reason to have a proof of purchase requirement for consumer products that nobody is going to save the packaging for over a period of 14 years. And to have those different recovery amounts when no class member is going to have that information doesn't make sense, and there should be some consequence for structuring a settlement that way, for structuring a settlement in a way that does throttle class recovery, which is what happened here.

THE COURT: You're comparing now the 144,000 versus

the 2,600, roughly, of the claimants, because it's about 144,977 who don't have proof of purchases compared to 2,600 who actually do have the proof of purchases. That's your point.

MS. ST. JOHN: That's right. Plenty of settlements allow class members to affirm I purchased this many products during the class period without requiring the burdensome proof of purchase proof.

You know, there's also the fact that some class members may have been dissuaded from filing any claim given the lower recovery amount for not having the proof of purchase. That's another issue that likely depressed class relief and that the parties had control over.

And it's not surprising to anyone who operates in the class action space that claims rate would be low in a consumer class-action settlement. They're notoriously in single-digit percentages.

It's not a surprise -- you know, I don't know what happened in Kimberly-Clark's other settlement. There may have been a higher recovery amount. The class may have been larger in relation to the actual settlement size. Without having that information, it's hard to know from that one particular instance why the claims were so robust, but that's not typically the case.

THE COURT: So let me hear from -- Mr. Joyce, you

look like you want to say something, and then I will hear from plaintiffs as well with respect to that issue.

MR. JOYCE: In that prior settlement I referred to, similar consumer class action, similar amounts of money made available. I think other data point to look at that we were thinking about and had back of mind, right, was the *Belfiore* settlement that Your Honor approved I believe in the summer of 2020. And there, I believe that was nearly 60,000 claims on a single state settlement on a product whose market share -- you can debate about the numbers -- is probably -- Kimberly-Clark often discussed as having 50 percent of this market. Proctor & Gamble is like 5 to 8 percent. And that generated high claims rate for a settlement structure that was quite similar and I think that claims rate -- I can't remember the overall dollars -- my client's more interested in number of claims than dollars, but --

MR. SERRA: I think with respect to *Belfiore* at the time of the fairness hearing there was $350,000 paid out. I don't think we know what the final accounting was.

MR. JOYCE: And that was roughly 3 million -- 2.8 million in fees.

MR. SERRA: Right. And -- I'm sorry.

THE COURT: Remind me, though, how much could the consumer claim in that *Belfiore* matter?

MR. JOYCE: Very similar.

MR. SERRA: Yeah. It was -- we have higher individual maximum payouts for claims in our settlement.

THE COURT: Okay.

MR. SERRA: So I believe, if you look at the *Belfiore* case, which is New York, and the *Pettit* case, which is the 49 states, Proctor & Gamble, the amount of the payout here is actually more than those two settlements combined after two notice programs and we have a single notice program.

THE COURT: Was there a proof of purchase requirement in those cases as well?

MR. SERRA: Same type of structure. We had a certain amount available with proof and a certain amount without proof.

THE COURT: Okay.

MR. SERRA: I know, Your Honor, in the final approval order you did do an analysis of the payout and the average class member, right, can get $7, which is I think seven times the amount of the minimum purchase price of a package and half of the maximum package price without any proof of purchase whatsoever and that class member wouldn't be entitled to anything absent the settlement.

THE COURT: Okay. So the question then becomes, for me, or perhaps the logistical issue is, I didn't ask before for the contemporaneous billing records. But if I'm going to, as I'm leaning towards now, apply a lodestar method or even if

I were going to consider a percentage of fund but based on the total fund amount, as I mentioned before, it seems to me those two numbers are close based on the submissions I've already received. It just seem to me I now need to get those contemporaneously billing records so I have the OPTION.

I'll give you at least some initial impression, Mr. Serra, about the fees being claimed pursuant to the lodestar method, even to the extent that I let you give me a summary version of that.

I have a concern about the proportion of fees that were incurred by partners, yourself included. I'm certainly not disparaging the work you did here, but just the percentage of fees generated by Mr. Reich, yourself, and then Mr. Wilens. And my concern is that you add those -- all of your hours together, in terms of the fees, it's 3.5 million, if I'm reading that -- yeah. So it's 1.289 million, 1.795 million, and then 494 -- sorry. Wait a second. I'm reading the hours. Sorry.

The first figure was 1.1 million, roughly, for Mr. Reich, 1.5 for you, roughly, and then 500,000 roughly for Mr. Wilens. So if you add those all together, they're about $3 million. And that's a good part of the whole amount being requested, which is about 4 million.

I'm a little concerned that the billing was a bit partner heavy in a way that would strike me as unnecessary

since in many cases the associates bear a lot of burden of the work and a lot of it can be done by associates. So I'd think I'd want to see the contemporaneous billing records to do a little bit of a gimlet-eye review, even though I don't really relish that idea, but I think I would want to look at the contemporaneous billing records.

MR. SERRA: Your Honor, can I address the rates?

THE COURT: Please do.

MR. SERRA: I think there's an explanation here that will help sort of synthesize this information.

So I started on this case less than a year after it started. I was an associate at the time. This was the beginning of 2015, right when the case started to blow up with class certification and whatnot. So I was an associate at the time. The vast majority of my hours were billed as an associate.

Now, we're using here as this -- I believe -- I think we clarified in our briefing, but we're using current market rates, right, even though my time was billed out as an associate for the majority of that work, I think 2021 was when I became a partner. And when you have a litigation going for a decade, I guess it's bound to happen, right. An attorney working on the case gets elevated during the litigation. But I think using current rates is a practice that's well accepted in the circuit.

I think if you look at the *Goldberger* opinion itself, there's some reference to a couple of different special master opinions in the lower court where they talk about using current rates and, you know, it's justified to compensate for the delayed payment or the risk undertaken or the quality of representation. So I think that certainly explains my hours billed out. A lot of them, it looks here, I've got the partner designation obviously, but I was working on this case as an associate for a lot of it.

THE COURT: So, then, let me ask you, you say it's common practice to use, quote/unquote, your current rates, you mean your partner rate applied to all your hours even though the majority of your work was done as an associate?

MR. SERRA: Yes, Your Honor.

THE COURT: You're saying that that's consistent with normal practice? I find that a little bit odd.

MR. SERRA: I think it is, Your Honor, from what I have seen, at least, yeah.

MR. RUDMAN: Your Honor, may I speak?

THE COURT: Yes, please.

MR. RUDMAN: Yes. I've done many, many settlements. We all use current rates, and that frequently is the subject of -- you'll get objections on that sometimes and the Courts generally cite back to *Goldberger*, say that it's compensation for the risk and the time and efforts put into the case.

This is a unique case and I've litigated this case for nine or ten years and Mr. Serra was elevated during that time.

THE COURT: I guess I don't see the correlation between the risk and the amount of time because it's a question of what experience did Mr. Serra -- and, again, I feel odd talking about you while you're sitting here, but what experience he had at the point he started, in 2015, on the case up until, you know, or as time went on, obviously, he accrued more experience. And I understand that it might be inconvenient and more burdensome to calculate some graduated pay scale, but it doesn't strike me as the risk or the time spent justify giving him, or letting him recover at the same rate he would make as a partner, and when he has only been a partner for two years of that time.

It may well be the practice. I'm just not sure I agree with it. I'll certainly go back and look at *Goldberger* to see if that's really what they meant. I just don't see the correlation between risk and time and the rate, which to me is about how efficient a person can be, how much experience they have to bring to bear, in some ways the quality of the work, if you will. I don't mean that to be disparaging. But the reality is an associate, you know, how many years, is not the same as a seven-year partner, or a person who has been in the firm at least seven years and now has made partner. It seems

different to me.

That's why I'm having this concern, is I'm looking at these bulk numbers. And I'm a little bit concerned about what appears to me to be a disproportionate number of partner hours. And you have now explained that in part but not in a way that I am satisfied with.

So I do want to look at the contemporaneous billing records, in any event, just because what has ended up being a fairly lopsided recovery for the attorneys versus the claimant.

I understand that these cases are -- these consumer product cases are always -- have that inherent disparity built in. And I think my concern too with this case is that it started off as a much broader lawsuit. I think that got whittled down over time to a price premium lawsuit. We have had this discussion before. I have to tell you, I'm not a huge fan of price premium cases because I think as class actions, they often end up like this.

Now, obviously, I understand there's merit to these in a certain way, but I feel like the attorney's fees almost always dwarf the recovery by the individual class members, which doesn't mean they don't have a salutary effect on the market overall and police very valuable policy goals, in a way, or police certain values. But I just am a little bit more cautious about giving out such high attorney fees awards

in cases like this. So you'll have to forgive me for kicking the tires on a bit on this one.

How long would it take you folks to assemble your billing records?

MR. RUDMAN: We have them.

MR. SERRA: We can provide those to you relatively quickly, within a week.

THE COURT: Okay. That's fine. That would be helpful. As it turns out, I do have to re-evaluate everything anyway in light of *Moses*. I'll certainly take care of it quickly.

MR. SERRA: Your Honor, is that going to be just to you? I believe you raised this early.

THE COURT: Yes.

MR. SERRA: Directly to you.

THE COURT: When you say directly to me, I prefer to have a record of what I get, so file it under seal. In other words, you don't have to reveal --

MR. RUDMAN: Well, what we mean, Your Honor, is are they going to be provided to the objector and to the defense lawyers? Because one thing we certainly don't want to get into now is 10-hour sessions where we're debating about time entries, and this person billed for this and then he billed for that on that date. I don't think at this stage of the litigation I don't think any of that will be useful to the

Court.

THE COURT: Well, actually, I disagree on that because I think, especially post *Moses*, it all goes into the mix because now I should access the attorney's fees at the same time I'm re-evaluating the substantive fairness. I think that that is a factor and I don't think it would be right to exclude the objector from that. I certainly understand redactions because you don't want to reveal internal thought processes or impressions.

MR. RUDMAN: Yes, I mean, the records are going to be littered with that kind of material.

THE COURT: Right, which is why I asked you how long it might take because typically what I get are redacted contemporaneous billing records. So I understand you don't want to explain that you were looking up X or Y theory or you were pursuing some claim or cause of action. I understand all of that. That's why I know it will be a bit burdensome. And I will give you as much time as you need to do that.

MR. RUDMAN: A few weeks for that.

MR. SERRA: Nine and a half years.

MR. RUDMAN: If we have to redact it, it's going to be a few weeks.

THE COURT: I understand, yes. I apologize. I do want to look at them because the numbers are, as I said before, a bit lopsided. At the end of the day, it's going to

be about potentially $4 million, I guess, in attorney's fees and expenses compared to the 1 million in recovery. I understand that that's not necessarily atypical in these cases, these type of consumer product cases, especially involving price premiums.

All right. Did either Mr. Joyce --

MR. JOYCE: Yes, if I may. I can't speak for objector, obviously, but Kimberly-Clark does not need to see those records.

I think consistent with what I have said to Your Honor, which may change the nature of the redactions, if they're thinking about case strategy going to Kimberly-Clark, that may be different than case strategy as to objector, redactions to be different, and we'll hear what objector has to say. But the final point I will make -- I think one I made previously -- I have stood up both in open court prior to settlement and in court after settlement and complained about other counsel's practices filling courtroom with bodies, et cetera, and said what are we doing here? This is not that case. Mr. Rudman's firm has litigated this case, from Kimberly-Clark's perspective, efficiently and professionally. I've never come to this courtroom seeing it packed with people I've never heard of, which I wish that had been my case in other consumer class-action litigations. They tended to bring a team senior.

Consistent with that, I introduced myself to Mr. Rudman today. To my knowledge, he was not just coming to court to rack up hours. And generally I saw Mr. Reich and Mr. Serra when Mr. Serra was still an associate, and that is over the course of, essentially, two trials, which is what Judge Weinstein put us through.

So I can't speak to the reasonable of the award of *Goldberger*, but I can speak to counsel's professional conduct, and it was -- as I said, I wish everyone held themselves out in these cases the same way.

THE COURT: I do appreciate that and that actually does mean a lot.

The only issue I am debating, and it will probably make things more efficient, is whether or not to let objector counsel see the billing records, because if not, then I can just review them, effectively, in camera and use them in making my determination pursuant to lodestar, if I decide to, or even if I decide to go with a percentage of the fund approach but based on the total amount, because the two can sort of be compared I think for purposes of deciding whether the amount being requested is reasonable.

So Ms. St. John, I don't want to cut you out of the conversation. I assume you would like to see them. Do you take the position that I'm legally required to let you see them?

MS. ST. JOHN: Well, to start off, we would like an opportunity to see them.

I think as far as the law, class members are entitled to notice of what the attorneys seek, at least broken down in more specific categories so we can see what time was spent on what parts of the litigation, you know, whether hours were continued to be at a high rate after a settlement in principle was reach, and how much partner time was spent on discovery issues. We would at least like an opportunity to look at categories of hours and timing of hours even if you think looking at individual contemporaneous time records is overkill.

THE COURT: All right. So let's do this, because I don't really want to unnecessarily burden plaintiff's counsel with having to do massive redactions. So you can submit your unredacted attorney fees records to me ex-parte or for en camera review. You don't have to file those or docket those.

MR. SERRA: Okay.

THE COURT: And if they get docketed, I think they would be completely under seal for no one else to see just so that there is a record should there be a need for one, but we would take care of docketing those.

With respect to providing some breakdown, I mean, there is already the breakdown that has been provided attached to Mr. Sera's declaration -- go ahead.

MR. SERRA: I was going to say, I believe, Your Honor, when preparing for the original fairness hearing, looking at what was submitted in the *Belfiore* action, I believe our submission is actually more detailed than in that case. We do have a breakdown and discussion of the fees and expenses and refer Your Honor to that.

THE COURT: So go back for a second. I'm sorry. So you're saying in your original application you did more than the breakdown by attorney hours? Because right now what I recall is -- what I am looking at is the attorneys -- or the breakdown by hours worked on by the attorneys, the rate, and then those are calculation for --

MR. SERRA: Right. You're correct, Your Honor. I may have been remembering the expense documentation that we have submitted.

THE COURT: Okay.

MR. SERRA: For our expenses, right.

THE COURT: I'm going to deny the request to have you break it down further simply for the benefit of the objector. I think at this point there has at least been an offering by way of a publicly-filed document regarding the breakdown by the attorneys themselves, which I think provides a good amount of detail and obviously has raised some questions that I have asked. But I think beyond that I'm not going to require plaintiff's counsel to do more on the public

record. I'll just take a look at the contemporaneous billing records submitted en camera. And then, as I said before, revisit the question of substantive fairness in conjunction with a determination about attorney's fees.

Did you want to say anything further, Mr. Serra, Mr. Rudman, or Mr. Karam, I guess, about your application?

I'm assuming that you are advocating for either a percentage of the total fund amount, so if I choose to go with a percentage of the fund, I use the $20 million figure, or a lodestar, a modified lodestar?

MR. SERRA: Correct, Your Honor. The application is under the lodestar analysis. Obviously, it also, as you pointed out, it works out as a percentage of the funds made available. So, yes, we'd -- we would request the fee under either of those analyses.

THE COURT: All right. Mr. Joyce, did you want to say anything further?

MR. SERRA: I'm sorry. Could I just -- I guess in terms of reasonableness of the fee and *Goldberger* factors, if I could just talk briefly about --

THE COURT: Yes. Yes.

MR. SERRA: -- our efforts and this litigation.

You know, Your Honor, we were the first case on file, that the Kurtz litigation was the first flushable wipes case brought, and this was nine and a half years ago, and it

was litigated intensely for eight years, as you know. It carried significant risk. There is no roadmap, right, for success in this case. There was no Government investigation that we hitched on to. There wasn't any litigation regarding flushable wipes or their makeup. There were significant risks that Judge Weinstein had pointed out along the way in terms of the price premium analysis through summary judgment, trial, the Shady-Grove issue of full statutory damages. So we had an uphill battle if we were to continue on with the litigation.

And, Your Honor, just in terms of public policy considerations, I know you touched on this, I just want to point out that aside from the traditional policy considerations of, you know, incentivizing counsel to bring consumer class actions and, you know, adequate compensation for that, but putting that aside, the impact of this litigation on the flushable wipes industry as a whole, I don't want to ignore that, because we brought, not only in the *Kurtz* case, the Honigman case, and there were a number of cases pending over the years, and throughout the litigation the wastewater industry was really paying attention to this litigation. The *Kurtz* litigation in particular because it was the first case filed. It was a very public-facing case. And, you know, before Judge Weinstein certified the class, you know, he identified these issues that were apparent throughout the litigation, and one of them being these wipes were ending

up not only in consumer home plumbing systems but also in wastewater facilities throughout the country.

And, obviously, injunctive relief was part of our case for a while until the Second Circuit ultimately didn't certify that injunctive relief class. But throughout the litigation, Your Honor, we were interfacing with the wastewater community and with Kimberly-Clark and their business and legal personnel. We were discussing, you know, guidelines for flushability. And Judge Weinstein early on, he pointed out the fact that there were no universally accepted flushable guidelines. There was an industry standard, a flushable wipes industry standard, but that was not acceptable to the wastewater industry. So we spent considerable time interfacing with both the industry and with Kimberly-Clark, the leading wipes manufacturer in the country, and also the wastewater folks.

And after that injunctive relief was not certified, we continued to pursue that relief through a wastewater action in Charleston, in South Carolina. And we've mentioned this in our briefs. But we actually ultimately achieved really beyond what we could have imagined in this case. We actually were part of, you know, an effort that's now, you know, changing the industry. And Kimberly-Clark committed to developing, manufacturing, and selling a truly flushable wipes. And now others in that litigation are following suit and also trying

to develop wipes that are truly flushable.

This litigation really -- without our efforts in this litigation, because we used our efforts here as a springboard to achieve that settlement in Charleston and that has a real public benefit, right. And that's relief on wastewater systems. And, you know, these wipes were inundating their systems and costing them a lot of money. And now with Kimberly-Clark's lead in developing, you know, wipes that are really flushable, the whole industry is really on the cusp of a shift. And I think this litigation was at the heart of it. And I think that is something to be considered as well.

THE COURT: That is very helpful and I agree with you on all of that. So thank you again for highlighting it.

Mr. Joyce, did you want to say anything?

MR. JOYCE: No, I have nothing further, Your Honor.

THE COURT: So -- please. Yes.

MR. RUDMAN: I'm sorry, Your Honor, to interrupt.

I just want to say one thing. I don't want anyone to think I showed up at the end when it was time for the attorneys' fees. Why is he here today of all days?

I came in case Your Honor had any questions as to why -- what on earth possessed us to pursue this case for nine years.

THE COURT: Okay.

MR. RUDMAN: And it's because of our strong commitment to our clients. We saw a problem in an unchartered area without a roadmap and aggressively pursued the case with tremendous resources. My guys did two trials. Judge Weinstein put them through the ringer and really affected industry -- what we believe were a material part of the conversation or, at least, got things going to help effect the change in the industry. You've got to consider that. That's what you want to incentivize lawyers to do. That's what we did in this case.

This isn't one of those cases where we filed a case, settled it and are looking for a big fee. This is a case where I had competent, experienced lawyers that I could have had working on other matters but were working on this. That's why I came in today to tell you that.

We took that seriously. We are proud of the settlement. We wish more people had made claims. We did everything we could to get the claims rate up. But at the end of the day, we feel good about everything we did.

THE COURT: Thank you very much, Mr. Rudman. I appreciate that.

So, Ms. St. John, what would you like me to take away from today's session?

MS. ST. JOHN: Your Honor, they structured a settlement that left $19 million on the table that could have

been paid to the class. It wasn't paid to the class. They spent nine years to get a million dollars, less than a million dollars for the class.

A lodestar-based fee award doesn't incentivize attorneys to prioritize class recovery, as you recognized, and fees are meant to correlate success.

They are asking for a full lodestar award at current rates. And, you know, just at a minimum, that lodestar should be significantly discounted, just as the class recovered a discounted settlement amount.

THE COURT: Did you want to say anything else?

MS. ST. JOHN: That's all for now.

THE COURT: Okay. I appreciate you being succinct. I think that's been your position throughout.

All right. So what we will do is I'll give you a week to send me, if that's enough time, you're contemporaneous billing records.

MR. SERRA: Yes.

THE COURT: You can send them maybe even via e-mail, maybe hard copy.

MR. RUDMAN: My guess is it's going to be too big for e-mail.

MR. SERRA: Maybe send a thumb drive.

THE COURT: There is an issue with that.

MR. RUDMAN: Security issue.

THE COURT: Yes, there is.

Currently -- we were using Box for a while. Now I think that's been nixed.

MR. RUDMAN: We can send a hard copy and then if Your Honor wants them in electronic format, we can figure out the best way to deal with that.

MR. SERRA: Maybe a transfer, a file transfer system.

THE COURT: Why don't you wait for us to tell you which file transfer system we use before we kill a bunch of trees, because ultimately we would need to download them into our system to the extent I would like to preserve them under seal just so the record is complete.

What I will do is I will have my deputy reach out to you tomorrow probably by e-mail and then figure out how you can send them to us electronically. Because we do have some kind of system to receive large documents, but I think we are in a transition right now as to which system is the most secure, or which is the one that is secure enough for us to use. Okay?

MR. RUDMAN: Thank you.

THE COURT: So we will let you know tomorrow.

MR. RUDMAN: Thank you.

THE COURT: Thank you for that.

Yes? Did you want to say something?

MS. ST. JOHN: Do you think it would be helpful for us to provide any briefing on the attorneys' fees specific issues?

THE COURT: I think you already did, actually, as I recall, because I was looking at your filing again and you have -- you wove both in to your discussion about the fairness and then you separately addressed the fees amount.

Is there anything further you want to say than what you already submitted back in, I think it's August of 2022, specifically August 16th?

I think you covered it pretty thoroughly then, as I recall.

MS. ST. JOHN: I think that's right, and I think it would be difficult to add more without having any additional information about the lodestar. Again, I think the class member should have greater lodestar information if that's how the fee will be awarded, but I understand.

THE COURT: Right. But it seems to me your argument is really more about the result. The $1 million in payments really indicates that there should be a discount, to use your word, on the attorneys' fees because the attorney shouldn't, in a way, do so much better perhaps as a percentage or a multiplier, and it would be important to incentivize them to strike a better deal by reducing the amount they received. That's essentially your argument.

Getting into the weeds or not about the lodestar I don't think will necessarily change your argument, although maybe it would support specific cuts, I guess, or discounts, I think. So I think that's something I will do or look at, I should say, on my own, but I don't think that I am going to have you, as the objector, weigh in on that particular analysis. But I certainly appreciate your argument overall in terms of the total amount.

MS. ST. JOHN: Thank you, Your Honor.

THE COURT: Thank you very much. As always, I have appreciated your input, Ms. St. John.

All right. Thank you everybody. And we will be in touch with you folks about the records. But, otherwise, again, thanks for all of your thoughts and contributions on this issue.

Thank you again for alerting me to *Moses* so I can make sure we deal with it before it's too late.

MR. SERRA: Thank you, Your Honor.

MR. RUDMAN: Thank you very much, Your Honor.

THE COURT: Thanks, everyone.

MR. JOYCE: Thank you.

(Matter adjourned.)

EXHIBIT H

EXHIBIT A

In re Chembio Diagnostics, Inc. Sec. Litig., No. 2:20-cv-02706-ARR-JMW
Robbins Geller Rudman & Dowd LLP
Inception through March 23, 2023

NAME		***HOURS***	***RATE***	***LODESTAR***
Albert, Michael	(P)	68.90	760	$ 52,364.00
Gusikoff Stewart, Ellen A.	(P)	118.80	1105	131,274.00
Love, Andrew S.	(P)	17.50	1175	20,562.50
Myers, Danielle S.	(P)	15.90	1050	16,695.00
Robbins, Darren J.	(P)	6.50	1375	8,937.50
Rosenfeld, David A.	(P)	310.30	980	304,094.00
Bono, Natalie C.	(A)	7.00	440	3,080.00
Delaney, Sarah E.	(A)	288.30	425	122,527.50
Aronica, R. Steven	(FA)	10.00	775	7,750.00
Barhoum, Anthony J.	(EA)	16.00	450	7,200.00
Hensley, Austin B.	(EA)	16.00	315	5,040.00
Vue, Chong	(EA)	21.30	355	7,561.50
Crowley, Mark S.	(I)	65.50	325	21,287.50
Paralegals		167.50	375-395	64,798.50
Shareholder Relations		27.90	100	2,790.00
TOTAL		***1,157.40***		***$ 775,962.00***

(P) Partner
(A) Associate
(FA) Forensic Accountant
(EA) Economic Analyst
(I) Investigator

EXHIBIT I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re: Chembio Diagnostics, Inc. Securities Litigation	20-CV-02706(ARR)
	United States Courthouse Brooklyn, New York
	June 5, 2023
	11:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE ALLYNE R. ROSS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs:
ROBBINS GELLER RUDMAN & DOWD
665 W. Broadway
San Diego, California 92101
BY: ELLEN GUSIKOFF STEWART, ESQ.
DAVID AVI ROSENFELD, ESQ.

ROLNICK KRAMER SADIGHI LLP
1251 Avenue of the Americas
New York, New York 10020
BY: LAWRENCE M. ROLNICK, ESQ.

For the Defendant:
K&L GATES, LLP
599 Lexington Avenue
New York, New York 10022
BY: JOANNA DIAKOS, ESQ.
JOHN ROTUNNO, ESQ. (via teleconference)

LATHAM & WATKINS LLP
12670 High Bluff Drive
San Diego, California 92130
BY: COLLEEN SMITH, ESQ.

Court Reporter:
JAMIE A. STANTON, RPR, CRR
Official Court Reporter
Telephone: (718) 613-2274
E-mail: JamieStanton.edny@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

* * * *

(In open court.)

THE COURT: Please be seated.

THE COURTROOM DEPUTY: This is In re: Chembio Diagnostics Incorporated Securities Litigation, 20-CV-2706.

Please state your name for the record.

MS. GUSIKOFF STEWART: Good morning, Your Honor. Ellen Gusikoff Stewart of Robbins Geller Rudman & Dowd, on behalf of the Lead Plaintiffs in the class.

MR. ROSENFELD: Good morning, Your Honor. David Rosenfeld of Robbins Geller Rudman & Dowd, on behalf of Lead Plaintiffs in the class.

MR. ROLNICK: Good morning, Your Honor. Lawrence Rolnick, Rolnick Kramer Sadighi, on behalf of the Class Plaintiffs.

THE COURT: Good morning.

MS. DIAKOS: Good morning, Your Honor. Joanna Diakos, K&L Gates on behalf of Chembio Diagnostics and the individual Defendants. And joining us by phone is my partner, John Rotunno.

THE COURT: Good morning.

MR. ROTUNNO: Good morning, Your Honor.

MS. SMITH: Good morning, Your Honor. Colleen Smith of Latham & Watkins, on behalf of the underwriter Defendants.

THE COURT: Good morning.

This is the final settlement approval hearing in *In Re: Chembio Diagnostics Securities Litigation.* During the summer of 2020, four punitive class actions were filed against Chembio, several of its senior executives and directors, and Robert W. Baird & Co., Inc., and Dougherty & Co. LLC. The latter two Defendants were underwriters of Chembio's May 2020 secondary stock offering.

The class actions were consolidated into the current action. The Municipal Employees' Retirement System of Michigan and three entities known as the "Special Situations Funds" were appointed Lead Plaintiffs. The firms Robbins Geller Rudman & Dowd LLP and Rolnick Kramer Sadighi LLP were appointed class counsel.

The Lead Plaintiffs filed a Consolidated Amended Complaint alleging that defendants violated both the Securities Act of 1933 and the Securities Exchange Act of 1934. In February 2022, I granted defendants' motions to dismiss the Exchange Act claims in their entirety with prejudice and dismissed the Securities Act claims except as to Baird and Dougherty. Lead Plaintiffs moved for reconsideration, which I denied, then filed a Second Consolidated Amended Complaint alleging solely Securities Act violations. Defendants did not move to dismiss.

After mediation, the parties advised the Court that they had reached a settlement in principle. On

February 3, 2023, I granted preliminary approval of the settlement, certified the class for settlement purposes, and approved the class notice. Before me are various filings in support of final settlement approval, as well as class counsel's application for attorneys' fees and costs, and Lead Plaintiff, Municipal Employees' Retirement System of Michigan's motion for a separate award covering its costs in representing the punitive class.

I am unaware of any objections to the proposed settlement or plan of allocation, and I believe that no class member has opted out.

Is that correct?

MS. GUSIKOFF STEWART: That is correct, Your Honor.

THE COURT: Okay.

In light of that, I will approve the settlement.

Rule 23 requires that the settlement be "fair, reasonable, and adequate," and meet the specific considerations of Rule 23(e)(2). Little has changed since I granted preliminary approval of the settlement, and I find that the Rule 23 factors are met.

First, the class representatives and class counsel must have adequately represented the class. I conclude that joint class counsel, the firms of Robbins Geller Rudman & Dowd and Rolnick Kramer Sadighi, have adequately represented

the interests of class members throughout the litigation. Counsel undertook an extensive investigation, actively litigated two rounds of briefing concerning the sufficiency of the claims, and ultimately reached a settlement agreement following mediation. Similarly, the Lead Plaintiffs have adequately represented the class, and they have no interests antagonistic to other class members that would prevent my finding that they were adequate class representatives.

Second, the settlement was negotiated at arm's length between parties represented by Counsel utilizing a third-party mediator, Jed Melnick of JAMS. I have reviewed Mr. Melnick's declaration in support of the settlement, which confirms that the settlement agreement was negotiated at arm's length. This factor weighs in favor of settlement.

Third, I find that the relief provided to the class is adequate. As I noted in my prior opinion and as Lead Plaintiffs have emphasized, Chembio has limited resources and continued litigation could well have resulted in further diminution of Chembio's funds. I also understand from the briefing that Chembio has indemnification obligations to the investment banks who underwrote the secondary stock offering at issue.

Recovery on the merits of this case was far from assured. In light of potential defenses concerning loss causation, due diligence, and materiality, Plaintiffs were

not guaranteed success on the Securities Act claims.

To recover on the exchange act claims, Plaintiffs would have needed to successfully appeal following the final resolution of the Securities Act claims.

"The costs, risks and delay of trial and appeal" are therefore considerable factors supporting settlement approval.

In light of these considerations, the $8.1 million recovery for the class members is adequate.

Finally, the proposal treats class members equitably relative to each other. In the preliminary approval opinion, I required further detail from Lead Plaintiffs regarding the proposed Plan of Allocation between Securities Act Claimants, who will receive $5.09 million, and Exchange Act Claimants, who will receive the remaining $3.01 million.

Lead Plaintiffs have explained that the hypothetical maximum damages under the Exchange Act are larger and the claims involve more shares. However, because I had dismissed the exchange act claims with prejudice, any recovery on these claims was contingent on a successful appeal followed by more litigation. Lead Plaintiffs describe the Plan of Allocation as adjusting for this uncertain outcome.

Lead Plaintiffs also engaged Mr. Melnick, an

experienced mediator in securities class actions, to assist with the development of the Plan of Allocation.

I agree that the Plan of Allocation treats class members equitably relative to each other. The absence of opt-outs or objections further supports this conclusion.

I also conclude that the settlement comports with the nine factors identified by the Second Circuit in *city of Detroit versus Grinnell Corporation*, 495 F.2d 488, 463 (2d Circuit 1974). I will only address those that do not overlap with the requirements of Rule 23.

As I noted in my prior opinion, although the "stage of the proceedings" is relatively early, that the Exchange Act claims could only be revived following an appeal places the parties in a unique position. In light of the additional factor that Chembio clearly has a limited ability to withstand a larger judgment and its ability to operate as a going concern is questionable, the lack of discovery does not weigh against approving the settlement.

Now that the class notice has been issued, I am able to evaluate the *Grinnell* factor concerning the reaction of the class. There have been no opt-outs or objections, which strongly suggest that the class approves of this settlement. I conclude that the Lead Plaintiffs have shown that the settlement complies with *Grinnell*.

As I noted in the prior order, the proposed method

used to disseminate the settlement notice provided adequate notice that apprised members of the class of the settlement terms and their options in connection with the settlement. The notice met all requirements of Rule 23 and the Private Securities Litigation Reform Act. Following my approval, the claims administrator, Gilardi & Co. LLC, mailed copies of the Notice, published a summary notice in leading national publications, and posted relevant materials on a website for the settlement. This was the best notice practicable under the circumstances and comports with notice that has been approved in other securities class actions. Accordingly, I find that notice was adequately carried out.

Class counsel seeks a fee award amounting to 24 percent of the common fund of $8.1 million, or $1.94 million. Counsel also seeks costs of approximately $16,400, and Lead Plaintiff Municipal Employees' Retirement System of Michigan seeks an award of $3,600 for its time and expenses incurred in representing the class. When I granted preliminary approval of the settlement, I indicated that the awards sought were reasonable. I affirm that judgment now.

Plaintiffs' counsel seeks a fee award of 24 percent of the common fund, which is lower than the 27.5 percent they previously sought. As I noted in my prior opinion, percentage award is in line with other fee awards approved in this district in similar actions and is

reasonable given the effort plaintiffs' counsel put into the case.

I use the "lodestar" method to cross-check counsel's fee request by reviewing counsel's time records to ensure that the total fee award is reasonable. However, a cross-check does not require extensive scrutiny of the information provided by counsel. The lodestar is the product of the number of hours spent by each attorney by that attorney's hourly rate; the lodestar "multiplier" is an adjustment reflecting factors such as the risk of contingent fee awards, the quality of the attorney's work, and the results obtained.

Lead counsel and paralegals spent 2,105.3 hours on this case, which, based on the billing rates provided, produces a lodestar amount of $1.7 million. Based on the requested attorneys' fees of 1.94 million, the lodestar multiplier requested by plaintiffs' counsel is 1.15. This modest multiplier is well within the range of multipliers awarded in securities class actions in this Circuit and is reasonable to compensate counsel for the high-quality work they have produced and the risks they undertook in bringing this case on a contingent fee basis. I agree that the fee adequately compensates counsel for their time and labor in researching the case ahead of filing, litigating the motion to dismiss, mediating with defendants, and designing the

settlement. The absence of opt-outs or objections to the requested fees also attests to the fairness of the request.

Counsel are also entitled to reasonable out-of-pocket expenses incurred which would customarily be charged to their clients. The expenses requested include filing fees, paying the mediator, and the costs of using legal research services. I have reviewed Lead Counsel's submissions and agree that the costs of $16,400 are reasonable and properly compensable from the settlement fund.

Finally, Lead Plaintiff MERS requests an award of $3,600 as compensation for its time and expenses incurred in representing the class. The PSLRA allows a class representative an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class." Per MERS' submission, its deputy general counsel spent dozens of hours over three years corresponding with class counsel, reviewing briefs and pleadings, consulting with lead counsel on settlement strategy, and reviewing and approving the proposed settlement. These are compensable activities and Lead Plaintiffs are routinely given cash awards for these activities pursuant to the PSLRA. Again, no class member has objected to the request. Accordingly, I grant MERS the $3,600 compensatory fee sought pursuant to 15 USC

Section 78u-4(a)(4).

In light of the submissions from Lead Plaintiffs, the lack of objections, and based on my review of the settlement and supporting papers, I will grant final approval to the settlement, certify the class for settlement purposes, and approve the award of attorneys' fees, costs, and an award to Lead Plaintiff MERS.

And I am signing what was proposed and now is final judgment an order of dismissal with prejudice. What was proposed and now is order approving Plan of Allocation. And finally, what was proposed and now is order awarding attorneys' fees and litigation expenses.

MS. GUSIKOFF STEWART: Thank you, very much, Your Honor, and thank you for your time during the course of the litigation.

MS. DIAKOS: Thank you, Your Honor.

MR. ROTUNNO: Thank you, Your Honor, and thank you for your attention to this matter throughout this case, several years.

THE COURT: Have a good day, everyone.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Jamie A. Stanton — June 5, 2023

JAMIE A. STANTON — DATE

EXHIBIT J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE OATLY GROUP AB SECURITIES,

New York, N.Y.

21 CV 6360 (AKH)

----------x Settlement

July 17, 2024
2:45 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

SCOTT & SCOTT, LLP
Attorneys for Plaintiffs
BY: JACOB B. LIEBERMAN
WILLIAM C. FREDERICKS

ROBBINS GELLER RUDMAN & DOWD, LLP
Attorneys for Plaintiffs
BY: MICHAEL G. CAPECI

LATHAM & WATKINS, LLP
Attorneys for Defendant
BY: WILLIAM O. RECKLER
MOLLY BABAD

THE DEPUTY CLERK: In the matter of In re Oatly Group AB Securities, docket no. 21 CV 6360, counsel, please state your appearance for the record.

MR. LIEBERMAN: Jacob Lieberman on behalf of plaintiffs.

MR. FREDERICKS: William Fredericks also on behalf of plaintiffs, law firm of Scott & Scott.

MR. CAPECI: Michael Capeci, Robbins Geller, also on behalf of plaintiffs.

MR. RECKLER: William Reckler of Latham & Watkins on behalf of defendants.

MS. BABAD: Molly Babad, Latham & Watkins, on behalf of defendants.

THE COURT: Good afternoon, all. One moment.

Who is speaking for the plaintiffs?

MR. LIEBERMAN: I am, your Honor. Jacob Lieberman.

THE COURT: Go ahead, Mr. Lieberman.

MR. LIEBERMAN: Good afternoon, your Honor. We are pleased to present the settlement to you for final approval. As we explained this past February and March, during the preliminary approval process, a certain cash payment of $9.25 million is a very good result for the class under these circumstances and will resolve this action as well as the related state court Section 11 case.

As you may recall, the Court preliminarily approved

settlement on March 27, 2024, and appointed Gilardi as the claims administrator. Now the only thing that has changed since we last were before the Court is that notice has now been provided to the class. And as the Court may recall, from preliminary approval, those notices set out the terms of the settlement, counsel's belief that the settlement presented a good result for the class, and the amounts of fees, expenses and PSLRA awards that will be sought. As required, the notice also informed potential class members of their rights to opt out of the settlement and to object and the deadlines for doing so.

I am happy to report, your Honor, that the reaction of the class has overwhelmingly positive. There have been no objections and only four timely requests for exclusion and one untimely request.

The opt-outs are all individual investors, who collectively purchased fewer than 1,000 shares of Oatly ADS. The only thing I would add, which is not currently in our papers, is as of this past Monday, Gilardi has received nearly 5500 claims for the settlement. Now, the deadline to submit a claim is not until July 25, so we expect that number to grow materially for at least two reasons. First, because the claims that have been submitted so far are still being processed and a number of them are from institutions. We expect that what appears to be one claim today may in fact be multiple claims.

And then second, as the Court may know, many institutions wait until the last few days to file their claims. So we expect those claims to come in in the coming weeks.

The outcome of the claims process will be reported to the Court pursuant to the schedule set out in the order appointing Gilardi as the claims administrator.

Now, I think, your Honor, in light of the class's overwhelming support, we respectfully request that the Court approve the settlement and plan of allocation and award the requested attorneys' fees expenses and PSLRA awards to the four plaintiffs.

THE COURT: Let's do the attorney fees in a second phase and concentrate only now on the settlement.

So, of the 5500 claims, do you have a proportion as between holders of ADS and option people?

MR. LIEBERMAN: So, we do not have a formal proportion. We expected your Honor would have a question like this. And of the claims that have been processed, sort of about 12 have been options and the rest have been ADS. But we can give that final breakdown to you when we report on the claim process.

THE COURT: Your expert thought that there would be very little value to the options. So I guess the fact that 12 claims for options and 5,488 for ADS holders bears that out.

MR. LIEBERMAN: Yes, your Honor, we think it's

consistent with what Dr. Hakala expected.

THE COURT: What were the potential number of claimants you thought you might have?

MR. LIEBERMAN: We estimated that the class size was probably around 50,000.

THE COURT: So this is a small portion of the claims, the claims are a small portion of the total.

MR. LIEBERMAN: Well, I think --

MR. CAPECI: If I may on that point. Just to provide some additional context.

THE COURT: Why is not Mr. Lieberman able to talk?

MR. CAPECI: I apologize. Mr. Lieberman and I didn't get a chance to discuss this. I was the one speaking directly with the claims administrator about this.

There were 896 electronic claims of the 5500. Looking at the Excel spreadsheets, they were able to ascertain that 12 contained options. For the remaining claims, it was too early in the administration process to know definitively whether they include options or not. They very well may. They may not. It's just too early to know. I didn't want your Honor to have a misunderstood view of what's been submitted.

THE COURT: Thank you. If the 5500 claims submitted gets to a field of 50,000, you think there will be many more claims coming in?

MR. CAPECI: Your Honor, I couldn't speculate on that.

I just want you to understand exactly ask what Gilardi received and where they stand on it.

THE COURT: All right. Continue. What would be, do you think, the average payout?

MR. LIEBERMAN: So, your Honor, at this time, we can't calculate the specific average payout. But if we assume the maximum number of estimated damages shares submit claims which it's, again, very high number, the average payout would be I think it's around 5 cents per ADS.

Now, you never have 100 percent claims rate in a settlement like this, so I expect that what individual investors recover will be materially more than that. I just don't know at this time.

THE COURT: What do you think?

MR. LIEBERMAN: I'm sorry?

THE COURT: What do you think?

MR. LIEBERMAN: What do I think? I think it's -- difficult to know. Because the settlement -- in past settlements I've seen it go up one or two times that amount per share. And sometimes it's less. It is very difficult to tell while the claims are still being processed.

THE COURT: So they were selling at the offering for what, about 20?

MR. LIEBERMAN: Yes, your Honor.

THE COURT: So, someone bought 500 shares, $10,000

investment, that person would get how much in a settlement at the rate of 5 cents a share?

MR. LIEBERMAN: So if it was the minimum amount, right, which is assuming 100 percent of the shares submit claims, it would be 5 cents a share.

THE COURT: Let's say 35 percent do.

MR. LIEBERMAN: Then so that would be --

THE COURT: It would be 5 cents per share if you had 50,000 claims. That would be $75 if you had 500 shares. All right?

MR. LIEBERMAN: I think that's right, your Honor. I'm not very good at doing math in my head.

THE COURT: So if you multiply that by, what, three, you would be getting -- I don't know. My question is pointed to the fact is there a significant enough recovery for an individual shareholder.

MR. LIEBERMAN: So I think there is, your Honor. Because I don't think you can look at the individual recovery in isolation. You have to look at it in the context of the risks of this case, which are innumerous we think, and the likely outcome had the case been successful.

THE COURT: Let's leave that aside. I'm very well aware of the risks of the case. I've been involved in it twice in dealing with the adequacy of the pleadings. I'm just thinking about $9,250,000, when you think about it, what does

it mean to the average shareholder? If you were an institution, and you had a million shares, or several hundred thousand shares, it might be significant. But if you are an average shareholder, what does it mean?

MR. LIEBERMAN: I think I come at this from two ways, your Honor. First, because our phone number's in the notice, I've spoken to a number of potential class members who call us with questions. And I would say that of the maybe 10 to 15 people that I've talked to in the context of this specific settlement, all of them were quite happy that we had brought this case and were going to get them some relief. But I think so that's one data point.

Another data point, your Honor, is we have no objections here. And as you correctly point out, there would be institutional shareholders which have large holdings of Oatly ADS. If they believed that the settlement as a whole was insufficient, they could have objected and had the incentive to object, and did not. And we think that the case law, including what's cited in our brief, suggests that the absence of institutional investor objections is a benefit to the settlement.

THE COURT: All right. Anything else you want to tell me, Mr. Lieberman?

MR. LIEBERMAN: Not about the settlement, your Honor, unless you have other questions.

THE COURT: No, I don't have any other questions. Mr. Fredericks, do you want to add anything?

MR. FREDERICKS: No, your Honor. I think my colleague Mr. Lieberman has handled everything. I don't know whether Mr. Reckler on behalf of defendants has anything to say.

THE COURT: Mr. Capeci, anything you want to add?

MR. CAPECI: No, your Honor. Thank you.

THE COURT: Mr. Reckler?

MR. RECKLER: Your Honor, all I'll add is that obviously Oatly believes that it had very strong defenses to the case.

THE COURT: You can stand.

MR. RECKLER: Sorry.

Your Honor, Oatly obviously believes it had very strong defenses to the case. We were successful on the initial motion to dismiss. We made the decision to settle this in recognition of the risks inherent in the litigation. And we do believe it is a very generous settlement for the class.

THE COURT: What motivated the settlement at this early stage?

MR. RECKLER: Well, obviously, your Honor, there is risk inherent in litigation. Oatly --

THE COURT: It's unusual for a securities class action to settle before any discovery has taken place.

MR. RECKLER: Your Honor, this was simply a cost

benefit analysis for Oatly and a desire to being able to get back to its core business and growing its business.

THE COURT: These were Europeans who owned this, right?

MR. RECKLER: Swedish.

THE COURT: Swedish company. I suspect there was a very strong desire not to get involved in American litigation.

MR. RECKLER: Exactly.

MR. FREDERICKS: Your Honor, if I may, I would just add one point in response to your question, perhaps to your prior question. Oatly's financial condition declined for a number of reasons since the offering. At the time we negotiated the settlement, I believe that its stock price was around 50 cents a share. I think it's currently trading around a dollar.

THE COURT: Is it not an insurance driven amount?

MR. FREDERICKS: Well, I don't think so entirely because if one is looking at the value of bringing a case all the way through trial, and the ultimate ability to pay a very large judgment --

THE COURT: You would have outstripped the insurance.

MR. FREDERICKS: Exactly.

THE COURT: At this stage it's probably insurance driven I would think.

MR. FREDERICKS: I don't want to speak to the

company's motivations, but we had sustained an initial dismissal. The company was not in great shape.

THE COURT: You didn't explore that issue.

MR. FREDERICKS: I think that as in all cases we try to look at the case holistically.

THE COURT: But you didn't get discovery about insurance. You didn't pursue that.

MR. FREDERICKS: Well, we would have had to have gotten past the motion to dismiss.

THE COURT: Right. This was settled in the context of a motion to dismiss the third amended complaint.

MR. FREDERICKS: That is correct, your Honor. And counsel --

THE COURT: You received the defendant's briefs and settled before you filed your own briefs.

MR. LIEBERMAN: I would correct that. We had filed the third amended complaint, and then we engaged in mediation before the defendants had filed their motion to dismiss. Although we had extensive motion to dismiss briefing on the second amended complaint. And while we thought that the third amended complaint had addressed the arguments raised by defendant, I don't know if they had anything new. We also had extensive mediation briefing which would be sort of a motion to dismiss where both sides previewed their motions to dismiss arguments. So we think we understood their position on the

motion to dismiss that would have been filed had the case not settled.

THE COURT: Right. You're correct. No motion was made. The third amended complaint was filed on August 11, 2023. And the briefing schedule was set and then you told me about mediation.

MR. LIEBERMAN: Thank you, your Honor.

THE COURT: Okay. Anything else?

All right. I approve the settlement as fair, reasonable, and adequate in the circumstances presented. This case went through several iterations of pleadings. There were two -- there were one or two orders of dismissal?

MR. LIEBERMAN: There were technically two, your Honor. When the case was first filed, the Court sua sponte dismissed one of the complaints, and then there was one motion to dismiss.

THE COURT: That was argued and then I filed an order following the rulings in the transcript.

So this case was settled when the pleadings were not yet completed, and when there was a good chance that the pleadings would never be completed, and a motion to dismiss would have been granted. The ability to adequately plead misrepresentations under the '33 Act was found to be extremely difficult, and there were other risks in the case. And in the context of those risks, and the context of a settlement by an

outside mediator, on the basis of the mediator's proposal for settlement, I can't say that it was not fair, reasonable, and adequate in the circumstances.

The adequacy of the plaintiffs and plaintiffs' counsel was there. Unfortunately, the merits couldn't be changed, but these are experienced counsel, who knew what they were doing. I did not appreciate the length, the prolixity, and the rhetorical nature of the proceedings. I let you know that. And I think it could have been decided at the outset whether this case was worth exploring or not. But you did explore it, you did pursue it, and you got a settlement. That was clearly better than no settlement at all. No one else was suing. So the settlement was arm's length. Defendant strongly resisted with two very good motions. And a mediator was necessary to bring you together. So there was arm's length dealing.

The risks of establishing liability at trial, the risks of establishing damages at a trial, and the very substantial costs of litigation all support the reasons for settlement. The allocation method has been very intensively explored at the preliminary conference. It's been fixed up and I believe it's reasonable and adequate.

I'll deal with the issue of attorneys' fees later today. There is equitable treatment by the members of the class. There have been no objections, are there?

MR. LIEBERMAN: There have been no objections.

THE COURT: No objections. The plaintiffs have had sufficient information to make an informed decision regarding the settlement. The notice was hammered out with my review. Notice was adequate. There was a very serious issue about defendant's ability to withstand the ability of a large judgment, also speaking to the reasonableness of the settlement. And taking everything, the plan of allocation is fair and adequate, taking everything into consideration, I approve the settlement.

Now, the only thing left is attorneys' fees. So let's talk about that now. I have two applications essentially, one from Mr. Fredericks' firm, and one from Mr. Capeci's firm.

First tell me how much do you want separately or together?

MR. LIEBERMAN: So, your Honor, it's one application for fees and expenses. So the fees sought would be a percentage of the recovery which is standard in this jurisdiction.

THE COURT: You want 30 percent.

MR. LIEBERMAN: We are requesting 30 percent.

THE COURT: Which would be a fee of $2,775,000.

MR. LIEBERMAN: Yes, your Honor.

THE COURT: Higher than the lodestar of $2,197,595. I have trouble with that kind of fee in relationship to a settlement based on a case did not advance beyond pleadings.

And although $9,250,000 is better than nothing, compared to what would have been achievable by trying this case or at least going through discovery, does not point to an excellent settlement. It points to a reasonable settlement. So the fees should be reasonable. And I think 30 percent in the context is much too high.

MR. LIEBERMAN: Well, your Honor, I think a couple of responses to that. We begin with the lists of risks that the Court just articulated in approving the settlement. And how this was a case that, what I would say had some warts.

THE COURT: You knew that at the outset. I mean, you knew that before you began, because you had to confront that when you did your pleadings.

MR. LIEBERMAN: I think to the extent that that is true, your Honor, we had to understand the case when we brought it. We thought it was not -- this is certainly not Enron 2.0. We thought it was a viable case and we pursued it diligently. And we got what we think is a very good result under the circumstances of this case.

And I think if you look at the lodestar multiplier here, your Honor, the fee that we're seeking, the 30 percent is roughly 1.26 the actual lodestar. So this is not a case where we're making a tremendous amount of money.

THE COURT: You're making a good deal of money. Your rates are not modest at all.

Let's explore the lodestar. So your firm had roughly 1,700 hours, according to your records. In time, $1,636,988. Of that number of hours, 1695, 1165 hours were partners' hours, 530 were associates, of a ratio of 69 percent to 31 percent partner to associate. That's much too high.

MR. LIEBERMAN: Your Honor, I think that this is a little bit self-aggrandizing for myself, but I was an associate when I was on this case and worked most of those hours. And I became a partner on January 1st. So under the Second Circuit law, we can bill me out at my current rate and my current title because I'm now a partner.

But, with the exception of the preliminary approval work that I did, the first part of this year when I was a partner, all of those other hours would have been associate hours. And I think that if we were to go back and recalculate it, that the number would switch.

THE COURT: Well, it would be less. It would be substantially less. So the ratio would be better, but it still would be overloaded.

Mr. Fredericks put in almost 300 hours, 297 hours. He's billing at $1900 an hour. That's pretty high.

MR. LIEBERMAN: I would agree with you that $1900 an hour is a large amount to an average person. But if you were to look at fees charged in this district, by comparable counsel, they would be at that rate, if not higher.

I can give you a benchmark, your Honor. I think my current rate is $795. When I was a seventh year associate at Sullivan & Cromwell, my hourly rate was $1200.

THE COURT: You don't have the overhead of Sullivan & Cromwell. And these are rates that are given leading to amounts that are awarded by courts, and it's different than having rates determined with clients.

And it's not a comparable fee. Mr. Gusikoff of Robbins Geller has a rate of $1200 an hour. Mr. Rudman, who did only seven hours in the case, has a rate of $1400 an hour. I'm sure Mr. Fredericks is an excellent attorney and I know he is because he's been here. But $1900 is a bit much when you're looking for an award from the Court.

MR. LIEBERMAN: Well, your Honor, I would say that Ms. Gusikoff is based out of San Diego, so her rate may be the prevailing rate in San Diego. Mr. Rudman's office is outside of New York City. Whereas Mr. Fredericks works in New York City and is a lawyer in New York City. And the Second Circuit's opinion in the case that is now escaping me indicates that the Court should look at the prevailing rate for legal services in the market where the case is brought.

THE COURT: So that would justify a higher fee for Mr. Rudman and Ms. Gusikoff.

I'm not, look, there is no science in what I'm saying. I'm pointing out that I think the lodestar is too high as well.

And so, when you say that it's only a 1.26 multiplier, the base for the multiplier is too high. It's too high because it was not a proper ratio of partner to client neither in your firm nor in the Robbins Geller firm. And the rates that are charged by Robbins Geller are more in line with the rates that one should expect with someone looking to get fees from the Court than those opposed to here. So I'm not prepared to give you the lodestar.

MR. LIEBERMAN: Well, your Honor, I would note if you were to decrease the hourly rates, say by a third, or even more, you would still get a multiplier well within the range that is acceptable in courts in this jurisdiction which routinely award a three X or four X multiplier on lodestar.

THE COURT: Robbins Geller was counsel in the *American Capital* case.

MR. CAPECI: Yes, that's correct.

THE COURT: You did an extraordinary job in that case.

MR. CAPECI: I'm sorry?

THE COURT: You did an extraordinary job on that case.

MR. CAPECI: Thank you. It wasn't me personally, but my colleagues appreciate that, your Honor, I do believe.

THE COURT: I gave you a very good fee in that case, if I remember correctly.

MR. CAPECI: Yes. You had looked at Robbins Geller's rates at that time. If I could, I want to talk very briefly

about your point about the partner versus associate time. We feel that we were trying to be as diligent as possible in terms of prosecuting this case, given the early posture in which we were set to go to mediation. We purposely did not include an associate. The associate time for Robbins Geller was for an individual who assisted with the state action prior to the stay that was imposed by Justice Borrok. We could have but we chose not to have an associate be engaged in the process.

Part of putting together the third amended complaint and settlement process instead you had me and Ms. Gusikoff who specializes in the settlement space.

Lodestar in this case was done with an eye toward how we know your Honor wants to see these cases be prosecuted. Mr. Rudman and some of the other folks you mentioned from my firm had very limited hours. These were in connection with the mediation. I'm happy to explain any of the other items should it help the Court with its decision.

THE COURT: You had a 64 ratio which is to be expected because of the mediation.

I don't think a good job was done in the complaint. I expressed my views with the complaint. So I think a lot of hours were put into it that were not useful and the result was not a useful result and I have to allow for it.

And I think I've stated my comments with regard to attorneys and hours.

With regard to the expenses of Scott & Scott, having a company that read SEC filings and help people prepare the complaint, why isn't that part of your capital structure? It's your business to read SEC complaints and do that. This is not an expense incurred in the litigation. It is an expense incurred to prepare for this litigation just as you prepare for all other litigations. That's my comment as I see it.

MR. LIEBERMAN: Well, your Honor, I think that in this case, we brought in the accountants to help analyze Oatly's financial records and sort of accounting practices to prepare the second amended complaint which had allegations related to both of those two issues. And so we needed -- we wanted to make sure we were articulating them correctly and truthfully. So we hired experts to help us with that.

THE COURT: I believe that that should be part of your capital, your capital invested in your business. We have a $2,730 expense for transportation hotels and meals. You are a New York attorney. There was no discovery. How could you expend that kind of money?

MR. LIEBERMAN: Those expenses are for me, your Honor, because I'm located in our firm's Connecticut office. So it's for me to travel here and attend these hearings.

THE COURT: I don't believe that transportation for an attorney outside of this district is necessary. If you choose to do that, it shouldn't be an expense that is subject to be

allowance by the Court.

I notice that Robbins Geller did not charge, only charged $123.

Then you have a $6,000 expense for online legal and financial research when there was no really important legal issue here you didn't really experience time and time and time again in your other work.

MR. LIEBERMAN: Well, your Honor, we had significant briefing on the motion to dismiss which required legal research as well as mediation briefing that the parties exchanged required legal research. And unfortunately, Westlaw is very expensive.

THE COURT: I understand it's very expensive. But I understand also what kinds of issues are involved in this case. And it's not something you haven't done over and over and over again.

There is no science as I said before. To cut to the chase, I think a fee inclusive of expenses of $1,750,000 would be adequate.

MR. FREDERICKS: Your Honor, I appreciate the Court's discretion and have of course listened to your Honor's comments.

Let me speak as a more senior member of Scott & Scott in terms of just business dynamics. It's unfair to have my junior partners speak to that.

But, I will just say that from the perspective of trying to run a plaintiffs' firm, which is capable of taking on some of the best lawyers in the world who are here in Manhattan, we're very fortunate to have Mr. Lieberman with my firm. We got him from Sullivan & Cromwell. We need more men and women like Mr. Lieberman at our firm and the plaintiffs' bar.

But, the rate structures that big law provide here in New York make it very difficult to compete to get that kind of talent. We operate on a contingent fee basis. The $1900 rate I will say is not a rate that I set myself. It's set by the firm. But the law firms that we go against, their lawyers are paid $1900 and up on a non-contingent basis. They get paid whether they win or lose.

I don't mean to wax too much on this. But we took the case. Every case requires effort. We take every case we bring seriously. It takes time. I had 300 hours in the case. We had the complaint, we had a further version of the complaint, we had a third version of the complaint, we had motions to dismiss, we had the mediation, we worked on the settlement. Mr. Reckler and his firm are formidable adversaries. And I would just say that I respectfully request, your Honor, that recognizing that we operate on a contingent fee basis, recognizing that 25 percent, actually 30 percent fee is the benchmark.

THE COURT: It's not.

MR. FREDERICKS: I understand. But, I think not to at least be awarded at our lodestar. I understand, your Honor, but I did just want to say that, you know, we have to compete with these folks, we have to operate on a contingent fee basis, we wish every case were a winner and brought in a large number. But, again, with respect, I just wanted to make those comments. I've had the pleasure of being in front of your Honor 20 years ago, it is a pleasure to be in front of your Honor today. I just hope the fact that my --

THE COURT: Let me ask you a question. You heard my attitudes about this case today and previously. Assuming I don't think you should get your lodestar, and assuming I want to include expenses into the one figure, to be inclusive of fees, expense and the like, what number should I give you?

MR. FREDERICKS: Your Honor, I think that we put in the fee request that we thought was appropriate. I think we all understand that that's not a fee that you are comfortable with. You proposed 1.75. I would respectfully suggest or request very respectfully that there is a number that's higher than 1.75 and lower than 2.775 that would be appropriate here. But it's your Honor's call. I can only make the suggestion as respectfully as I could.

THE COURT: The fee inclusive of expense will be $2 million. Fine?

MR. FREDERICKS: Your Honor, I know when we have a negotiation, we had a negotiation with defendants. I don't -- this is not a negotiation. I appreciate your Honor's comments.

THE COURT: Fee inclusive of expense will be $2 million. I'm ready to sign the documents.

MR. LIEBERMAN: I have copies.

THE COURT: Does anything change in the order and final judgment? Any blanks to fill in?

MR. LIEBERMAN: I don't believe so, your Honor. I think the order and final judgment you just need to sign. And the same thing for the proposed order appointing or approving the plan of allocation.

THE COURT: The order and final judgment has been signed and will be filed.

MR. LIEBERMAN: The one thing we have not discussed yet today are the --

THE COURT: The order approving the plan of allocation has been signed and will be filed. Yes.

MR. LIEBERMAN: Is the four plaintiffs' request for PSLRA awards.

THE COURT: I approved $3500 each.

MR. LIEBERMAN: Thank you, your Honor.

THE COURT: I've signed the order awarding attorneys' fees, etc., with changes which now will be exhibited to counsel.

MR. FREDERICKS: Your Honor, if I may just address one item which wasn't discussed in colloquy or argument.

I notice that your Honor wants no portion of the fees or expenses paid until the distribution to the class. We understand that you are not unique amongst judges in having some holdback provision, but in our experience, usually it's a holdback of just --

THE COURT: It is my strong policy, Mr. Fredericks, and I've done this in every settlement that I've approved. I do it because lawyers should not be paid before the clients are paid as a matter of principle. And secondly, because this gives you a very strong incentive to get the money out to the people who deserve it quickly.

MR. FREDERICKS: Again, I understand your position. If it's something that the Court consistently does, again in our experience, we're used to having a holdback but not 100 percent holdback. And the Court does have an order for us to comply with getting claims out which we plan to comply with. I would just respectfully submit to the Court that I think we're plenty incentivized to get the claims distributed to the class if the holdback were only, let's say, 50 percent.

THE COURT: I've done this in every case. Mr. Capeci, did I do it in *American Capital*?

MR. CAPECI: Your Honor, I did not look at that aspect of *American Capital* in preparing for today. What I will say is

that the most recent settlement I had just down the hall I think with Judge Rakoff was 50-50 on approval of the settlement and first distribution.

MR. FREDERICKS: I guess I'd say we'll all look at *American Capital*, and if that's what the rule is, that's fine. If it was 50-50 in *American Capital*, would your Honor be willing to give us the same terms in that case, if the terms were different? That's all I would ask. But, we'll live obviously of course with your decision.

Your Honor, let me withdraw the request.

THE COURT: The lawyers have to wait. If they're getting money out of the settlement fund, they should not before the clients' benefit.

MR. FREDERICKS: Thank you.

THE COURT: Thank you.

Look, I will part with a different comment. The securities laws depend on private law enforcement for the integrity of the system, so what you do is socially important, important to the bar, important to society, and I applaud those efforts. At the same time it's my job to look for ways to economize and to award efficiency and to create a deterrent to what I think is inefficiency.

It is no easy task for a judge to work with pleadings as prolix and redundant and rhetorical as I've seen in this case and in so many others. And if anything as a final message

I would like to give to you is to come in with less rhetoric and more pointed allegations. And the security laws require a lot more disclosure than when I started practice. And you have substantial difficulties even when spotting that something is wrong in creating a pleading. But you do not help yourself with all the rhetoric. We read past it and it is a burden to us and it doesn't help you. We're looking for the adequacy of pleadings in light of the securities laws and the rhetoric doesn't help you. It gets in the way.

I would urge you to come in with pleadings that are much more useful to judges. You're no different than anybody else. We're all the same. And I don't know what you're trying to prove by the complaint. The only people who read the complaint is the lawyers who wrote it and the lawyers who have to deal with it and the judges. Okay, folks, thanks.

MR. FREDERICKS: Thank you, your Honor.

MR. LIEBERMAN: Thank you, your Honor.

MR. RECKLER: Thank you, your Honor.

(Adjourned)

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NORBERT G. KAESS, et al,

Plaintiffs,

v. 09 CV 1714 (GHW)(RWL)
Telephone Conference

DEUTSCHE BANK AG, et al.,

Defendants.

----------x

New York, N.Y.
June 11, 2020
4:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

GLANCY PRONGAY & MURRAY LLP
Attorneys for Plaintiffs
BY: BRIAN P. MURRAY
-and-
ROBBINS GELLER RUDMAN & DOWD LLP
BY: THEODORE J. PINTAR
ERIC NIEHAUS
KEVIN LAVELLE

CAHILL GORDON & REINDEL LLP
Attorneys for Deutsche Bank Defendants
BY: DAVID JANUSZEWSKI
SAMUEL MANN

SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Attorneys for Underwriter Defendants
BY: WILLIAM J. O'BRIEN
ANDREW BEATTY

(The Court and all parties appearing telephonically)

THE COURT: This is Judge Woods.

Is there a court reporter on the line?

(Pause)

THE COURT: Let me just say a few words at the outset of today's conference.

First, you should conceive of this conference as if it was happening in the courtroom. As you know, the dial-in information for this call is publicly available; members of the public and the press are welcome to dial in.

Second, let me ask you to all keep your phones on mute at all times when you're not speaking on the phone. I can hear some background noise right now, shuffling some paper. We should not hear any background noise during the course of the conference. Please keep your phones on mute at all times when you are not speaking during the conference. That will help us to keep a clear record of what we say today.

Third, I'd like to ask each of the people who will speak during this conference to please identify themselves each time that they speak during this conference. So, if you speak during this conference, you should say your name each time that you speak. You should do that regardless of whether or not you've spoken previously during the conference. That will help us to keep a clear record of today's conference.

Last, as you've heard, there is a court reporter on

the line. You should not be surprised if he chimes in at any point. If he does, and if he asks you to do something to help him to hear or understand what you're saying, please do what he asks. That will help us to, again, keep a clear record of the conference today.

Because there is a court reporter on the line transcribing the conference, I'm ordering that there be no recordings or rebroadcasts of any portion of the conference.

So, with those introductory remarks in hand, let me turn to the parties.

I'd like to ask for counsel for each side to identify counsel who are on the line for each of the parties and any representatives for each of the parties. What I'm going to ask is that, if you can, that one person from each side identify herself and the members of her team; that way, we won't have to hear many people chiming in at a time.

So let me begin with counsel for plaintiffs.

Who's on the line for plaintiffs?

MR. PINTAR: Good afternoon, your Honor. It's Ted Pintar, and I'm here with Eric Niehaus and Kevin Lavelle, from Robbins Geller Rudman & Dowd, for plaintiffs.

THE COURT: Good. Thank you very much.

Who is on the line for defendants?

MR. MURRAY: Excuse me. I hate to interrupt, but this is also for plaintiffs, Brian Murray, from Glancy Prongay &

Murray. Sorry to interrupt you.

Now the defendants.

THE COURT: Fine.

Counsel for defendants?

MR. JANUSZEWSKI: Good afternoon, your Honor. This is David Januszewski, and I have my colleague, Samuel Mann. We are both from Cahill Gordon & Reindel, representing Deutsche Bank and the Deutsche Bank defendants. And on the line, we also have, from Deutsche Bank, Stella Tipi, in-house counsel at Deutsche Bank.

THE COURT: Good. Thank you very much.

So, counsel --

MR. O'BRIEN: I'm sorry. Good afternoon, your Honor. I just wanted to introduce myself and my colleagues. William J. O'Brien and Andrew Beatty, from the firm of Skadden Arps Slate Meagher & Flom, on behalf of the underwriter defendants.

THE COURT: Good. Thank you very much.

So, counsel, first, let me thank you all for being on the call. I scheduled this conference as a settlement hearing or approval hearing with respect to the proposed resolution of this case. I have reviewed all of the materials that have been submitted on the docket to date in connection with this matter. I'd like to hear, however, from each of the parties, to hear, in particular, if there's anything that any of you would like to add to any of your written submissions in connection with

the proposed resolution of the case.

Let me begin with counsel for plaintiffs.

Counsel?

MR. PINTAR: Again, good afternoon, your Honor. Ted Pintar, for plaintiffs.

I had a number of things I wanted to mention just at the outset. Obviously, we're here on the final approval of an $18.5 million settlement. We are very proud of that result. As we have indicated, and I won't repeat all of what's in the papers, but it represents a very significant percentage of reasonably recoverable damages.

On February 27, 2020, this Court entered its preliminary approval order. Pursuant to that order, notice was disseminated. The claims administrator mailed over 112,000 notice packages, published the summary notice in the Wall Street Journal and Business Wire, and set up a settlement website where the notice and other settlement-related documents were posted.

And, as a result, there was one objection. It's not clear to me whether that has been withdrawn. I won't attempt to characterize Mr. Agay's email. We submitted it to the Court. He indicates, however, that he would not be participating today. There were only four opt-outs. And I do have some information on claims to date. Over 11,000 claims have been submitted, and they are still processing claims --

the mailed claims, so that number is likely to rise even from there.

So, we believe that not only is it a good settlement, that the class has reacted very positively to it, and, as you know, today we're asking the Court to enter three orders: The final judgment, the order approving plan of allocation, and the order awarding attorneys' fees and expenses and award to class plaintiffs. Other than that, your Honor, I certainly don't have anything to add to our papers. I'm happy to address any questions the Court may have, though.

THE COURT: Good. Thank you very much, counsel.

Let me hear from each of the groups of defendants.

First, counsel for the Deutsche defendants.

MR. JANUSZEWSKI: Yes, your Honor. Again, this is David Januszewski, from Cahill Gordon.

We have nothing to add to what was submitted, which was designed to address the objection that my friend just addressed. We have nothing to add to that.

THE COURT: Good. Thank you very much.

Counsel for the remaining defendants, anything that you'd like to add to your written submissions?

MR. O'BRIEN: Yes. William O'Brien, from the firm of Skadden Arps Slate Meagher & Flom, on behalf of the underwriter defendants.

And like Mr. Januszewski, we have nothing further to

add.

THE COURT: Good. Thank you very much.

Is there anyone else on the line who wishes to be heard?

So, hearing none, counsel, I'm going to approve the proposed resolution of this action, or series of actions. What I'd like to do is to ask you to place your phones, again, on mute, if you would, please. I'd like to review the reasoning for my decision. I'm going to do so now orally. At the end, I'll take up the two orders and judgment that the parties have proposed. Let me begin with, first, an overview.

So, I. Overview:

Plaintiffs brought this securities class action in February 2009 on behalf of all persons who purchased the 7.35 percent Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X and/or the 7.60 percent Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III securities from Deutsche Bank AG pursuant to public offerings from November 6, 2007, to February 14, 2008. Plaintiffs allege that defendants violated Sections 11, 12(a)(2), and 15 of the Securities Act (the "Securities Act") and (15, U.S.C., Section 77k, 771(a)(2), and 77o) by omitting material facts from the offering documents. See declaration of Eric I. Niehaus ("Niehaus dec."), Docket No. 308, paragraph 3.

Since then, plaintiffs have extensively litigated this

case. The parties have engaged in significant motion practice, and have completed fact discovery. Niehaus declaration paragraphs 3-4. Now, plaintiffs seek final approval of the class action settlement and approval of their plan for allocating the net proceeds of the settlement. Plaintiffs' counsel also seek an award of attorneys' fees and litigation costs, and the lead plaintiffs seek an award for expenses incurred while representing the class.

Judge Batts presided over this case for almost the entire time that it has been pending in this court. The case was reassigned to me on February 20, 2020, after Judge Batts' untimely death.

II. Class Certification:

On October 2, 2018, pursuant to Rule 23 of the Federal Rules of Civil Procedure, Judge Batts granted plaintiffs' motion to certify a class defined as: All persons or entities who purchased or otherwise acquired the 7.35 percent Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X ("7.35 percent Preferred Securities"), and/or the 7.60 percent Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III ("7.60 percent Preferred Securities"), pursuant or traceable to the public offerings that commenced on or about November 6, 2007, and February 14, 2008. Excluded from the class are defendants, the officers and directors of Deutsche Bank, and the underwriter defendants at

all relevant times, members of their immediate families and their legal representatives, heirs, successors, or assigns and any entity in which defendants have or had a controlling interest. Docket No. 224 at 10.

III. Approval of the Settlement Agreement:

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Federal Rule of Civil Procedure 23(e). To determine procedural fairness, courts examine the negotiating process leading to the settlement. Wal-Mart Stores, Inc. v. Visa USA, Inc., 396 F.3d 96, 116 (2d Cir. 2005). To determine substantive fairness, courts analyze whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

The court examines procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. Wal-Mart Stores, 396 F.3d at 116. A "presumption of fairness, adequacy, and reasonableness may attach to a class action settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." Id. "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." In re EVCI Career Colls. Holding Corp. Sec. Litig., 2007 WL 2230177, at *4

(S.D.N.Y. July 27, 2007).

A. Procedural Fairness:

The settlement is procedurally fair, reasonable, adequate and not a product of collusion. The settlement was reached after the parties had conducted a thorough investigation and evaluated the claims and defenses; the agreement in principle was reached after sessions with the Honorable Judge Layn R. Phillips, a former United States District Judge and an experienced mediator of securities class actions and other complex litigation. Niehaus declaration paragraph 6, 129. In advance of the mediation, the parties exchanged detailed mediation statements addressing both liability and damages. Id. The parties reached a final resolution on September 12, 2019, with the assistance of Judge Phillips, after formal mediation. Id.

B. Substantive Fairness:

The settlement is also substantively fair. The factors set forth in Grinnell provide the analytical framework for evaluating the substantive fairness of a class action settlement. The Grinnell factors are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the

ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a recovery in light of all of the attendant risks of litigation. Grinnell 295 F.2d at 463. Litigation here through trial will be complex, expensive, and long. It has been complex, expensive, and long. Thus, the first Grinnell factor weighs in favor of final approval. See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 36 (E.D.N.Y 2019) ("Settlement is favored if settlement results in substantial and tangible present recovery, without the attendant risk and delay of trial.").

With respect to the second factor, the class members' reaction to the settlement has been overwhelmingly positive. Of the 112,397 notice packets mailed to potential members of the settlement class, four exclusion requests were received. Supplemental declaration of Ross D. Murray (Supplemental Murray Dec.") Docket No. 324, Paragraphs 4, 6. Only one class member, Mr. Richard Agay, objected. See Richard Agay letter ("Agay letter") Docket No. 320-21.

That objection did not challenge the settlement, the resolution of this case, the reasons for the settlement, the manner in which class plaintiffs and lead counsel prosecuted the litigation, the work lead counsel performed, or lead

counsel's fee and expense application. Instead, the objection asserted only that Mr. Agay received his copy of the notice late, and that he was confused by certain aspects of the submission, and that the claims administrator did not sufficiently respond to Mr. Agay's telephonic inquiry. On June 5, 2020, Mr. Agay emailed lead counsel in an email that I construe as him withdrawing his objections, perhaps because he recognized that he was apparently persuaded by the response of the parties showing that he was not entitled to recovery in the suit. See Docket No. 329. While Mr. Agay received his notice later than expected, he received it with enough time to submit objections, and the delay was caused by a failure at his broker. His objection does not suggest that the overall distribution or notice program was ineffective in design or execution.

The absence of objections, with the exception of one retail investor, who literally withdrew his objection, coupled with the minimal number of requests for exclusion, strongly supports the finding that the settlement plan of allocation and fee and expense requests are fair, reasonable, and adequate. See In re Citigroup, Inc. Sec. Litig., 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013); In re Bisys Sec. Litig., 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007); In re Veeco instruments Inc. Sec. Litig., 2007 U.S. Dist. LEXIS 85629, at *40.

In sum, the overall favorable response demonstrates

that the class approves of the settlement and supports final approval.

The plaintiffs completed fact discovery, so counsel "had an adequate appreciation of the merits of the case before negotiating." Beckman v. KeyBank, N.A., 293 F.R.D. 467, 475 (S.D.N.Y. 2013)(quoting In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 537 (3rd Cir. 2004); see also Niehaus declaration paragraph 5. Lead plaintiffs spent significant time and resources analyzing and litigating the legal and factual issues of this case, including an extensive factual and legal investigation into the settlement class's claims and engaging in the detailed formal mediation process. Niehaus declaration paragraph 5.

Turning to the fourth and fifth factors, the risk of establishing liability and damages further weighs in favorable of final approval. "Litigation inherently involves risks." In re PaineWebber Ltd. Partnerships Litig., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Indeed, the primary purpose of settlement is to avoid the uncertainty of a trial on the merits. See Velez v. Majik Cleaning Serv., Inc., 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007). Here, plaintiffs face significant risks as to both liability and damages; defendants challenged the premise that the allegedly omitted information was material and the notion that plaintiffs could prove that the drop in price was related to the allegedly omitted information. See Niehaus

declaration paragraphs 106, 115 to 17. The proposed settlement eliminates these uncertainties. These factors, therefore, weigh in favor of final approval.

The risk of obtaining class certification is nonexistent here. Therefore, the sixth Grinnell factor weighs in favor of final approval. Settlement generally eliminates the risk, expense, and delay inherent in the litigation process as a whole.

Turning to the seventh factor, there is nothing to suggest that Deutsche Bank or the underwriter defendants would be unable to withstand a greater judgment than the settlement amount. "But a defendant is not required to empty its coffers before a settlement can be found adequate." Shapiro v. JP Morgan & Co., 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014)(quotation omitted).

Deutsche Bank's financial circumstances -- or I should say the defendants' financial circumstances do not ameliorate the force of the other Grinnell factors, which lead to the conclusion that the settlement is fair, reasonable, and adequate.

Finally, the amount of the settlement, in light of the best possible recovery and the attendant risks of litigation, weighs in favor of final approval. The determination of whether a settlement amount is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." In

re Austrian & German Bank Holocaust Litig., 80 F.Supp. 2d 164, 178 (S.D.N.Y. 2000). Instead, "There is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972).

Here, lead plaintiffs assert that the settlement would constitute 47 percent of the estimated recoverable damages. Niehaus declaration paragraph 19. This is a reasonable result when compared to the median ratio of settlement to investor losses of 2.1 percent for securities class action settlements in 2019. Id. Therefore, the amount of this immediate recovery is reasonable, and this factor weighs in favor of final approval.

Weighing the Grinnell factors, I find that the settlement is substantively fair and weigh in favor of final approval.

IV. Plan of Allocation:

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized - namely, it must be fair and adequate...an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." In Re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d

319, 344 (S.D.N.Y. 2005)(citation and quotation omitted). "A plan of allocation need not be perfect," in re EVCI Career Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007)(collecting cases), or "tailored to the rights of each plaintiff with mathematical precision," PaineWebber, 171 F.R.D. at 133; see also RMed International, Inc. v. Sloan's Supermarkets, Inc., 2000 WL 420548, at *2 (S.D.N.Y. April 18, 2000) (recognizing that "aggregate damages in securities fraud cases are generally incapable of mathematical precision"). Thus, "In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel." In re EVCI Career Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at *11.

Lead counsel, who are experienced and competent in complex class actions, prepared the plan of allocation in connection with plaintiffs' damages expert. Niehaus declaration paragraphs 100, 134. The settlement fund, minus attorneys' fees and expenses, will be allocated on a pro rata basis according to the relative size of class members' "Recognized claims." Id. at paragraphs 9, 10. The expert has calculated an estimated individual class members' claim based on (i) allegations when the alleged concealed facts and trends became known (i.e., realization events); (ii) an event study that estimates price changes in the securities as a result of realization events; and (iii) the statutory formula used to

calculate recoverable damages during the settlement class period. Declaration of Steven P. Feinstein ("Feinstein dec"), Docket No. 177-1, paragraphs 29-42.

Because the plan of allocation has a clear rational basis, equitably treats the class members, and was devised by experienced and estimable class counsel, the Court finds it fair and adequate. See In re Telik, Inc. Sec. Litig., 576 F.Supp. 2d, 570, 581 (S.D.N.Y. 2008).

V. Dissemination of Notice:

On February 27, 2020, the Court entered an order granting preliminary approval of the settlement as "fair, reasonable and adequate" to class members. In accordance with that order, lead counsel retained Gilardi & Co. LLC ("Gilardi") as claims administrator to supervise and administer the notice procedure in connection with the settlement and to process all claims. Declaration of Ross D. Murray ("Murray dec"), Docket No. 310, paragraph 2.

Gilardi sent a copy of the notice to potential members of the settlement class. First, Gilardi mailed, by first class mail, the notice packet to 283 nominees - banks, brokerage companies, and other institutions - that Gilardi had in its proprietary database. Id. at paragraph 5.

Next, Gilardi mailed the notice packet to 4,643 additional institutions or entities on the U.S. Securities and Exchange Commission's ("SEC") list of active brokers and

dealers. Id. paragraph 5.

Gilardi also delivered electronic copies of the notice packet to 381 registered electronic filers, primarily institutions and third-party filers, and to the depository trust company ("DTC") on the DTC legal notice system ("LENS"), which enables bank and broker nominees to contact Gilardi for copies of the notice for their beneficial holders. Id. paragraph 7. Gilardi received multiple responses and additional names of potential settlement class members from individuals or other nominees, with requests for over 64,000 notice packets to be forwarded directly to nominees' customers. Id. paragraph 9. Gilardi also published the summary notice in the Wall Street Journal and transmitted it over Business Wire. Id. paragraph 11. Gilardi also posted the date and time of the hearing on the settlement website. Id. paragraph 12.

Gilardi ultimately mailed a total of 112,397 notice packets, including mailing notice packets to persons a second time when the first set were returned as undeliverable. Supplemental Murray declaration paragraph 4.

These notices apprised settlement class members, among other things, of: (i) the amount of the settlement; (ii) the reasons why the parties are proposing the settlement; (iii) the maximum amount of attorneys' fees and expenses that will be sought; (iv) the identity and contact information for representatives of lead counsel available to answer questions

concerning the settlement; (v) the right of settlement class members to object to the settlement; (vi) the right to request exclusion from the settlement class; (vii) the binding effect of a judgment on settlement class members; (viii) the dates and deadlines for certain settlement-related events; and (ix) the way to obtain additional information about the action and the settlement by contacting lead counsel and the settlement administrator. See Federal Rule of Civil Procedure 23(c)(2)(B).

I find that these efforts fairly and adequately advised class members of the terms of the settlement, as well as the right of Rule 23 class members to opt out of, or to object to the settlement, and to appear at the final fairness hearing today. I find that the notice and its distribution comported with all constitutional requirements, including those of due process.

VI. Attorneys' Fees, Costs and Expenses:

Lead counsel requests attorneys' fees in the amount of what the Court calculates to be $6,166,666.67 plus interest earned at the same rate as the settlement fund. This amounts to one-third of the settlement fund, or 33.3 percent of the settlement fund. Lead counsel also seeks reimbursement of: (i) $1,203,502.39 in litigation expenses in total, with Robbins Geller Rudman & Dowd LLP ("Robbins Geller") seeking $1,170,981.31, Glancy Prongay & Murray seeking $28,740.22, and

Murray Frank LLP seeking $3,780.86; and (ii) to approve the award to the lead plaintiffs, or class plaintiffs, of "20,000 in the aggregate pursuant to 15, U.S.C., Section 77Z-1(a)(4) in connection with their representation of the class." Niehaus declaration paragraph 17.

Now, the trend in the Second Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases, although the Court has discretion to award attorneys' fees based on the lodestar method or the percentage of recovery method. See Fresno County Employees' Ret. Association v. Isaacson/Weaver Family Trust, 925 F.3d 63, 68 (2d Cir. 2019).

The notice provided to class members advised that class counsel would apply for attorneys' fees for up to 33.3 percent of the settlement fund, in addition to litigation costs not to exceed 1.3 million. See Gilardi declaration Exhibit A Notice at 2. No class member objected to the request.

A. Goldberger Factors:

Reasonableness is the touchstone when determining whether to award attorneys' fees. In Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000), the Second Circuit set forth the following six factors to determine the reasonableness of a fee application: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the

litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Id at 50.

1. Class Counsel's Time and Labor:

Plaintiffs' counsel have expended more than 26,000 hours of attorney time in total over the course of this action, the vast majority of which was time expended by of counsel at Robbins Geller. Declaration of Eric Niehaus in support of lead counsel's motion for an award of attorneys' fees ("Niehaus fee declaration"), Docket No. 311 paragraph 5. Niehaus declaration paragraph 135.

2. Magnitude and Complexity of the Litigation:

The size and difficulty of the issues in a case are significant factors to be considered in making a fee award. In re Prudential Sec, Inc. Ltd. Partnership Litig., 912 F. Supp. 97, 100 (S.D.N.Y. 1996). "In evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." In re Flag Telecom Holdings Ltd. Sec. Litig., 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (quotation omitted). This case is one of substantial magnitude. In addition to all of the complications that are attendant to any large securities class action, this matter involved events that happened over ten years ago, extensive discovery, and litigation. The amount sought by plaintiffs'

counsel is commensurate with the magnitude and complexity of this litigation.

3. The Risk of Litigation:

As discussed, lead counsel faced significant risk in prosecuting this action and proving the merits of the claims. All of the fact-finding has concluded. Given the complexity of the case, the risk at summary judgment and trial is significant. Defendants adamantly denied any wrongdoing, and, in the event that litigation had continued, would have continued to aggressively litigate their defenses through summary judgment, Daubert motions, trial, and any appeals.

4. Quality of Representation:

Lead counsel has considerable expertise in securities litigation. See Robbins Geller resume, Niehaus fee declaration, Exhibit G; see also declaration of Brian P. Murray filed on behalf of Glancy Prongay & Murray LLP in support of application for award of attorneys' fees and expenses ("Murphy fee declaration"). Robbins Geller attorneys are currently "lead or [are] named counsel in hundreds of securities class action or large institutional-investor cases" and are "responsible for the largest securities class action in history." Niehaus fee declaration, Exhibit G. RiskMetrics Group has recognized Glancy Prongay & Murray as one of the top plaintiffs' law firms in the United States in its securities class action services report for every year since the inception

of the report in 2003. See Murphy fee declaration, Exhibit I.

The high quality of defense counsel opposing plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the settlement. Cahill Gordon & Reindel and Skadden Arps Slate Meagher & Flom are two prominent defense firms, and "the ability of plaintiffs' counsel to obtain a favorable settlement for the class in the face of such formidable opposition confirms the quality of their representation of the class." In re Marsh ERISA Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010).

Accordingly, the Court finds that this Goldberger factor weighs in favor of the requested fee award.

5. The Requested Fee in Relation to the Settlement:

Generally, courts consider the size of a settlement to ensure that the percentage awarded does not constitute a windfall. In this case, the requested fee is 33.3 of the settlement, within the range of reasonableness, in light of other class action settlements in this circuit. See Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009)("Class counsel's request for 33 percent of the settlement fund is typical in class action settlements in the Second Circuit.").

6. Public Policy Considerations:

When determining whether a fee award is reasonable, courts consider the social and economic value of the class

action "and the need to encourage experienced and able counsel to undertake such litigation." In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). "Courts have, as a generic matter, frequently observed that the public policy of vigorously enforcing the federal securities laws must be considered in calculating an award." In re BioScrip, Inc. Sec. Litig., 273 F.Supp. 3d 474, 502 (S.D.N.Y. 2017)(quotation omitted) affirmed sub nom. Fresno County Employees Retirement Association v. Isaacson/Weaver Family Trust, 925 F.3d 63 (2d Cir. 2019).

Vigorous, private enforcement of the federal securities laws can only occur if private investors can obtain some parity in representation with that available to large corporate defendants. Accordingly, public policy favors granting lead plaintiffs' fee request.

After considering all of the Goldberger factors, the requested fee award appears to be reasonable.

B. Lodestar "Cross Check":

In Goldberger, the Second Circuit "encouraged the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." Goldberger, 209 F.3d at 50. "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." Id.

As of April 17, 2020, plaintiffs' counsel have

expended over 26,000 hours in total in this case, resulting in a total lodestar of $16,069,646. Niehaus fee declaration paragraph 4, Exhibit A; Murphy fee declaration, Exhibit A. Robbins Geller expended 17,356.85 hours with a lodestar of $12,021,477, Glancy Prongay & Murray LLP expended 8,097.8 hours with a lodestar of $3,639,826.50, the Frank Murray LLP expended 562.2 hours with a lodestar of $355,902.50. Id. Plaintiffs' counsel submitted declarations and time reports in support of their motion for attorneys' fees. Id. Counsel submitted a summary time records detailing the billable rate and hours worked by each attorney and professional support staff in this case. I find that these billable rates based on the timekeeper's title, specific years of experience, and market rates for similar professionals in their fields nationwide and in New York, where Robbins Geller LLP is based, to be reasonable in this context.

Based on plaintiffs' counsel's requested fee - one-third of the settlement, or by the Court's calculation, $6,166,666.67 - the lodestar yields a negative "cross-check" multiplier of about 0.38; therefore, the fee is well below the typically awarded multipliers in this circuit. "Courts regularly award lodestar multipliers from 2 to 6 times lodestar in this circuit." Fleisher v. Phoenix Life Insurance Company, 2015 WL 10847814, at *18 (S.D.N.Y. Sept. 9, 2020)(quotation omitted)(collecting cases). Thus, the lodestar

"cross-check" confirmation that plaintiffs' counsel requested fee is reasonable.

The Court therefore finds that, based on the Goldberger factors and the lodestar "cross-check," that plaintiffs' counsel's requested fees are reasonable.

C. Litigation Expenses:

Plaintiffs' counsel requests $1,203,502.39 total in litigation expenses, including filing fees, process service, mailing expenses, document management and hosting services, investigative and expert witnesses, legal research, travel and mediation. See Niehaus fee declaration paragraph 5, Exhibit B. Robbins Geller seeks $1,170,981.31, Glancy Prongay & Murray seeks $28,740.22, and Murray Frank LLP seeks $3,780.86. The largest component of plaintiffs' counsel's expenses was the cost of experts and consultants, amounting to $750,458, or approximately 62 percent of total expenses. Niehaus fee declaration paragraph 6. The next largest components of plaintiffs' counsel's expenses were for transportation, hotels, and meals ($227,852.66), court transcripts and deposition materials ($68,030.54), and mediation ($27,210). See Niehaus fee declaration, Exhibit B. The notice disclosed that lead counsel would seek up to $1,300,000 in litigation expenses. No objection to these expenses was received.

"It is well-established that counsel who create a common fund are entitled to the reimbursement of expenses that

they advance to a class." In re Giant Interactive Group, Inc., 279 F.R.D. 151, 165 (S.D.N.Y. 2011); see also In re Indep. Energy Holdings, 302 F.Supp. 2d 180, 183 Note 3 (S.D.N.Y. 2003). "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients as long as they were 'incidental and necessary to the representation of those clients.'" (quotation omitted). The expenses for which lead counsel seeks payment are the type of expenses that courts typically approve. See In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004). Therefore, the Court finds that the requested litigation expenses are reasonable and necessary to the representation of the class and are appropriately reimbursed to class counsel.

D. Lead Plaintiffs' Expenses:

Lead plaintiffs seek an award of $20,000 for both of them in recognition of the time and expense that they incurred on behalf of the class. Motion in support, Docket No. 307, at 31; see also Niehaus declaration paragraph 17. 15, U.S.C., Section 77Z-1(a)(4) allows "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

As set forth in their declaration, lead plaintiffs dedicated a significant amount of time to the successful

prosecution of this action, including by reviewing pleadings and motions, discussing strengths and risks of the case, and consulting with lead counsel regarding settlement. Kaess and Farrugio declaration paragraphs 2 through 12. These are the kinds of activities which regularly are found to support awards to class representatives.

As set forth in their declaration, lead plaintiffs assert that the value of their time and resources invested in this case is substantially in excess of the $20,000 award that they seek here. Id. And the application here is consistent with the notice, which disclosed that "Class plaintiffs may seek an award pursuant to 15, U.S.C., Section 77z-1(a)(4) in connection with their representation of the class in an amount not to exceed $20,000 in the aggregate." Murphy fee declaration, Exhibit A notice.

Thus, I find that the requested award of $20,000 to lead plaintiffs is reasonable.

VII. Conclusion:

In conclusion, I approve the class action settlement for $18,500,000 and approve the plan for allocating the net proceeds of the settlement. I also award plaintiffs' counsel attorneys' fees in the amount of what the Court calculates to be $6,166,666.67, plus interest earned at the same rate as the settlement fund. This amounts to one-third of the settlement fund, or 33.3 percent of the settlement fund. I am also

awarding $1,203,502.39 in litigation expenses to be divided as outlined by lead counsel. Finally, I award lead plaintiffs $20,000 in the aggregate for time and expenses incurred while representing the class.

So, counsel, thank you very much for your patience as I got through the reasoning for my decision to approve the settlement here.

I received the proposed orders and judgment, and I expect to act on those promptly after today's conference.

Is there anything else that we should take up now, before we adjourn?

First, counsel for plaintiffs?

MR. PINTAR: Not for plaintiffs, your Honor. Again, Ted Pintar. Thank you very much.

THE COURT: Thank you.

Counsel for the Deutsche Bank defendants?

MR. JANUSZEWSKI: Your Honor, David Januszewski.

Nothing else from us.

THE COURT: Good. Thank you.

Counsel for the underwriter defendants?

MR. O'BRIEN: Yes. William O'Brien, from Skadden Arps Slate Meagher & Flom LLP.

Nothing further from us as well.

THE COURT: Good. Thank you, all.

COUNSEL: Thank you. * * *

EXHIBIT L

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
WESTMORELAND COAL COMPANY, *et al.*,[1]	Case No. 18-35672 (DRJ)
Debtors.	Jointly Administered

COVERSHEET TO THIRD INTERIM AND FINAL FEE APPLICATION OF MORRISON & FOERSTER LLP FOR ALLOWANCE OF COMPENSATION FOR SERVICES RENDERED AS COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR THE PERIOD FROM OCTOBER 22, 2018 THROUGH JUNE 21, 2019

Name of Applicant:	Morrison & Foerster LLP	
Applicant's Role in case:	Counsel to the Official Committee of Unsecured Creditors	
Date Order of Employment Signed:	November 28, 2018 (Docket No. 621)	
Periods for which Compensation and Reimbursement is sought:	***For WMLP Debtors:*** March 1, 2019 through June 21, 2019 (the "**Third Interim Application Period**"); ***For All Debtors:*** October 22, 2018 through June 21, 2019 (the **"Final Application Period"**)	
Time Period covered by any prior applications:	Beginning of Period	Ending of Period
	October 22, 2018	February 28, 2019
Total amounts awarded in all prior applications:		N/A

[1] Due to the large number of debtors in these chapter 11 cases, which are jointly administered, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the proposed claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

Third Interim Application Period (WMLP Debtors)	
Total fees requested in the Third Interim Application Period:	$486,722.95
Total professional fees requested in the Third Interim Application Period:	$464,888.95
Total actual professional hours covered by the Third Interim Application Period:	521.20
Average hourly rate for professionals for the Third Interim Application Period:	$1,029.41
Total paraprofessional fees requested in the Third Interim Application Period:	$21,834.00
Total actual paraprofessional hours covered by the Third Interim Application Period:	60.50
Average hourly rate for paraprofessionals for the Third Interim Application Period:	$360.89
Reimbursable expenses sought in the Third Interim Application Period:	$8,583.34
Final Application Period (All Debtors)	
Time Period covered:	October 22, 2018 – June 21, 2019
Total fees requested in the Final Application Period:	$4,289,985.95[2]
Total professional fees requested in the Final Application Period:	$4,111,660.45
Total actual professional hours covered by the Final Application Period:	5,053.20
Average hourly rate for professionals for the Final Application Period:	$845.94
Total paraprofessional fees requested in the Final Application Period:	$178,325.50
Total actual paraprofessional hours covered by the Final Application Periods:	506.20

[2] Consistent with the *Order Authorizing and Approving Intercompany Settlement Term Sheet* [Dkt. No. 1548] (the "Intercompany Settlement"), Morrison & Foerster seeks final approval of (and this number represents) (a) 100% of the fees and expenses incurred in connection with all estates through February 28, 2019; (b) 100% of the fees and expenses incurred in connection with the WMLP Debtors' estates from March 1, 2019 through June 21, 2019; and (c) 30% of the fees and expenses incurred jointly from March 1, 2019 through June 21, 2019 (*i.e.*, the percentage of joint fees and expenses allocable to the WMLP Debtors' estates under the terms of the Intercompany Settlement).

The WLB Plan (defined herein) authorized Morrison & Foerster to invoice the WLB Debtors directly for fees allocable to the WLB Debtors incurred after the WLB Plan was confirmed, and prior to the Effective Date (as defined in the WLB Plan). In addition, the WLB Plan and the WMLP Plan (defined herein) authorize Morrison & Foerster to invoice the Debtors directly for fees incurred after each plan's respective effective date in connection with the preparation of fee applications for the Committee's professionals.

Average hourly rate for paraprofessionals for the Final Application Period:	$352.28	
Reimbursable expenses sought in the Final Application Period:	$78,387.14	
Total to be Paid to Priority Unsecured Creditors:	WLB: WMLP:	Reconciliation in progress $4,533,000
Anticipated % Dividend to Priority Unsecured Creditors:	WLB: WMLP:	100% 100%
Total to be Paid to General Unsecured Creditors:	WLB: WMLP:	$3,250,000[3] $0
Anticipated % Dividend to Unsecured Creditors:	WLB: WMLP:	Reconciliation in progress 0%
Date of confirmation hearing:	WLB: WMLP:	February 28, 2019 June 5, 2019
Indicate whether the plan has been confirmed.	Yes.	

[Signature page follows]

[3] Less expenses of the claims administrator.

Date Signed: July 22, 2019

/s/ *Michael D. Warner*

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Counsel for the Official Committee of Unsecured Creditors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
WESTMORELAND COAL COMPANY, *et al.*,[1]	Case No. 18-35672 (DRJ)
Debtors.	Jointly Administered

THIRD INTERIM AND FINAL FEE APPLICATION OF MORRISON & FOERSTER LLP FOR ALLOWANCE OF COMPENSATION FOR SERVICES RENDERED AS COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR THE PERIOD FROM OCTOBER 22, 2018 THROUGH JUNE 21, 2019

THIS APPLICATION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE APPLICATION, YOU SHOULD IMMEIDATELY CONTACT THE APPLICANT TO RESOLVE THE DISPUTE. IF YOU AND THE APPLICANT CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE APPLICANT. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE APPLICATION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE APPLICATION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE APPLICATION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY

A HEARING ON THIS APPLICATION WILL BE CONDUCTED ON A FUTURE DATE TO BE DETERMINED IN COURTROOM 404, 515 RUSK STREET, HOUSTON, TEXAS 77002.

[1] Due to the large number of debtors in these chapter 11 cases, which are jointly administered, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the proposed claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

Morrison & Foerster LLP ("**Morrison & Foerster**") as counsel to the Official Committee of Unsecured Creditors (the "**Committee**") appointed in the above-captioned cases (the "**Chapter 11 Cases**") of Westmoreland Coal Company ("**WLB**") and the affiliated debtors and debtors in possession (collectively, "**Westmoreland**" or the "**Debtors**") hereby files its third interim and final application for allowance of compensation for services rendered and necessary expenses incurred for the period from October 22, 2018 through June 21, 2019 (the "**Application**") for (a) allowance of compensation for professional services rendered by Morrison & Foerster and reimbursement of its actual and necessary expenses in connection with the WMLP Debtors (defined herein) for the period from March 1, 2019 through June 21, 2019 (the "**Third Interim Application Period**"), and (b) allowance of compensation for professional services rendered by Morrison & Foerster and reimbursement of its actual and necessary expenses incurred in connection with all Debtors' estates for the period from October 22, 2018 through June 21, 2019 (the "**Final Application Period**," and together with the Third Interim Period, the "**Application Periods**") pursuant to sections 330 and 331 of the United States Bankruptcy Code (the "**Bankruptcy Code**"), Rule 2016 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Rules 2016-1 and 9013-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Southern District of Texas (the "**Local Rules**"), the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals* [Docket No. 495] (the "**Interim Compensation Order**"), and the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* effective as of November 1, 2013 (the "**U.S. Trustee Guidelines**" or "**Guidelines**," as applicable).

For the Third Interim Application Period, Morrison & Foerster seeks interim allowance of $486,722.95 as fees for services rendered and $8,583.34 as reimbursement of expenses incurred. For the Final Application Period, Morrison & Foerster seeks final allowance of $4,289,985.95 as fees for services rendered and $78,387.14 as reimbursement of expenses incurred. In support of this application (the "**Application**"), Morrison & Foerster submits the Declaration of Lorenzo Marinuzzi (the "**Marinuzzi Declaration**") attached hereto as **Exhibit 1** and a proposed order granting the Application attached hereto as **Exhibit 2**. In further support of this Application, Morrison & Foerster respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of Texas*, dated May 24, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 330, 331 and 1103 of the Bankruptcy Code, Bankruptcy Rule 2016 and Local Rules 2016-1 and 9013-1 of the Local Rules.

BACKGROUND

A. Background

3. On October 9, 2018 (the "**Petition Date**"), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code in this Court. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

4. On October 18, 2018, the Office of the United States Trustee for the Southern District of Texas (the "**U.S. Trustee**") appointed the Committee pursuant to Section 1102 of the Bankruptcy Code. The Committee consists of the following seven (7) members: (i) Ohio Machinery Co.; (ii) Wheeler Machinery Co.; (iii) Nelson Brothers Mining Services, LLC; (iv) Tractor & Equipment Co.; (v) Consol Mining Company LLC; (vi) Pension Benefit Guaranty Corporation; and (vii) United Mine Workers of America.

B. The Committee's Retention of Morrison & Foerster

5. On October 22, 2018, the Committee held a meeting and selected Morrison Foerster as lead counsel, subject to Court approval. The Committee also selected Cole Schotz P.C. ("**Cole Schotz**") to serve as co-counsel to the Committee in these cases, subject to Court approval.

6. On November 28, 2018, the Court entered the *Order Approving Application for Approval of the Employment of Morrison & Foerster LLP as Counsel to the Official Committee of Unsecured Creditors, Effective October 22, 2018* [Docket No. 621] (the "**Retention Order**").

7. The Retention Order authorizes the Debtors to compensate and reimburse Morrison & Foerster in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any Orders entered in these cases. The Retention Order also authorizes the compensation of Morrison & Foerster at its standard hourly rates and the reimbursement of Morrison & Foerster's actual and necessary out-of-pocket expenses incurred, subject to application to this Court.

C. Case Status

i. WLB Debtors

8. The Debtors commenced these cases to sell their respective assets as a going concern. WLB and its Debtor affiliates other than the WMLP Debtors (defined herein) (collectively, the "**WLB Debtors**") commenced these cases with a pre-arranged chapter 11 plan to sell their core assets to their prepetition secured lenders, and sell their non-core assets to a third party, on or before February 28, 2019. In the event no third party buyer emerged, the WLB Debtors' agreed to transfer their non-core assets to their prepetition lenders as well.

9. On October 25, 2018, WLB and certain of its Debtor-subsidiaries filed a *Joint Chapter 11 Plan of Westmoreland Coal Company & Certain of its Debtor Affiliates* [Docket No. 788] (the "**WLB Plan**"). A hearing on confirmation of the WLB Plan was held on February 28, 2019, and the Court subsequently entered an order confirming the WLB Plan [Docket No. 1561]. The WLB Plan became effective on March 15, 2019. [Docket No. 1608].

10. On April 15, 2019, Morrison & Foerster filed an application seeking final allowance of the fees and expenses incurred for services rendered in connection with the WLB Debtors' estates [Docket No. 1744]. Subsequently, the WMLP Lenders (defined herein) filed an omnibus limited objection to all final fee applications filed with respect to the WLB Debtors' estates [Docket No. 1815], and reserved the right to object to the allocation of fees and expenses among the two groups of Debtors. As a result, Morrison & Foerster converted its final application to a request for interim allowance of WLB-related fees and expenses, so that any allocation dispute could be adjudicated at the hearing on final fee applications with respect to the WMLP Debtors. *See Omnibus Order Awarding Interim Allowance of Compensation for Services Rendered and Reimbursement of Expenses* [Docket No. 2059].

ii. WMLP Debtors

11. As contemplated by the *Final Order (I) Authorizing the MLP Debtors to Use Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Certain Protections to Prepetition Lenders Pursuant to 11 U.S.C. § 105, 361, 362, 363 and 507, (III) Modifying the Automatic Stay and (IV) Granting Related Relief* [Docket No. 521] (the "**Cash Collateral Order**"), Westmoreland Resource Partners, LP ("**WMLP**") and its direct and indirect subsidiaries (together with WMLP, the "**WMLP Debtors**") entered these cases to pursue a going-concern sale of their assets. Toward that end, on February 5, 2019, the WMLP Debtors obtained approval of the sale of the assets of Oxford Mining Company LLC.

12. Subsequently, the WMLP Debtors sought, and on February 4, 2019 obtained, approval of bid procedures for the sale of the assets of Westmoreland Kemmerer, LLC and Westmoreland Kemmerer Fee Coal Holdings, LLC (such sale transaction, the "**Original Kemmerer Sale**"). On March 2, 2019, the Court entered an order approving the Original Kemmerer Sale. *See* Docket No. 1560.

13. In connection with the Original Kemmerer Sale, the Committee, the WMLP Debtors, and the WMLP Debtors' prepetition secured lenders (the "**WMLP Lenders**") entered into a global settlement of valuable claims and causes of action pertaining to the WMLP Debtors' estates that had been identified by the Committee during the course of its Challenge Investigations (defined herein). *See* Docket No. 1545 (the "**Original Committee Settlement**"). As a result of those investigations, the Committee had identified, among other things, (a) significant real estate assets owned by the WMLP Debtors for which no mortgage was recorded; (b) coal leases—potentially in excess of 30% of all leases in which the WMLP Debtors had an interest—under which the WMLP Debtors had failed to obtain necessary counterparty

consent to assign such leases to the WMLP Lenders; (c) several million dollars in potentially unencumbered cash; and (d) claims and causes of action that could be asserted relating to, among other things, the Kemmerer "drop-down" transaction and other prepetition transactions. These claims are discussed in further detail in the *Statement of the Official Committee of Unsecured Creditors in Support of the Settlement Term Sheet between the WMLP Debtors, the MLP Secured Lenders, and the Committee* [Docket No. 1527] and the letter dated January 6, 2019 from the Committee to the Debtors' counsel (attached hereto as **Exhibit 9**).

14. In settlement of the claims and causes of action identified by the Committee, the Original Committee Settlement, among other things, ensured the funding of a plan process; provided for the payment of administrative expense claims and substantial priority claims held by vendors, trade creditors, and governmental entities (including claims for the funding of benefits to disabled retirees mandated by the Black Lung Benefits Act, *see* 30 U.S.C. § 901, *et seq*.); contemplated a potential recovery to general unsecured creditors; and provided for the waiver of any preference or other avoidance claims that may have been pursued against general unsecured creditors (ensuring those creditors would not be subject to future lawsuits).

15. On or about March 21, 2019—subsequent to the execution of the Original Committee Settlement and the Court's approval of the Original Kemmerer Sale, but prior to that Sale's closing—a dispute arose among Westmoreland Mining Holdings, LLC (along with its affiliates, the "**WLB Purchaser**"), the proposed purchaser of the Kemmerer mine, the WLB Debtors, the WMLP Debtors, and Zurich American Insurance Company (along with its affiliates, "**Zurich**") regarding the replacement of surety bonds provided by Zurich securing certain reclamation obligations at the Kemmerer mine. *See Emergency Motion of the WLB Purchaser to Enforce Court Order Concerning Sale of Kemmerer Mine* [Docket No. 1629]. As a result of that

dispute (and following the litigation commenced by the WLB Purchaser), the Original Kemmerer Sale did not close and the Original Committee Settlement—which was contingent upon that Sale's closing—did not enter into effect.

16. Over the next two months, the parties negotiated the terms of an alternative sale transaction, resulting in a proposed sale of the Kemmerer mine to the WMLP Lenders in exchange for a credit bid and the assumption of certain liabilities (the "**Revised Kemmerer Sale**"). *See* Docket No. 1863. At the same time, the Committee negotiated in parallel with the WMLP Debtors and the WMLP Lenders to develop a revised global settlement of claims and causes of action, culminating in the "**Revised Committee Settlement**." *See* Docket No. 1978. The Revised Committee Settlement provided for the funding of a plan process, payment of substantial administrative expense and priority claims, and waiver of preference claims, in settlement of claims identified as a result of the Committee's investigation.

17. Critically, the settlement avoided the need for costly and time-consuming litigation concerning the value of the WMLP Debtors' unencumbered assets, the value of any alleged adequate protection claim asserted by the WMLP Lenders, or whether cash used to fund the WMLP Debtors' operations had come from unencumbered assets. The settlement also ensured the continued operations of the WMLP Debtors' mining assets, the preservation of jobs, the continuation of valuable customer and vendor relationships, and allowed the WMLP Debtors to continue operating their business in a manner that was environmentally safe.

18. On June 3, 2019, the WMLP Debtors filed the *Amended Joint Chapter 11 Plan for the WMLP Debtors* [Docket No. 1932] (the "**WMLP Plan**"). A hearing on confirmation of the WMLP Plan was held on June 5, 2019, and the Court subsequently entered orders confirming the WMLP Plan (which incorporated the terms of the Revised Committee Settlement) [Docket

No. 1967] and approving the Revised Kemmerer Sale [Docket No. 1966]. The Revised Kemmerer Sale closed, and the WMLP Plan became effective, on June 21, 2019. [Docket No. 2068].

SUMMARY OF PROFESSIONAL COMPENSATION AND REIMBURSEMENT OF EXPENSES REQUESTED

19. Morrison & Foerster seeks interim allowance of $486,722.95 in fees calculated at the hourly billing rates of Morrison & Foerster's personnel who worked on this case, and $8,583.34 in expenses actually and necessarily incurred by Morrison & Foerster while providing services to the Committee during the Third Interim Application Period. During the Third Interim Application Period, Morrison & Foerster attorneys and paraprofessionals expended a total of 581.70 hours for which compensation is requested. By this Application, Morrison & Foerster seeks interim allowance of 100% of the fees and expenses incurred in connection with the WMLP Debtors' estates during the Third Interim Application Period.

20. Morrison & Foerster seeks final allowance of $4,289,985.95 in fees calculated at the hourly billing rates of Morrison & Foerster's personnel who worked on this case, and $78,387.14 in expenses actually and necessarily incurred by Morrison & Foerster while providing services to the Committee during the Final Application Period. During the Final Application Period, Morrison & Foerster attorneys and paraprofessionals expended a total of 5,559.40 hours for which compensation is requested. By this Application, Morrison & Foerster seeks final allowance of 100% of the fees and expenses incurred in connection with ***all*** of the Debtors' estates during the Final Application Period.

21. Pursuant to the Interim Compensation Order, during these cases, Morrison & Foerster has filed monthly fee statements for services rendered and expenses incurred from March 1, 2019 through June 21, 2019. As of the date of this Application, Morrison & Foerster

has not received any objections to its monthly fee statements. A summary of the amounts paid to Morrison & Foerster in accordance with the Interim Compensation Order for monthly fee statements relating to the Third Interim Application Period is set forth as follows:

Period	Fees Incurred	Fees Paid	Expenses Incurred	Expenses Paid	Balance (Fees & Expenses)
March 1, 2019 – March 31, 2019	$214,836.90	$179,473.44	$1,532.05	$1,532.05	$35,363.46
April 1, 2019 – April 30, 2019	$82,017.15	$65,613.70	$1,620.63	$1,620.63	$16,403.43
May 1, 2019 – May 31, 2019	$112,119.65	$0.00	$1,159.83	$0.00	$113,279.48
June 1, 2019 – June 21, 2019	$77,749.25	$0.00	$4,270.83	$0.00	$82,020.08
Total:	**$486,722.95**	**$245,087.14**	**$8,583.34**	**$3,152.68**	**$247,066.45**

22. Pursuant to the Interim Compensation Order, during these cases, Morrison & Foerster has filed monthly fee statements for services rendered and expenses incurred from October 22, 2018 through June 21, 2019. As of the date of this Application, Morrison & Foerster has not received any objections to its monthly fee statements. A summary of the amounts paid to Morrison & Foerster in accordance with the Interim Compensation Order for monthly fee statements relating to the Final Application Period is set forth as follows:

Period	Fees Incurred	Fees Paid	Expenses Incurred	Expenses Paid	Balance (Fees & Expenses)
October 22, 2018 – October 31, 2018	$319,371.50	$319,371.50	$593.37	$593.37	$0.00
November 1, 2018 – November 30, 2018	$688,352.50	$688,352.50	$11,099.71	$11,099.71	$0.00
December 1, 2018 – December 31, 2018	$1,211,792.00	$1,211,792.00	$23,741.70	$23,741.70	$0.00

Period	Fees Incurred	Fees Paid	Expenses Incurred	Expenses Paid	Balance (Fees & Expenses)
January 1, 2019 – January 31, 2019	$980,336.00	$980,336.00	$20,129.34	$20,129.34	$0.00
February 1, 2019 – February 28, 2019	$603,410.50	$603,410.50	$14,239.68	$14,239.68	$0.00
March 1, 2019 – March 31, 2019	$214,836.90	$179,473.44	$1,532.05	$1,532.05	$35,363.46
April 1, 2019 – April 30, 2019	$82,017.15	$65,613.70	$1,620.63	$1,620.63	$16,403.43
May 1, 2019 – May 31, 2019	$112,119.65	$0.00	$1,159.83	$0.00	$113,279.48
June 1, 2019 – June 21, 2019	$77,749.25	$0.00	$4,270.83	$0.00	$82,020.08
Total:	**$4,289,985.45**	**$4,048,349.64**	**$78,387.14**	**$72,956.48**	**$247,066.45**

23. After accounting for the Intercompany Settlement that provides for a 70/30 split of nearly all joint fees and expenses among the WLB Debtors and the WMLP Debtors, respectively, the allocation for fees and expenses billed to the Debtors' estates during the Final Application Period is set forth as follows:[2]

Period	WLB Debtors	WMLP Debtors
October 22, 2018 – October 31, 2018	$242,232.86	$77,732.01
November 1, 2018 – November 30, 2018	$449,064.80	$250,387.41
December 1, 2018 – December 31, 2018	$907,156.19	$328,377.51
January 1, 2019 – January 31, 2019	$680,127.34	$320,338.00
February 1, 2019 – February 28, 2019	$301,454.46	$316,195.72
March 1, 2019 – March 31, 2019[3]	N/A	$216,368.95

[2] The summary above includes both fees and reimbursable expenses. During the Final Application Period, Morrison & Foerster incurred fees (*i.e.*, excluding reimbursable expenses) of $2,531,172.99 with respect to the WLB Debtors and $1,764,820.80 with respect to the WMLP Debtors.

[3] Pursuant to the WLB Plan, fees and expenses incurred by Morrison & Foerster in connection with the WLB Debtors during the period between the confirmation of the WLB Plan and its Effective Date were not included in Morrison & Foerster's monthly fee statement for March, but instead were directly invoiced to the WLB Debtors.

Period	WLB Debtors	WMLP Debtors
April 1, 2019 – April 30, 2019	N/A	$83,637.78
May 1, 2019 – May 31, 2019	N/A	$113,279.48
June 1, 2019 – June 21, 2019	N/A	$82,020.08
Total:	**$2,580,035.65**	**$1,788,336.94**

24. Pursuant to this Application, Morrison & Foerster now seeks payment of the remaining amounts it is owed, including the twenty percent "hold-back" amounts, in connection with its previously filed monthly fee statements.

25. The fees charged by Morrison & Foerster in these cases are billed in accordance with Morrison & Foerster's existing billing rates and procedures in effect during the Application Periods. The rates Morrison & Foerster charges for the services rendered by its professionals and paraprofessionals in these chapter 11 cases generally are the same rates Morrison & Foerster charges for professional and paraprofessional services rendered in comparable bankruptcy and non-bankruptcy related matters. Such fees are reasonable based on the customary compensation charged by comparably skilled practitioners in comparable bankruptcy and non-bankruptcy cases in a competitive national legal market.

26. Morrison & Foerster prepared a budget (the "**Budget**") and a staffing plan (the "**Staffing Plan**") for Morrison & Foerster's engagement for the periods from March 1, 2019 through June 21, 2019. The Budget, which includes a comparison to the fees and hours actually billed for each task, is attached hereto as **Exhibit 3**, and the Staffing Plan is attached as **Exhibit 4**. The fees sought in this Application do not exceed the budget.

27. Attached hereto as **Exhibit 5** is a summary breakdown of hours and amounts billed by timekeeper, reflecting the allocation of such time to the appropriate estate pursuant to paragraph 2(b) of the Interim Compensation Order. The summary sheet lists those Morrison &

Foerster professionals, paraprofessionals, and other non-legal staff who have performed services for the Committee during the Application Periods, the capacities in which each individual is employed by Morrison & Foerster, the department in which each individual practices, the hourly billing rate charged by Morrison & Foerster for services performed by such individual, the year in which each attorney was first licensed to practice law, where applicable, and the aggregate number of hours expended in this matter and fees billed therefor.

28. Attached hereto as **Exhibit 6** is a summary of the time billed by task code for the Application Periods, and the allocation of such time to the appropriate estate pursuant to paragraph 2(b) of the Interim Compensation Order.

29. Attached hereto as **Exhibit 7** is a summary and comparison of the aggregate blended hourly rates billed by Morrison & Foerster's New York timekeepers to nonbankruptcy matters during the preceding fiscal year and the blended hourly rates billed to the Committee during the Application Periods.

30. Attached hereto as **Exhibit 8** is a summary for the Application Periods, setting forth the total amount of reimbursement sought with respect to each category of expenses for which Morrison & Foerster is seeking reimbursement.

31. Morrison & Foerster maintains computerized records of the time spent by all Morrison & Foerster attorneys and paraprofessionals in connection with these chapter 11 cases. Copies of these computerized records were filed and served with Morrison & Foerster's monthly fee statements in the format and by the procedure specified by the Interim Compensation Order. Copies of the monthly time records are attached hereto as **Exhibit 10**.

32. Morrison & Foerster reserves the right to request additional compensation for the Application Periods to the extent that it is later determined that time or disbursement charges for

EXHIBIT 5

SUMMARY OF PROFESSIONAL SERVICES RENDERED BY PROFESSIONAL BY MORRISON & FOERSTER LLP ON BEHALF OF THE COMMITTEE DURING THE THIRD INTERIM APPLICATION PERIOD

			WMLP Debtors		Joint Matters[1]	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Partners and Counsel						
Bell, Jeffery	Title: Partner Dep't: Corporate Admission: 2001	$1,095.00	0.00	$0.00	0.00	$0.00
Carbone, Anthony J.	Title: Partner Dep't: Tax Admission: 1982	$1,500.00	0.00	$0.00	0.00	$0.00
Doufekias, Demme	Title: Partner Dep't: Litigation Admission: 2003	$1,040.00	0.00	$0.00	0.40	$416.00
Goren, Todd M.	Title: Partner Dep't: Business, Restructuring & Insolvency Group[2] Admission: 2003	$1,150.00	152.30	$175,145.00	8.60	$9,890.00
Marines, Jennifer L.	Title: Partner Dep't: BRIG Admission: 2005	$1,100.00	6.00	$6,600.00	0.00	$0.00
Marinuzzi, Lorenzo	Title: Partner Dep't: BRIG Admission: 1996	$1,300.00	128.80	$167,440.00	9.80	$12,740.00

[1] The "Joint Matters" fees and expenses are Collective Fees and are allocated between WMLP Debtors and the WLB Debtors as contemplated by the Intercompany Settlement. As set forth in the Interim Compensation Order, all parties in interest, including all official committees appointed in these cases as well as the U.S. Trustee and any fee examiner appointed in these cases, has the right to object to any proposed allocation in connection with any interim or final fee application.

[2] Hereinafter referred to as "BRIG".

			WMLP Debtors		Joint Matters[1]	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Dopsch, Peter C.	Title: Senior Counsel Dep't: Finance Admission: 1987	$1,150.00	0.00	$0.00	0.00	$0.00
Richards, Erica J.	Title: Of Counsel Dep't: BRIG Admission: 2007	$925.00	11.70	$10,822.50	1.50	$1,387.50
Associates and Attorneys						
Harris, Daniel J.	Title: Associate Dep't: BRIG Admission: 2008	$895.00	105.00	$93,975.00	0.80	$716.00
Kissner, Andrew	Title: Associate Dep't: BRIG Admission: 2017	$625.00	33.30	$20,812.50	35.10	$21,937.50
Richardson Arnould, Kat	Title: Associate Dep't: BRIG Admission: 2018	$525.00	24.90	$13,072.50	3.00	$1,575.00

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Name of Professional Person	Title, Department & Earliest Licensure / Experience	Hourly Billing Rate	WMLP Debtors Total Billed Hours	WMLP Debtors Total Compensation	Joint Matters[1] Total Billed Hours	Joint Matters[1] Total Compensation
Paraprofessionals						
Delehanty, Danielle E. (Braun)	Title: Paralegal Dep't: BRIG Experience: 5.5 years	$360.00 (2019)	25.20	$9,072.00	31.70	$11,412.00
Guido, Laura	Title: Senior Paralegal Dep't: BRIG Experience: 11 years	$375.00 (2019)	1.30	$487.50	2.30	$862.50
Total Incurred:			**488.50**	**$497,427.00**	**93.20**	**$60,936.50**
Less Client Accommodation for Non-Working Travel (50% of Fees Incurred):				**($22,477.50)**		**($0.00)**
Less Client Accommodation for Time Entry Review (100% of Fees Incurred):				**($6,507.50)**		**($0.00)**
Joint Billing Deduction (70% of Fees Incurred):[3]				**N/A**		**($42,655.55)**
Total Requested After Deductions:			**488.50**	**$468,442.00**	**93.20**	**$18,280.95**

[3] Consistent with the Intercompany Settlement, Morrison & Foerster seeks final approval of 30% of fees and expenses incurred jointly in connection with both the WLB Debtors' and WMLP Debtors' estates during the Third Interim Application Period. As set forth in the *Second Interim and Final Fee Application of Morrison & Foerster LLP for Allowance of Compensation for Services Rendered as Counsel to the Official Committee of Unsecured Creditors for the Period from October 22, 2018 through February 28, 2019* [Docket No. 1744] (the "Second Interim Application), Morrison & Foerster intends to invoice the WLB Debtors directly for the remaining 70% of such fees and expenses.

SUMMARY OF PROFESSIONAL SERVICES RENDERED BY PROFESSIONAL BY MORRISON & FOERSTER LLP ON BEHALF OF THE COMMITTEE DURING THE FINAL APPLICATION PERIOD

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Bell, Jeffery	Title: Partner Dep't: Corporate Admission: 2001	$1,025.00 (2018)	6.70	$6,867.50	8.00	$8,200.00	0.00	$0.00
Bell, Jeffery	Title: Partner Dep't: Corporate Admission: 2001	$1,095.00 (2019)	3.40	$3,723.00	4.40	$4,818.00	9.80	$10,731.00
Carbone, Anthony J.	Title: Partner Dep't: Tax Admission: 1982	$1,500.00 (2018)	1.90	$2,850.00	1.00	$1,500.00	0.00	$0.00
Carbone, Anthony J.	Title: Partner Dep't: Tax Admission: 1982	$1,500.00 (2019)	0.70	$1,050.00	0.00	$0.00	0.00	$0.00
Doufekias, Demme	Title: Partner Dep't: Litigation Admission: 2003	$975.00 (2018)	25.30	$24,667.50	0.30	$292.50	154.20	$150,345.00
Doufekias, Demme	Title: Partner Dep't: Litigation Admission: 2003	$1,040.00 (2019)	2.90	$3,016.00	3.80	$3,952.00	80.20	$83,408.00
Goren, Todd M.	Title: Partner Dep't: Business, Restructuring & Insolvency Group[4] Admission: 2003	$1,075.00 (2018)	108.50	$116,637.50	29.20	$31,390.00	111.20	$119,540.00

[4] Hereinafter referred to as "BRIG".

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Goren, Todd M.	Title: Partner Dep't: Business, Restructuring & Insolvency Group Admission: 2003	$1,150.00 (2019)	77.10	$88,665.00	225.00	$258,750.00	90.10	$103,615.00
Marines, Jennifer L.	Title: Partner Dep't: BRIG Admission: 2005	$1,025.00 (2018)	52.30	$53,607.50	2.20	$2,255.00	12.60	$12,915.00
Marines, Jennifer L.	Title: Partner Dep't: BRIG Admission: 2005	$1,100.00 (2019)	4.00	$4,400.00	10.30	$11,330.00	1.00	$1,100.00
Marinuzzi, Lorenzo	Title: Partner Dep't: BRIG Admission: 1996	$1,195.00 (2018)	83.70	$100,021.50	30.40	$36,328.00	146.50	$175,067.50
Marinuzzi, Lorenzo	Title: Partner Dep't: BRIG Admission: 1996	$1,300.00 (2019)	107.80	$140,140.00	218.60	$284,180.00	137.10	$178,230.00
Dopsch, Peter C.	Title: Senior Counsel Dep't: Finance Admission: 1987	$1,075.00 (2018)	9.80	$10,535.00	8.70	$9,352.50	26.30	$28,272.50
Dopsch, Peter C.	Title: Senior Counsel Dep't: Finance Admission: 1987	$1,150.00 (2019)	0.00	$0.00	0.00	$0.00	28.30	$32,545.00
Lightner, Mark Alexander	Title: Of Counsel Dep't: BRIG Admission: 2009	$885.00 (2018)	0.00	$0.00	0.00	$0.00	0.80	$708.00
Richards, Erica J.	Title: Of Counsel Dep't: BRIG Admission: 2007	$875.00 (2018)	61.50	$53,812.50	4.80	$4,200.00	61.00	$53,375.00
Richards, Erica J.	Title: Of Counsel Dep't: BRIG Admission: 2007	$925.00 (2019)	42.80	$39,590.00	43.80	$40,515.0	123.00	$113,775.00
Associates and Attorneys								

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Adeseye, Tola	Title: Associate Dep't: Litigation Admission: 2016	$575.00 (2018)	2.60	$1,495.00	1.70	$977.50	69.40	$39,905.00
Adeseye, Tola	Title: Associate Dep't: Litigation Admission: 2016	$625.00 (2019)	4.80	$3,000.00	4.90	$3,062.50	0.00	$0.00
Anabi, Andrew Issa	Title: Associate Dep't: Finance Admission: Pending	$475.00 (2018)	0.00	$0.00	1.30	$617.50	47.90	$22,752.50
Anabi, Andrew Issa	Title: Associate Dep't: Finance Admission: Pending	$525.00 (2019)	0.00	$0.00	0.00	$0.00	64.10	$33,652.50
Bell, Mike	Title: Associate Dep't: Litigation Admission: 2018	$715.00 (2018)	2.70	$1,930.50	1.60	$1,144.00	43.40	$31,031.00
Butterfield, Benjamin	Title: Associate Dep't: BRIG Admission: 2014	$725.00 (2018)	97.50	$70,687.50	24.30	$17,617.50	28.00	$20,300.00
Butterfield, Benjamin	Title: Associate Dep't: BRIG Admission: 2014	$805.00 (2019)	0.00	$0.00	0.00	$0.00	3.70	$2,978.50
Damast, Craig	Title: Attorney Dep't: BRIG Admission: 1992	$925.00 (2019)	0.00	$0.00	12.80	$11,840.00	8.90	$8,232.50
Fayyad, Khaled Salam	Title: Associate Dep't: Litigation Admission: Pending	$475.00 (2018)	56.50	$26,837.50	13.50	$6,412.50	0.00	$0.00
Fayyad, Khaled Salam	Title: Associate Dep't: Litigation Admission: Pending	$525.00 (2019)	0.00	$0.00	5.50	$2,887.50	0.00	$0.00
Ferraioli, Raff	Title: Associate Dep't: BRIG Admission: 2016	$475.00 (2018)	0.00	$0.00	0.00	$0.00	3.50	$1,662.50

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Frost, Alison	Title: Associate Dep't: Litigation Admission: Pending	$460.00 (2018)	0.00	$0.00	0.00	$0.00	35.70	$16,422.00
Frost, Alison	Title: Associate Dep't: Litigation Admission: Pending	$510.00 (2019)	11.90	$6,069.00	12.10	$6,171.00	0.00	$0.00
Gambier, Lauren	Title: Associate Dep't: Litigation Admission: 2013	$775.00 (2018)	33.70	$26,117.50	15.90	$12,322.50	90.30	$69,982.50
Gambier, Lauren	Title: Associate Dep't: Litigation Admission: 2013	$845.00 (2019)	4.40	$3,718.00	12.90	$10,900.50	24.90	$21,040.50
Goodman, Mara Elyse	Title: Associate Dep't: Admission:	$550.00 (2019)	0.00	$0.00	8.50	$4,675.00	0.00	$0.00
Harris, Daniel J.	Title: Associate Dep't: BRIG Admission: 2008	$875.00 (2018)	77.80	$68,075.00	40.00	$35,000.00	91.10	$79,712.50
Harris, Daniel J.	Title: Associate Dep't: BRIG Admission: 2008	$895.00 (2019)	66.60	$59,607.00	183.50	$164,232.50	125.10	$111,964.50
Heo, Min W. J.	Title: Associate Dep't: Finance Admission: 2015	$660.00 (2018)	16.90	$11,154.00	10.40	$6,864.00	21.50	$14,190.00
Heo, Min W. J.	Title: Associate Dep't: Finance Admission: 2015	$750.00 (2019)	13.70	$10,275.00	6.40	$4,800.00	12.50	$9,375.00

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Jensen, Sofie	Title: Visiting Int'l Attorney Dep't: Finance Experience: 2018	$275.00 (2018)	25.70	$7,067.50	8.90	$2,447.50	0.00	$0.00
Jensen, Sofie	Title: Visiting Int'l Attorney Dep't: Finance Experience: 2018	$275.00 (2019)	0.00	$0.00	0.00	$0.00	5.60	$1,540.00
Kagel, Benjamin S.	Title: Associate Dep't: Litigation Admission: 2017	$460.00 (2018)	1.90	$874.00	1.30	$598.00	22.40	$10,304.00
Kissner, Andrew	Title: Associate Dep't: BRIG Admission: 2017	$525.00 (2018)	57.00	$29,925.00	4.20	$2,205.00	129.40	$67,935.00
Kissner, Andrew	Title: Associate Dep't: BRIG Admission: 2017	$625.00 (2018)	13.00	$8,125.00	54.30	$33,937.50	85.00	$53,125.00
Mahyera, Rohani	Title: Associate Dep't: Finance Admission: 2013	$725.00 (2018)	0.00	$0.00	0.00	$0.00	6.90	$5,002.50
Masylkanova, Aisulu	Title: Associate Dep't: Finance Admission: 2013	$775.00 (2018)	4.20	$3,255.00	1.20	$930.00	0.00	$0.00
Mateo, Kat E.	Title: Associate Dep't: Litigation Admission: 2017	$600.00 (2018)	45.00	$27,000.00	26.50	$15,900.00	1.70	$1,020.00
Mbakwe, Jason N.	Title: Associate Dep't: Litigation Admission: 2017	$535.00 (2018)	15.40	$8,239.00	3.60	$1,926.00	234.90	$125,671.50
Mbakwe, Jason N.	Title: Associate Dep't: Litigation Admission: 2017	$575.00 (2019)	17.90	$10,292.50	17.90	$10,292.50	34.60	$19,895.00

Name of Professional Person	Title, Department & Earliest Licensure / Experience	Hourly Billing Rate	WLB Debtors Total Billed Hours	WLB Debtors Total Compensation	WMLP Debtors Total Billed Hours	WMLP Debtors Total Compensation	Joint Matters Total Billed Hours	Joint Matters Total Compensation
Miriyala, Arvind S.	Title: Associate Dep't: Litigation Admission: 2018	$460.00 (2018)	0.00	$0.00	0.00	$0.00	3.30	$1,518.00
Pundeff, Karina N.	Title: Associate Dep't: Litigation Admission: 2018	$460.00 (2018)	0.00	$0.00	0.00	$0.00	7.90	$3,634.00
Radzinschi, Julian N.	Title: Associate Dep't: Litigation Admission: 2014	$725.00 (2018)	6.80	$4,930.00	3.10	$2,247.50	45.40	$32,915.00
Radzinschi, Julian N.	Title: Associate Dep't: Litigation Admission: 2014	$805.00 (2019)	2.70	$2,173.50	2.60	$2,093.00	0.00	$0.00
Richardson Arnould, Kat	Title: Associate Dep't: BRIG Admission: 2018	$475.00 (2018)	76.00	$36,100.00	51.70	$24,557.50	32.30	$15,342.50
Richardson Arnould, Kat	Title: Associate Dep't: BRIG Admission: 2018	$525.00 (2019)	23.90	$12,547.50	43.60	$22,890.00	66.70	$35,017.50
Rosenberg, Adam N.	Title: Associate Dep't: Litigation Admission: 2018	$460.00 (2018)	10.50	$4,830.00	19.50	$8,970.00	97.30	$44,758.00
Rosenberg, Adam N.	Title: Associate Dep't: Litigation Admission: 2018	$510.00 (2019)	4.10	$2,091.00	4.10	$2,091.00	0.00	$0.00
Sassoon, Harriet	Title: Associate Dep't: Litigation Admission: 2015	$600.00 (2018)	0.00	$0.00	0.00	$0.00	19.10	$11,460.00
Scheinok, Brittany	Title: Associate Dep't: Litigation Admission: 2015	$550.00 (2018)	2.10	$1,155.00	1.40	$770.00	15.00	$8,250.00
Wang, Jenny	Title: Associate Dep't: Corporate Admission: 2011	$800.00 (2018)	14.20	$11,360.00	21.90	$17,520.00	0.00	$0.00

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Wang, Jenny	Title: Associate Dep't: Corporate Admission: 2011	$875.00 (2019)	1.90	$1,662.50	0.00	$0.00	12.90	$11,287.50
Zidel, Max Phillip	Title: Associate Dep't: Litigation Admission: 2017	$475.00 (2018)	32.20	$15,295.00	18.60	$8,835.00	16.30	$7,742.50
Zidel, Max Phillip	Title: Associate Dep't: Litigation Admission: 2017	$550.00 (2019)	0.00	$0.00	0.00	$0.00	2.20	$1,210.00

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Paraprofessionals								
Bergelson, Vadim	Title: eDiscovery Project Manager Dep't: Litigation Experience: 9.5 years	$330.00 (2018)	1.90	$627.00	0.00	$0.00	56.10	$18,513.00
Bergelson, Vadim	Title: eDiscovery Project Manager Dep't: Litigation Experience: 9.5 years	$330.00 (2019)	0.00	$0.00	0.00	$0.00	12.30	$4,243.50
Delehanty, Danielle E. (Braun)	Title: Paralegal Dep't: BRIG Experience: 6 years	$340.00 (2018)	27.80	$9,452.00	0.00	$0.00	43.60	$14,824.00
Delehanty, Danielle E. (Braun)	Title: Paralegal Dep't: BRIG Experience: 6 years	$360.00 (2019)	17.30	$6,228.00	34.70	$12,492.00	68.70	$24,732.00
Effendowicz, Alexander	Title: Trainee Solicitor Dep't: Finance Experience: 5 months	$385.00 (2018)	0.00	$0.00	0.00	$0.00	12.50	$4,812.50
Effendowicz, Alexander	Title: Trainee Solicitor Dep't: Finance Experience: 5 months	$400.00 (2019)	9.10	$3,640.00	9.00	$3,600.00	0.00	$0.00
Guido, Laura	Title: Senior Paralegal Dep't: BRIG Experience: 11 years	$375.00 (2019)	0.00	$0.00	3.30	$1,237.50	4.00	$1,500.00
Konjuhi, Alex	Title: Paralegal Dep't: Litigation Experience: 1.5 years	$385.00 (2018)	0.00	$0.00	0.00	$0.00	95.40	$36,729.00
Konjuhi, Alex	Title: Paralegal Dep't: Litigation Experience: 1.5 years	$400.00 (2019)	19.50	$7,800.00	19.50	$7,800.00	7.00	$2,800.00

			WLB Debtors		WMLP Debtors		Joint Matters	
Name of Professional Person	**Title, Department & Earliest Licensure / Experience**	**Hourly Billing Rate**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**	**Total Billed Hours**	**Total Compensation**
Musto, Michael	Title: Paralegal Dep't: Real Estate Experience: 6 months	$245.00 (2018)	2.30	$563.50	2.20	$539.00	0.30	$73.50
Zaccarelli, Monet D.	Title: Paralegal Dep't: Finance Experience: 3.5 years	$270.00 (2018)	26.20	$7,074.00	12.00	$3,240.00	21.50	$5,805.00
Total Incurred:			**1,436.10**	**$1,160,856.00**	**1,310.90**	**$1,173,706.50**	**2,812.40**	**$2,118,489.00**
Less Client Accommodation for Non-Working Travel (50% of Fees Incurred):				**($15,205.00)**		**($22,477.50)**		**($64,075.50)**
Less Client Accommodation for Time Entry Review (100% of Fees Incurred):				**($780.00)**		**($7,287.50)**		**($10,585.00)**
Joint Billing Deduction (70% of Fees Incurred during the Third Interim Application Period):[5]				**N/A**		**N/A**		**($42,655.55)**
Total Requested:			**1,436.10**	**$1,144,871.00**	**1,310.90**	**$1,143,941.50**	**2,812.40**	**$2,001,173.45**

[5] Consistent with the Intercompany Settlement, Morrison & Foerster seeks final approval of 30% of fees and expenses incurred jointly in connection with both the WLB Debtors' and WMLP Debtors' estates during the Third Interim Application Period. As set forth in the Second Interim Application, Morrison & Foerster intends to invoice the WLB Debtors directly for the remaining 70% of such fees and expenses.

EXHIBIT 6

SUMMARY OF PROFESSIONAL SERVICES RENDERED BY PROJECT CATEGORY BY MORRISON & FOERSTER ON BEHALF OF THE COMMITTEE DURING THE THIRD INTERIM APPLICATION PERIOD[1]

		WMLP Debtors		Joint Matters	
Project Category	**Description**	**Hours**	**Fees**	**Hours**	**Fees**
002	Asset Disposition	82.70	$91,553.50	0.00	$0.00
003	Assumption and Rejection of Leases and Contracts	2.30	$1,891.00	0.00	$0.00
006	Business Operations	2.10	$2,083.50	0.00	$0.00
007	Case Administration	38.50	$20,021.50	6.70	$3,532.00
008	Claims Administration and Objections	6.40	$6,446.00	0.80	$920.00
010	Employee Benefits and Pensions	2.00	$2,378.00	0.00	$0.00
011	Employment and Fee Applications	0.40	$520.00	59.50	$32,618.00
012	Employment and Fee Applications Objections	6.50	$6,993.00	12.30	$11,602.50
013	Financing and Cash Collateral	3.40	$3,848.50	0.00	$0.00
014	Other Litigation	1.20	$1,398.00	3.70	$3,407.50
015	Meetings and Communications with Creditors	53.70	$45,201.00	9.90	$8,511.50
016	Non-Working Travel	37.50	$44,955.00	0.00	$0.00
017	Plan and Disclosure Statement	167.70	$180,642.00	0.30	$345.00
023	Discovery	7.00	$9,100.00	0.00	$0.00
024	Hearings	64.90	$67,288.50	0.00	$0.00
026	Claims Investigation	4.00	$4,400.00	0.00	$0.00

[1] The subject matter of certain time entries may be appropriate for more than one project category. In such cases, time entries generally have been included in the most appropriate category. Time entries do not appear in more than one category.

		WMLP Debtors		Joint Matters	
Project Category	**Description**	**Hours**	**Fees**	**Hours**	**Fees**
030	Schedules and Statements	2.00	2,200.00	0.00	$0.00
032	Time Entry Review	6.20	6,507.50	0.00	$0.00
Total Incurred:		**488.50**	**$497,427.00**	**93.20**	**$60,936.50**
Less Client Accommodation for Non-Working Travel (50% of Fees Incurred):			**($22,477.50)**		**($0.00)**
Less Client Accommodation for Time Entry Review (100% of Fees Incurred):			**($6,507.50)**		**($0.00)**
Joint Billing Deduction (70% of Fees Incurred):[2]			**N/A**		**($42,655.55)**
Total Requested:		**488.50**	**$468,442.00**	**93.20**	**$18,280.95**

[2] Consistent with the Intercompany Settlement, Morrison & Foerster seeks final approval of 30% of fees and expenses incurred jointly in connection with both the WLB Debtors' and WMLP Debtors' estates during the Third Interim Application Period. As set forth in the Second Interim Application, Morrison & Foerster intends to invoice the WLB Debtors directly for the remaining 70% of such fees and expenses.

SUMMARY OF PROFESSIONAL SERVICES RENDERED BY PROJECT CATEGORY BY MORRISON & FOERSTER ON BEHALF OF THE COMMITTEE DURING THE FINAL APPLICATION PERIOD[3]

		WLB Debtors		WMLP Debtors		Joint Matters	
Project Category	**Description**	**Hours**	**Fees**	**Hours**	**Fees**	**Hours**	**Fees**
001	Asset Analysis and Recovery	193.60	$103,195.00	121.40	$74,998.50	8.90	$4,985.00
002	Asset Disposition	76.20	$75,135.00	238.50	$247,348.50	106.20	$112,544.00
003	Assumption and Rejection of Leases and Contracts	2.60	$1,675.00	2.30	$1,891.00	45.30	$23,851.50
006	Business Operations	4.90	$3,418.00	2.10	$2,083.50	6.10	$6,793.50
007	Case Administration	0.00	$0.00	38.50	$20,021.50	118.70	$78,192.50
008	Claims Administration and Objections	13.50	$11,664.50	10.90	$11,412.50	60.30	$59,526.00
009	Corporate Governance and Board Matters	0.00	$0.00	2.00	$2,378.00	0.00	$0.00
010	Employee Benefits and Pensions	71.40	$55,015.50	0.00	$0.00	42.60	$41,929.00
011	Employment and Fee Applications	6.60	$3,235.00	1.90	$2,168.50	191.80	$132,885.50
012	Employment and Fee Applications Objections	0.00	$0.00	6.50	$6,993.00	26.60	$28,506.50
013	Financing and Cash Collateral	108.20	$99,261.50	107.40	$104,154.50	0.00	$0.00
014	Other Litigation	0.00	$0.00	1.20	$1,398.00	3.70	$3,407.50
015	Meetings and Communications with Creditors	12.20	$11,091.50	57.40	$49,313.00	266.60	$236,770.00
016	Non-Working Travel	25.40	$30,410.00	37.50	$44,955.00	120.30	$128,151.00
017	Plan and Disclosure Statement	514.40	$496,650.00	260.20	$287,310.50	2.10	$2,340.00
018	Real Estate	0.00	$0.00	0.00	$0.00	33.70	$15,015.00
019	Relief from Stay and Adequate Protection	0.00	$0.00	58.80	$45,297.50	0.60	$780.00
021	Tax	13.20	$10,902.50	1.00	$1,500.00	0.00	$0.00

[3] The subject matter of certain time entries may be appropriate for more than one project category. In such cases, time entries generally have been included in the most appropriate category. Time entries do not appear in more than one category.

		WLB Debtors		WMLP Debtors		Joint Matters	
Project Category	**Description**	**Hours**	**Fees**	**Hours**	**Fees**	**Hours**	**Fees**
023	Discovery	157.10	$95,018.50	106.10	$63,998.00	1,101.90	$679,794.50
024	Hearings	6.90	$3,642.00	64.90	$67,288.50	150.40	$134,304.50
025	First and Second Day Motions	0.00	$0.00	0.00	$0.00	49.90	$40,495.50
026	Claims Investigation	68.40	$58,370.00	70.30	$54,748.00	217.90	$183,557.50
027	Lien Investigation	160.90	$101,392.00	113.20	$74,961.00	197.10	$150,716.50
028	Intercompany Claims	0.00	$0.00	0.00	$0.00	37.70	$34,804.50
029	Other Motions/Applications	0.00	$0.00	0.00	$0.00	0.40	$460.00
030	Schedules and Statements	0.00	$0.00	2.00	$2,200.00	9.80	$8,094.00
032	Time Entry Review	0.60	$780.00	6.80	$7,287.50	13.80	$10,585.00
Total Incurred:		**1,436.10**	**$1,160,856.00**	**1,310.90**	**$1,173,706.50**	**2,812.40**	**$2,118,489.00**
Less Client Accommodation for Non-Working Travel (50% of Fees Incurred):			**($15,205.00)**		**($22,477.50)**		**($64,075.00)**
Less Client Accommodation for Time Entry Review (100% of Fees Incurred):			**($780.00)**		**($7,287.50)**		**($10,585.00)**
Joint Billing Deduction (70% of Fees Incurred During Third Interim Period):[4]			**N/A**		**N/A**		**($42,655.55)**
Total Requested:		**1,436.10**	**$1,144,871.00**	**1,310.90**	**$1,143,941.50**		**$2,001,173.45**

[4] Consistent with the Intercompany Settlement, Morrison & Foerster seeks final approval of 30% of fees and expenses incurred jointly in connection with both the WLB Debtors' and WMLP Debtors' estates during the Third Interim Application Period. As set forth in the Second Interim Application, Morrison & Foerster intends to invoice the WLB Debtors directly for the remaining 70% of such fees and expenses.

EXHIBIT 7

BLENDED RATES

Category of Timekeeper	Blended Hourly Rate		
	Billed by the New York and Washington D.C. Offices (Excluding BRIG) October 22, 2018 to December 31, 2018[1]	**Billed to Committee During Third Interim Application Period**	**Billed to Committee During Final Application Period**
Senior/ Equity Partner/ Shareholder	$997.59	$1,216.84	$1,156.21
Senior Counsel	$1,036.11	N/A	$1,104.04
Of Counsel	$797.07	$925.00	$906.06
Attorneys and Senior Associate (7 or more years since first admission)	$714.41	$895.00	$863.26
Associate (4-6 years since first admission)	$561.40	N/A	$688.36
Junior Associate (1- 3 years since first admission)	$453.29	$596.03	$521.93
Attorney	$603.23	N/A	$925.00
Visiting International Attorney	$260.07	N/A	$393.87
Trainee Solicitor	$391.31	N/A	$275.00
Senior Paralegal	$340.67	$375.00	$375.00
Paralegal	$255.03	$360.00	$352.14
eDiscovery Project Manager	$315.42	N/A	$332.62
Total Attorney Rate	$781.96	$1,029.41	$845.94
Total Blended Rate (Attorneys, Paraprofessionals)	$819.29	$959.88	$800.99

[1] In accordance with the United States Trustee's guidelines, the data in this column excludes blended hourly rate information for bankruptcy law matters.

EXHIBIT M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ANTHONY BELFIORE, on behalf of himself and others similarly situated,

Plaintiff,

- against -

PROCTER & GAMBLE CO.,

Defendant.

----------x

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

14-CV-04090 (PKC) (RML)

PAMELA K. CHEN, United States District Judge:

On May 23, 2014, Anthony Belfiore filed a class action complaint against P&G in the Supreme Court of the State of New York, County of Nassau, Case No. 602364/2014 (the "Action"). (Dkt. 1.) On July 1, 2014, P&G removed the Action to the United States District Court, Eastern District of New York, where it was assigned Case No. 14-CV-04090-JBW-RML, now 14-CV-04090-PKC-RML. (*Id.*) In his Complaint, Belfiore alleges that P&G manufactures and markets pre-moistened personal hygiene wipes under the name Charmin Freshmates Flushable Wipes. (Dkt. 1, at ECF[1] 8.) Belfiore further alleges that, although the packaging on the wipes states that the wipes are "flushable," "septic safe," and "safe for sewer and septic systems," the wipes are not suitable for disposal by flushing down a toilet, are not regarded as flushable by municipal sewage system operators, do not disperse upon flushing, and routinely damage or clog plumbing pipes, septic systems, and sewage lines and pumps. (*Id.* at ECF 8–18.) Belfiore alleges in his Complaint that P&G is liable for violation of New York General Business Law § 349. (*Id.* at ECF 20–21.)

[1] Citations to ECF refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

P&G denies that there is any factual or legal basis for Plaintiff's allegations. It contends that the labeling of the Charmin Freshmates product is truthful and non-misleading, and that purchasers did not pay a "premium" for the wipes as the result of any misrepresentations. P&G therefore denies any liability. P&G also denies that Plaintiff or any other members of the settlement class have suffered injury or are entitled to monetary or other relief. P&G denies that this case should have been certified as a class action, except for purposes of settlement.

On March 6, 2020, this Court granted preliminary approval of a proposed settlement between the parties. In the Preliminary Approval Order, the Court provisionally certified a Settlement Class of all Persons, other than Excluded Persons, who purchased the Product in New York between May 24, 2011[2] and March 6, 2020, excluding purchases made for purposes of resale. (Preliminary Approval Order, Dkt. 352, ¶ 3.) "Products" means Charmin Freshmates Flushable Wipes and any other pre-moistened wipes sold under the Charmin brand name bearing the word "flushable" on the package label. The Court also approved the procedures for giving notice and the forms of notice. (*Id.* ¶¶ 6, 9–11.) Additionally, in the Preliminary Approval Order, the Court concluded that the Parties' proposed settlement, as set forth in the Settlement Agreement, was within range of possible final approval. (*Id.* ¶ 2.)

Now pending before the Court is Plaintiff's Motion for Final Approval of Class Action Settlement, and Plaintiff's Motion for an Award of Attorneys' Fees and Costs and a Class Representative Payment. (Dkt 358.) In accordance with the Preliminary Approval Order and the Settlement Agreement, on July 23, 2020, the Court held a duly noticed Fairness Hearing for purposes of: (a) determining the fairness, adequacy, and reasonableness of the settlement; and (b)

[2] The Preliminary Approval Order specifies this date as May 24, 2011, which is hereby corrected *nunc pro tunc* to May 23, 2011, based on the dates specified in the Settlement Agreement, Notice, and Claim Form. (*See* Dkt. 351-3, ECF 2, 8, 41–42, 53, 69.)

ruling upon an application by Class Counsel for an award of fees, costs, and expenses, and a Class Representative Payment. (*See* July 23, 2020 Minute Entry.)

The Parties and the Claim Administrator have submitted evidence, which the Court accepts, showing the following. Approximately 38 million online impressions targeted to reach potential members of the Settlement Class were displayed via cross-device targeting on mobile and desktop. Impressions ran on multiple inventory exchanges, Google search, and the social networking sites Facebook and Instagram. Notice was also published once in the New York edition of *People Magazine*, which has a circulation of 119,700 and a readership of 1,214,955. A press release was issued across PR Newswire's US1 and Hispanic New York State Newslines. Approximately 260 news mentions of the settlement resulted from the press releases. All of the online notices linked to, and the printed notices referred to, the Settlement Website, which contains a detailed class notice, including the procedures for Settlement Class Members to exclude themselves or object to the settlement, as well as a copy of the Settlement Agreement and motion papers filed in connection with the settlement.

A total of nine (9) persons filed timely requests to opt out of the Settlement Class; however, none of these individuals appear to be Settlement Class Members because they provide addresses outside of New York.

In addition, no persons filed objections to the settlement.

Having considered all matters submitted to it at the hearing on the motion and otherwise, including the complete record of this Action, and good cause appearing therefore, the Court hereby grants the Motion for Final Approval, and finds and concludes as follows:

1. The capitalized terms used in this Final Approval Order and Judgment shall have the same meaning as defined in the Settlement Agreement except as may otherwise be ordered.

2. The Court has jurisdiction over these cases and over all claims raised therein and all Parties thereto.

3. The Court reaffirms its findings at preliminary approval that the prerequisites of Rule 23 of the Federal Rules of Civil Procedure have been satisfied for certification of the Settlement Class for settlement purposes because: Settlement Class Members are ascertainable and are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the Settlement Class; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Settlement Class they represent; the Class Representatives have fairly and adequately protected the interests of the Settlement Class with regard to the claims of the Settlement Class they represent; common questions of law and fact predominate over questions affecting only individual Settlement Class Members, rendering the Settlement Class sufficiently cohesive to warrant a class settlement; and the certification of the Settlement Class is superior to individual litigation and/or settlement as a method for the fair and efficient resolution of this matter.

4. For purposes of the settlement and this Final Approval Order and Judgment, the Court hereby finally certifies the following Settlement Class: All Persons who purchased the Product in New York between May 23, 2011 and March 6, 2020,[3] excluding purchases for purposes of resale.

5. Excluded from the Settlement Class are (1) Honorable Pamela K. Chen, Honorable Jack B. Weinstein, Honorable Robert M. Levy and Honorable Steven M. Gold, and any member of their immediate families; (2) any government entity; (3) P&G; (4) any entity in which P&G has

[3] As discussed *supra*, the Court certifies the Settlement Class with these dates based on the dates specified in the Settlement Agreement, Notice, and Claim Form (Dkt. 351-3, ECF 2, 8, 41–42, 53, 69), and not on the dates specified in the Preliminary Approval Order (Dkt. 352).

a controlling interest; (5) any of P&G's subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (6); and persons or entities who purchased the Product for resale; and (7) any persons who timely excluded themselves from the Settlement Class. The following persons timely submitted requests to exclude themselves and shall be excluded from the settlement class: Cindy Wagner, Deborah Dumas, Frank Bologna, Thomas Valentine, Brian Bailey, Zena Mobley, Sarah Hughes, Sylvia Poole, and Carol Thomas.

6. For the purpose of this settlement, the Court hereby finally certifies Plaintiff Anthony Belfiore as Class Representative, and Wolf Popper as Settlement Class Counsel.

7. The Parties complied in all material respects with the Notice Plan set forth in the Settlement Agreement. The Court finds that the Notice Plan set forth in the Settlement Agreement, and effectuated pursuant to the Preliminary Approval Order, constituted the best notice practicable under the circumstances and constituted due and sufficient notice to the Settlement Class of the pendency of the litigation; the existence and terms of the Settlement Agreement; their rights to make claims, exclude themselves, or object; and the matters to be decided at the Final Approval Hearing. Further, the Notice Plan satisfied the requirements of the United States and New York Constitutions, Rule 23 of the Federal Rules of Civil Procedure, and any other applicable law.

8. The Court has determined that full opportunity has been given to the members of the Settlement Class to exclude themselves from the settlement, object to the terms of the settlement or to Class Counsel's request for attorneys' fees, costs, and expenses and for payments to the Class Representative, and otherwise participate in the Final Approval Hearing held on July 23, 2020. The Court has considered all submissions and arguments made at the final approval hearing.

9. The Court finds that the settlement is in all respects fair, reasonable, and adequate.

The Court therefore finally approves the settlement for all the reasons set forth in the Motion for Final Approval including, but not limited to, the fact that the Settlement Agreement was the product of informed, arms-length negotiations between competent, able counsel; the record was sufficiently developed and complete through meaningful discovery and motion proceedings to have enabled counsel for the Parties to have adequately evaluated and considered the strengths and weaknesses of their respective positions; the cases involved disputed claims, and these disputes underscore the uncertainty and risks of the outcome in this matter; the settlement provides meaningful remedial and monetary benefits for the disputed claims; and the Parties were represented by highly qualified counsel who, throughout this case, vigorously and adequately represented their respective parties' interests.

10. The settlement is in the best interests of the Settlement Class in light of the degree of recovery obtained in relation to the risks faced by the Settlement Class in litigating the class claims. The relief provided to the Settlement Class Members under the Settlement Agreement is appropriate as to the individual members of the Settlement Class and to the Settlement Class as a whole. All requirements of statute, rule, and Constitution necessary to effectuate the settlement have been met and satisfied. The Parties shall continue to effectuate the Settlement Agreement in accordance with its terms.

11. P&G is enjoined as follows for two years from the Effective Date, as defined in the Settlement Agreement:

> (a) P&G will maintain its modification of the packaging of the Product to include a statement that "Your satisfaction is guaranteed. For details of our refund program go to our website at https://www.charmin.com/en-us/about-us/flushable-wipes-guarantee." P&G provides details regarding the satisfaction guarantee on the Charmin website, including reasonable purchase price refunds to consumers who are dissatisfied with the product;

(b) P&G will maintain its modification of the packaging of the Product to include the statement: "Use only in well-maintained plumbing systems";

(c) On or before 90 days after the Effective Date, P&G will modify the packaging of the Product to exclude the statements "septic safe" and "safe for sewer and septic systems."

(d) The Product will maintain its compliance with the May 2018 more stringent INDA GD4 test protocols which (1) decrease the slosh box test duration from 180 minutes to 60 minutes, (2) increase the slosh box text pass-through percentage requirement from 25% to 60%, and (3) decrease the municipal pump test average power increase over baseline from 15% to 5%.

(e) The Product will comply with current and future versions of the INDA Guideline, including the slosh box test, provided P&G is a member of INDA and the organization maintains the same purpose and mission, with a similar membership composition, as on the date of the Settlement Agreement.

12. For avoidance of doubt, the distribution or sales by P&G of residual Product manufactured prior to the implementation of the labeling changes described in paragraph 11; or the distribution or sales by third parties of residual Product manufactured prior to the implementation of the labeling changes described in paragraph 11, shall not constitute a violation of the injunction issued herein.

13. All Valid Claims shall be paid according to the terms of, and by the deadlines set forth, in the Settlement Agreement.

14. By operation of this Final Approval Order and Judgment, Plaintiff on the one hand, and the Released Parties on the other hand, shall have unconditionally, completely, and irrevocably released and forever discharged each other from and shall be forever barred from instituting, maintaining, or prosecuting (1) any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that actually were, or could have been, asserted in the Action, based

upon any violation of any state or federal statutory or common law or regulation, and any claim arising directly or indirectly out of, or in any way relating to, the claims that actually were, or could have been, asserted in the Action, that Plaintiff, on the one hand, and P&G, on the other hand, have had in the past, or now have, related in any manner to the Released Parties' products, services or business affairs; and (2) any and all other claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that Plaintiff, on the one hand, and P&G, on the other hand, have had in the past or now have, related in any manner to any and all Released Parties' products, services or business affairs, or otherwise.

15. By operation of this Final Approval Order and Judgment, Settlement Class Members shall have released and forever discharged the Released Parties from any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, known or unknown, whether arising under any international, federal, state or local statute, ordinance, common law, regulation, principle of equity or otherwise, that were, or could have been, asserted in the Action regarding (i) the flushability or (ii) the safety for sewer and septic of the Product and statements concerning the Product's (i) flushability or (ii) safety for sewer and septic, except that there shall be no release of claims for personal injury or property damage allegedly caused by use of the Product, nor any release of claims for purchases made outside of New York.

16. Nothing herein shall bar any action or claim to enforce the terms of the Settlement Agreement.

17. No action taken by the Parties, either previously or in connection with the negotiations or proceedings connected with the Settlement Agreement, shall be deemed or

construed to be an admission of the truth or falsity of any claims or defenses heretofore made or an acknowledgment or admission by any Party of any fault, liability, or wrongdoing of any kind whatsoever to any other Party. Neither the Settlement Agreement nor any act performed or document executed pursuant to or in furtherance of the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any claim made by the Settlement Class Members or Class Counsel, or of any wrongdoing or liability of the persons or entities released under this Final Approval Order and Judgment and the Settlement Agreement, or (b) is or may be deemed to be, or may be used as an admission of, or evidence of, any fault or omission of any of the persons or entities released under this Final Approval Order and Judgment and the Settlement Agreement, in any proceeding in any court, administrative agency, or other tribunal. P&G's agreement not to oppose the entry of this Final Approval Order and Judgment shall not be construed as an admission or concession by P&G that class certification was appropriate in the cases or would be appropriate in any other action. Similarly, neither the Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor settlement negotiations, nor any related document, shall be used as an admission of any weakness or affirmity of any claim asserted in the Action by Plaintiff.

18. For the reasons stated in the separate Order on Class Counsel's application for an award of attorneys' fees, costs, expenses and Class Representative Payment, the following amounts shall be paid by P&G:

a. Fees, costs, and expenses to Class Counsel: $3,200,000.00.

b. Class representative payment to Plaintiff Anthony Belfiore: $10,000.00.

Such amounts shall be paid according to the terms of the Settlement Agreement.

19. This Order shall constitute a final judgment binding the Parties with respect to this

case.

20. Without affecting the finality of the judgment hereby entered, the Court reserves jurisdiction over the interpretation, implementation, and enforcement of the Settlement Agreement. In the event the Effective Date does not occur in accordance with the terms of the Settlement Agreement, then this Order and any judgment entered thereon shall be rendered null and void and shall be vacated, and in such event, all orders and judgments entered and releases delivered in connection herewith shall be null and void, and the Parties shall be returned to their respective positions *ex ante*.

21. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Settlement Agreement.

There is no just reason for delay in the entry of this Judgment, and immediate entry by the Clerk of the Court is expressly directed.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: July 27, 2020
Brooklyn, New York

EXHIBIT N

1160
1800

IN THE CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS
18TH JUDICIAL CIRCUIT

FILED
NOV 16, 2023 09:42 AM
Candice Adams
CLERK OF THE
18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

JOSEFINA DARNALL, GEORGE WYANT, CHERYL RUTKOWSKI and DEXTER COBB, *individually and on behalf of all others similarly situated,*

Plaintiffs,

v.

DUDE PRODUCTS, INC.,

Defendant.

Case No. 2023LA000761

[~~PROPOSED~~] FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

WHEREAS, a class action is pending before the Court entitled *Darnall, et al. v. DUDE Products, Inc.*, No. 2023LA000761;

WHEREAS, Plaintiffs Josefina Darnall, George Wyant, Cheryl Rutkowski, and Dexter Cobb (collectively "Plaintiffs") and Defendant Dude Products, Inc., have entered into a Class Action Settlement Agreement, which, together with the exhibits attached thereto, sets forth the terms and conditions for a proposed settlement and dismissal of the Action with prejudice as to Defendant upon the terms and conditions set forth therein (the "Settlement Agreement");

WHEREAS, on August 8, 2023, the Court granted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, conditionally certifying a Class pursuant to 735 ILCS 5/2-801 of "all persons in the United States (including its states, districts, or territories) who purchased one or more units of Dude Wipes 'flushable' wipes products (the 'Dude Wipe Products') from February 5, 2015, to and through the date of the Preliminary Approval Order;" and

WHEREAS, the Court has considered the Parties' Class Action Settlement Agreement, as

well as Plaintiffs' Unopposed Motion for Final Approval of the Settlement Agreement, Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs, Expenses, and Service Awards, together with all exhibits thereto, the arguments and authorities presented by the Parties and their counsel at the Final Approval Hearing held on November 16, 2023, and the record in the Action, and good cause appearing;

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. Terms and phrases in this Final Judgment shall have the same meaning as ascribed to them in the Parties' Class Action Settlement Agreement.

2. This Court has jurisdiction over the subject matter of the Action and over all Parties to the Action, including all Settlement Class Members.

3. The notice provided to the Settlement Class pursuant to the Settlement Agreement and order granting Preliminary Approval – including (i) direct notice to Settlement Class Members via email, based on the comprehensive data provided by Defendant, and (ii) the creation of the Settlement Website – fully complied with the requirements of 735 ILCS 5/2-803 and due process, and was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, their right to object to or to exclude themselves from the Settlement Agreement, and their right to appear at the Final Approval Hearing.

4. This Court now gives final approval to the Settlement Agreement, and finds that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class. The settlement consideration provided under the Settlement Agreement constitutes fair value given in exchange for the release of the Released Claims against the Released Parties. The Court finds that the consideration to be paid to members of the Settlement Class is reasonable, and in the best interests of the Settlement Class Members, considering the total value of their

claims compared to (i) the disputed factual and legal circumstances of the Action, (ii) affirmative defenses asserted in the Action, and (iii) the potential risks and likelihood of success of pursuing litigation on the merits. The complex legal and factual posture of this case, the amount of discovery completed, and the fact that the Settlement is the result of arms'-length negotiations between the Parties support this finding. The Court finds that these facts, in addition to the Court's observations throughout the litigation, demonstrate that there was no collusion present in the reaching of the Settlement Agreement, implicit or otherwise.

5. The Court has specifically considered the factors relevant to class action settlement approval, including:

> (1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed.

City of Chicago v. Korshak, 206 Ill. App. 3d 968, 972 (1st Dist. 1990).

6. The Court finds that the Class Representatives and Class Counsel adequately represented the Settlement Class for the purposes of litigating this matter and entering into and implementing the Settlement Agreement.

7. Accordingly, the Settlement is hereby finally approved in all respects.

8. The Parties are hereby directed to implement the Settlement Agreement according to its terms and provisions. The Settlement Agreement is hereby incorporated into this Final Judgment in full and shall have the full force of an Order of this Court.

9. This Court hereby dismisses the Action, as identified in the Settlement Agreement, on the merits and with prejudice.

10. Effective as of the Final Settlement Approval date, Plaintiffs and each and every Settlement Class Member who did not opt out of the Settlement Class (whether or not such members submit claims), including their respective present or past heirs, executors, estates, administrators, successors, assigns, insurers, legal representatives, trusts, and anyone claiming through them or acting or purporting to act on their behalf, shall be deemed to have released and will be forever barred from asserting, instituting, or maintaining against Defendant, as well as any and all of its current, former, and future parents, predecessors, successors, affiliates, assigns, subsidiaries, divisions, or related corporate entities, and all of their respective current, future, and former employees, officers, directors, shareholders, assigns, agents, trustees, administrators, executors, insurers, attorneys, vendors, contractors, and distributors to the extent allowable under the law, any and all past, present, or future, actual, potential, asserted or unasserted, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, causes of action, suits, claims, liens, demands, judgments, expenses, costs, damages, punitive, exemplary or multiplied damages, obligations, attorney fees (except as provided for in the Class Settlement), and all other legal responsibilities in any form or nature, including but not limited to, all claims relating to or arising out of state, local, or federal statute, ordinance, regulation, or claim at common law or in equity, arising out of or in any way allegedly related to purchases of the Dude Wipes Products, including all claims that were brought or could have been brought in the Action. Nothing herein shall be construed to release any claims for bodily injury related to the use of the Dude Wipes Products.

11. Effective as of the Final Settlement Approval date, the above release of claims and the Settlement Agreement will be binding on, and will have *res judicata* and preclusive effect on, all pending and future lawsuits or other proceedings maintained by or on behalf of

Plaintiffs and all other Settlement Class Members and Releasing Parties. All Settlement Class Members are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on or arising out of any of the Released Claims.

12. The Court has also considered Plaintiffs' Unopposed Motion For Attorneys' Fees, Costs, Expenses, and Service Awards, as well as the supporting memorandum and declarations, and adjudges that the payment of attorneys' fees, costs, and expenses in the amount of $3,000,000 is reasonable in light of the multi-factor test used to evaluate fee awards in Illinois. *See McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 407 (4th Dist. 2008). Such payment shall be made pursuant to and in the manner provided by the terms of the Settlement Agreement.

13. The Court has also considered Plaintiffs' Motion, memorandum of law, and supporting declarations for service awards to the Class Representatives, Josefina Darnall, George Wyant, Cheryl Rutkowski, and Dexter Cobb. The Court adjudges that the payment of service awards in the following amounts: (i) $5,000 to Ms. Darnall, (ii) $5,000 to Mr. Wyant, (iii) $5,000 to Ms. Rutkowski, and (iv) $5,000 to Mr. Cobb, to compensate them for their efforts and commitment on behalf of the Settlement Class, is fair, reasonable, and justified under the circumstances of this case. Such payment shall be made pursuant to and in the manner provided by the terms of the Settlement Agreement.

14. All payments made to Settlement Class Members pursuant to the Settlement Agreement that are not cleared within one hundred eighty (180) days of issuance shall be donated as *cy pres* to Chicago Volunteer Legal Services ; a non-sectarian, not-for-profit *pro bono* legal organization; or another non-sectarian, not-for-profit organization(s) recommended by the

Parties and approved by the Court.

15. Except as otherwise set forth in this Order, the Parties shall bear their own costs and attorneys' fees.

16. The Parties, without further approval from the Court, are hereby permitted to agree and adopt such amendments, modifications, and expansions of the Settlement Agreement and its implementing documents (including all exhibits to the Settlement Agreement) so long as they are consistent in all material respects with this Final Judgment and do not limit the rights of Settlement Class Members.

17. Without affecting the finality of this Final Judgment for purposes of appeal, until the Effective Date the Court shall retain jurisdiction over all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement.

18. The Court finds that there is no just reason to delay, and therefore directs the Clerk of Court to enter this Final Approval Order and Judgment as the judgment of the Court forthwith.

IT IS SO ORDERED, this 16 day of November, 2023.

Judge Timothy I. McJoynt
David G. Schwartz