

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MELISSA ARMSTRONG, *et al.*, individually
and on behalf of other similarly situated persons,

Plaintiffs,

v.

KIMBERLY-CLARK CORPORATION,

Defendant.

Civil Action No. 3:20-CV-3150-M
LEAD CASE

(Consolidated With Civil Action No. 3:21-CV-
01484-M)

**INTERIM CLASS COUNSEL'S JOINT DECLARATION IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT**

J. Austin Moore, Joshua L. Hedrick, Michael R. Reese, and Jordan S. Palatiello declare as follows:

1. We were appointed by this Court to serve as Plaintiffs' Co-Lead Interim Class Counsel in the above-captioned matter. *See* Order of Preliminary Approval of Settlement, Doc. 120 ¶ 10. We submit this Declaration in support of Plaintiffs' Unopposed Motion for Final Approval of Settlement, filed concurrently herewith. We have personal knowledge of all the matters addressed in this Declaration, including our work and that of our respective firms in prosecuting this action and negotiating its Settlement.¹

¹ All capitalized terms are defined as in the Parties' September 22, 2023 Settlement Agreement. *See* Doc. 117-1.

2. This Declaration focuses on the facts that bear on the Court's determination as to whether to grant final approval to the Settlement, and, among other things, summarizes our continued work on behalf of the Settlement Classes since this Court ordered issuance of notice, and our anticipated future work administering the Settlement. This Declaration also summarizes the benefits of the Settlement, details regarding the notice and claims process, including opt outs and objections, and our views regarding the fairness and reasonableness of the Settlement.

3. As detailed in our Declaration in Support of Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Expenses, and Service Awards (Doc. 123-1), we are highly experienced in litigating complex consumer cases and have worked diligently to bring this case to a successful resolution. Our collective experiences litigating and resolving consumer class action cases were brought to bear in the approach to prosecuting and settling the claims presented in this case, and it is our shared view that the Settlement presented here is an excellent result for the Settlement Class. We are confident that this Settlement is fair, reasonable, and adequate and in the best interests of the Settlement Class Members.

Overview of the Litigation

4. We have previously described the events of the litigation and negotiations leading to the settlement in our prior Declarations submitted in support of Plaintiffs' Motions for Preliminary Approval (Doc. 117) and Approval of Fees, Expenses and Service Awards (Doc. 123), and incorporate that material here. *See* Docs. 117-2, 123-1. Since the submission of those Declarations, we have continued to work in the best interests of the Class by overseeing the notice and claims process and responding to Settlement Class Member questions.

The Settlement Benefits Conferred on the Settlement Class

5. As set forth in our prior Declarations, the Settlement provides that Kimberly-Clark will pay a non-reversionary minimum of \$6,000,000 in new dollars, and a maximum of \$13,500,000, into a settlement fund to pay valid claims submitted as part of the Settlement. Accounting for the \$4,000,000 Kimberly-Clark paid through its refund program, Kimberly-Clark will pay at least \$10,000,000, and up to \$17,500,000, in connection with refunds to consumers who purchased recalled lots of Wipes. Doc. 117-1 ¶¶ 2.18, 2.17 (respectively, the “Minimum Settlement Amount” and “Maximum Settlement Amount”).

6. Settlement Class Members who submit a valid Claim with proof of purchase are eligible for reimbursement up to a maximum of 100% of the amount for which they provide proof of purchase. *Id.* ¶ 7.5(b). Settlement Class Members who submit a valid Claim without proof of purchase are eligible for reimbursement of up to five dollars (\$5.00) per household. *Id.* ¶ 7.5(a). If a Settlement Class Member was issued a refund card under the Recall and Refund Program and then activated the refund card, she is ineligible to submit a valid Claim under the Settlement Agreement, unless she provides proof to the Settlement Administrator that she had additional purchases of Wipes for which she did not receive compensation through the Recall and Refund Program. *Id.* ¶ 7.3(d).

7. The Settlement Administrator previously estimated that Notice and Administration Expenses will be \$1,361,405. Doc. 123-1 ¶ 23. Pursuant to the Agreement, Kimberly-Clark will pay costs of Notice and Administration Expenses and any Fee Award and Costs² separately from the Maximum Settlement Amount. Doc. 117-1 ¶¶ 6.4, 12.2. If the Amount Payable for Approved

² The attorneys’ fees and expenses provision was separately and independently negotiated by the Parties only after the Class relief was agreed upon, with the assistance of Justice Hankinson, and the Settlement Agreement is not conditioned on its approval.

Claims exceeds \$13,500,000, Service Awards will also be paid separately by Kimberly-Clark. *Id.* ¶ 12.1.

8. If the sum of the Amount Payable for Approved Claims exceeds \$13,500,000 (which is the Maximum Settlement Amount less the \$4,000,000 credit for previously-paid claims), payments to Settlement Class Members will be reduced *pro rata* so that the total of all payments for valid claims does not exceed the Maximum Settlement Amount. *Id.* ¶ 6.4.

9. Settlement Class Members could opt-out of or object to the Settlement by December 26, 2023 (within 40 days of the Notice Date). *Id.* ¶¶ 5.1–5.2; Doc. 120 ¶ 23. Settlement Class Members had until January 16, 2024 (sixty (60) days after the Notice Date) to submit claims. Doc. 117-1 ¶ 2.4; Doc. 120 ¶ 23.

10. In exchange for the benefits provided under the Settlement, Class Members will release any legal claims that may arise from or relate to the facts and claims alleged in the Complaint filed in this litigation. Importantly, personal injury claims are excluded from the Released Claims, meaning nothing in the release will impact the ability of Settlement Class Members to bring valid personal injury claims in another forum. Doc. 117-1 ¶ 11.2 (“Exclusion of Personal Injury Claims”). Thus, Class Counsel believes the releases are appropriately tethered to the claims that were presented in the litigation and therefore appropriate consideration in exchange for the substantial class relief provided by the Settlement.

The Notice and Claims Process

11. To ensure that direct Notice would be provided to the Class, Class Counsel dedicated substantial time and effort to working with third-party retailers to obtain sales data relating to the Wipes and Class Member contact information. Class Counsel served over 30 third-party subpoenas and conducted months of individual negotiations with dozens of retailers, all of

which were represented by counsel. While time consuming, these efforts were effective: they ultimately allowed the Parties to obtain contact information for more than 4,800,000 potential Class Members.

12. As part of the Court's September 27, 2023, Preliminary Approval Order, the Court appointed Kroll Settlement Administration LLC ("Kroll") as Settlement Administrator to provide notice to Class Members, process claims, and otherwise administer the Settlement. Doc. 120 ¶ 11. Kroll is an experienced class action notice provider and administrator and a widely regarded expert with the experience and capability to handle a case of this magnitude.

13. In accordance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, CAFA Notice was mailed on October 2, 2023 to the U.S. Attorney General, the Attorneys General of each of the 50 United States and the District of Columbia, and the Attorneys General of the recognized U.S. Territories. *See* the Declaration of Jeanne C. Finegan from Kroll, Exhibit 2 to Pls' Motion for Final Approval ("Ex. 2") ¶ 7. The 90-day period has expired, and neither Class Counsel nor the Settlement Administrator has received any inquiries from any federal or state official in response to the CAFA notice. *See id.*

14. Following the Preliminary Approval Order (Doc. 120), Kroll began the process of providing notice to the Class through electronic mail, and first-class U.S. mail, as well as additional notice by publication. *See* Ex. 2 ¶¶ 12–17. The Notice (1) informed Settlement Class Members of the Settlement and relevant terms, (2) provided Settlement Class Members the URL to the Settlement Website and a telephone number through which they can obtain additional information about the Settlement, and (3) instructed Settlement Class Members on how to make a Claim. *See* Doc. 117-1 at 23–36. The Notice also informed Settlement Class Members that Class Counsel

would seek combined attorneys' fees and expenses and service award payments for each Plaintiff for their service as representatives on behalf of the Settlement Class. *See id.*

15. In our opinion, the Notice Plan designed and implemented by Kroll satisfies the "best notice practicable" standard pursuant to Rule 23 of the Federal Rules of Civil Procedure, drawing on the most up-to-date techniques used in direct notice and publication notice to inform the class and stimulate participation. *See* Ex. 2 ¶¶ 4, 31.

16. To date, direct Notice has been sent to 4,827,542 unique putative Class Members: the Settlement Administrator sent direct Notice to 3,746,879 putative Class Members via email and U.S. mail, and upon information and belief, Amazon sent direct Notice to 1,080,663 putative Class Members via email.³ *See* Ex. 2 ¶ 17. Additionally, the Settlement Administrator has provided notice through display banner ads that targeted Cottonelle product purchasers, keyword search advertisements utilized on Google Ads, and social media advertising on Facebook, Instagram, and YouTube. Ex. 2 ¶¶ 18–21. The total impressions delivered by the publication notice program were scaled to effectively supplement the results of the direct outreach efforts, such that the Settlement Administrator believes more than 90% of the Class received notice through advertisements and/or direct Notice. *Id.* ¶ 4.

17. In our experience, the reach of the Notice Plan meets or exceeds that of other court-approved notice programs, and has been designed to meet due process requirements, including the "desire to actually inform" requirement.

³ *See* Doc. 117-4. In advance of the Final Approval Hearing, Class Counsel will submit a Declaration from Amazon to address Amazon's provision of email Notice.

18. Likewise, the Notice Plan has been executed in accordance with the requirements of the Court's Preliminary Approval Order, and in a manner that ensured Class Members' due process rights were amply protected.

19. The claims process similarly draws upon the most up-to-date techniques to facilitate participation, including a link the ability to file claims electronically or by mail, a dedicated email address, and a call-center via a toll-free number to assist Class Members in filing claims. Ex. 2 ¶¶ 9–11.

20. Over the last several months, Class Counsel have continued to perform work on behalf of the Settlement Class. Class Counsel have spent significant time overseeing the claims and notice process and communicating with the Settlement Administrator to ensure that administration of the settlement is on schedule and meets the requirements of the Court's Preliminary Approval Order.

21. Class Counsel have also reviewed the website to make sure it is correct and user-friendly, reviewed weekly reports from and conferred with Kroll about the claims process, and have responded to Class Member inquiries regarding the Settlement.

22. Class Counsel's oversight obligations and other responsibilities will continue until the Settlement is fully implemented, and we will continue to expend significant efforts to assist with the settlement administration process, including communicating with Class Members and overseeing the claims administration process and the distribution of settlement funds to the Class.

The Reaction of the Class

23. The reaction from Class Members to the Settlement has been overwhelmingly positive. Although the Settlement Class likely contains millions of Class Members, only 24 Class

Members timely requested exclusion from the Settlement and no Class Members filed objections. *See* Ex. 2 ¶ 30.

24. As of the Claims Deadline, January 16, 2024, Kroll received more than 3,100,000 claims from potential Class Members. Ex. 2 ¶ 24–25. This includes 69,797 claims submitted with proof of purchase, and 3,057,936 claims submitted without proof of purchase. *Id.* These claims are still being validated and de-duplicated, but even these preliminary figures, and comparatively small number of opt-outs (with no objections), demonstrate that the Settlement has been overwhelmingly well-received by Class Members.

The Settlement is Fair, Reasonable, and Adequate

25. Based on our experience and knowledge of the litigation, as well as experience in other consumer class actions, we believe this Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class.

26. Class Representatives and Class Counsel have vigorously and adequately represented the Class since the start of the litigation. The Class Representatives have shown their dedication to representing the Class by actively participating in the litigation for the benefit of all Settlement Class Members, by providing allegations for the Complaint, gathering information for formal and informal discovery, and working with proposed Class Counsel to advance the settlement process. As demonstrated in our Declaration in support of the Motion for Approval of Attorneys' Fees, Expenses, and Service Awards (Doc. 123-1), Class Counsel are highly experienced in handling class action litigation, particularly with respect to consumer claims like those at issue here and have vigorously prosecuted the claims in this case. As a result of Class Counsel's efforts, the proposed Settlement provides significant monetary relief to the Settlement Class. Since the Court's appointment of Class Counsel (Doc. 120 ¶ 10), Class Counsel have

remained hard at work overseeing the Notice Program and claims process and will continue to do so until the Settlement is fully implemented.

27. The Settlement is the product of nearly three years of heavily contested and arm's-length negotiations between experienced counsel with the assistance of a neutral, qualified, and highly-respected mediator, Justice Hankinson. The Parties' mediation efforts were extensive and included four formal mediation sessions and numerous conferences with the assistance of Justice Hankinson. To inform those efforts, the Parties spent many months exchanging information and documentation, providing sufficient information to all counsel to weigh the relative strengths and weaknesses of their respective cases. Thus, the stage of the proceedings and the amount of discovery completed also supports approval of the Settlement.

28. The Settlement is an excellent result for the Class in light of the probability of success on the merits, and the duration, costs, risks, and delay of trial and appeal. The Settlement requires Kimberly-Clark to fund a non-reversionary settlement fund of up to \$13,500,000 in new dollars to reimburse Settlement Class Members for up to 100% of the economic losses sought in this case. While Plaintiffs are confident in the merits of their claims, theory of liability, and ability to prove the claims of the absent Class Members, there remain significant obstacles to class-wide judgment. Plaintiffs' Complaint raises complex legal and factual issues, including those briefed and argued in relation to Kimberly-Clark's pending motion to dismiss, and there are many issues on which Plaintiffs and the class would have to prevail to obtain a class-wide judgment for the full damages allegedly suffered. Even if Plaintiffs survived Kimberly-Clark's motion to dismiss, achieved class certification, and prevailed at trial on behalf of the class, there is a risk that, after years-long litigation, the Fifth Circuit could reverse on the merits. At a minimum, continued litigation would require a significant amount of time and expense associated with written

discovery, depositions, the hiring and preparing of experts, motion practice, and trial. Further, Settlement Class Members, Kimberly-Clark, and likely witnesses are located across the country, further increasing the cost of continued proceedings. In light of these serious risks, the Settlement, which secures the primary relief sought by Plaintiffs, is an outstanding result and this factor supports final approval.

29. The effectiveness of the Notice Plan, and the overwhelmingly positive response to the Settlement to date, confirm that the proposed method of distributing relief is adequate and effective. The Notice Plan resulted in direct notice to over 4,800,000 consumers, a result of the exhaustive efforts of Class Counsel to obtain class contact information from third-party retailers. As evidenced by the over 3,100,000 claims submitted in this case electronically and via mail, the claims process was straightforward and consumer friendly. Over 69,000 consumers submitted claims with proof of purchase, and they are eligible to receive up to 100% of the purchase price (potentially reduced pro rata depending on the number of claimants); over 3,000,000 consumers submitted claims without proof of purchase, and they are eligible to receive up to \$5.00 per household. All of these claims are currently being considered by the Court-appointed Settlement Administrator. Thus, this factor weighs in favor of final approval.

30. The proposed attorneys' fees and expenses (\$3,547,157 and \$102,843.30, respectively), which do not diminish the recovery available to the Settlement Class Members, likewise support final approval:

a. First, the requested attorneys' fees are fair and reasonable under the percentage-of-the-fund method typically used in constructive common fund cases in this Circuit. Although the claims review process is ongoing, the Claims Deadline (January 16, 2024) has now passed. Given the over 3,100,000 claims submitted for reimbursement, Class Counsel values the

settlement at \$22,566,405, which is the total of: \$17,500,000 allocated to pay customers who purchased recalled Wipes (which includes \$4,000,000 in activated refund cards); (2) attorneys' fees and expenses (\$3,650,000); (3) Notice and Administration Expenses (estimated at \$1,361,405); and (3) Service Awards (\$55,000). *See* Doc. 123 at 19. Under this valuation, the fee request is 16.2% of the constructive fund. *See id.* Even if the Court were to not credit the \$4,000,000 paid in connection with Kimberly-Clark's refund program, the settlement's value is still \$18,566,405, resulting in a fee request equaling 19.7% of the constructive fund. In either scenario, Class Counsel's fee request is significantly less than typical benchmark fee awards in this Circuit, which typically range between 30% and 33%, and is well within the range of reasonableness.

b. Second, the requested attorneys' fees is also more than reasonable under the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.3d 714, 719–20 (5th Cir. 1974), including the extraordinary benefits conferred by the Settlement, the numerous and substantial risks faced by Class Counsel, the complexity and efficient resolution of the litigation, the skill of counsel for both Parties, and the positive reaction of the Settlement Class. *See* Doc. 123.

c. Finally, a lodestar-multiplier cross-check confirms that at the time Plaintiffs filed their fee motion, the requested fee represented a negative multiplier of .77 on Class Counsel's lodestar. Doc. 123 at 30–31; Doc. 123-1 ¶¶ 41–56. That negative multiplier has continued to increase as Class Counsel has continued to spend time overseeing the settlement claims process and preparing for final approval.

31. The Settlement is an excellent result given the range and certainty of recovery. While the Parties cannot identify the precise number of consumers impacted, over 4,800,000

putative Class Members received direct notice of the Settlement because of Class Counsel's third-party subpoena efforts. Over 3,100,000 claims have been filed to date—an excellent result given that most consumer class settlements, including those involving similar products, do not see this volume of response.

32. The views of Class Counsel, Class Representatives, and Absent Class Members likewise support final approval. The Class Representatives and Class Counsel strongly believe the Settlement is fair, reasonable, adequate, and in the best interest of Settlement Class Members. Further, described above, the reaction from the Settlement Class has been overwhelmingly positive, with over 3,100,000 claims and no objections.

33. Finally, the Settlement treats all Class Members equitably relative to one another because all are eligible to receive reimbursement taking into consideration the relative strength of claims for Settlement Class Members who can provide proof of purchase, and those that cannot. Other than what is reflected in the Settlement Agreement, there is no separate agreement between the parties.

Conclusion

34. Considering the totality of the circumstances, the Court should conclude that the Settlement as described in the Settlement Agreement is fair, reasonable, and adequate and therefore final approval of the Settlement should be granted.

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

Executed this 14th day of February, 2024.

/s/ J. Austin Moore
J. Austin Moore

/s/ Joshua L. Hedrick
Joshua L. Hedrick

/s/ Michael R. Reese
Michael R. Reese

/s/ Jordan S. Palatiello
Jordan S. Palatiello

Court-Appointed Interim Class Counsel