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)

[PROPOSED] ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARDING ATTORNEYS' FEES, EXPENSES AND SERVICE AWARDS

This matter came before the Court on Plaintiffs' Motion for Final Approval of Settlement ("Final Approval Motion") (ECF No. __) and Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses and Service Awards (ECF No. 123). All capitalized terms not otherwise defined have the meanings set forth in the Settlement Agreement. ECF No. 117-1 ("Settlement").

In their motions, Plaintiffs ask that the Court (1) certify the Settlement Class for purposes of entering judgment on the Settlement under Federal Rule of Civil Procedure 23(e); (2) finally approve the Settlement as fair, reasonable, and adequate; and (3) approve their requests for $3,547,157 in attorneys' fees, $102,843 in expenses, and a $2,500 service award to each of the Settlement Class Representatives.

Nothing has occurred that would alter the Court's initial determination that the Settlement is fair, reasonable, and adequate, and the response of Settlement Class Members to the Settlement further underscores this finding. Therefore, the Court, having considered the motions, the supporting memoranda of law, the Settlement together with all exhibits and attachments thereto, the record, and having conducted a Final Approval Hearing on March 6, 2024, GRANTS Plaintiffs' Motion for Final Approval of Settlement and GRANTS Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses and Service Awards.

I. JURISDICTION

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2), and personal jurisdiction over the Parties, Settlement Class Members, and Released Parties. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2).

II. CLASS CERTIFICATION

The Settlement Agreement provides for a Settlement Class defined as follows:

> All persons in the United States and United States territories who purchased recalled lots of Cottonelle Flushable Wipes ("Wipes") between February 7, 2020 and December 31, 2020 for personal use and not for resale, and any persons residing in the same household.

ECF No. 117-1. The Settlement expressly excludes from the Settlement Class: (1) Kimberly-Clark, its subsidiaries, parent companies, successors, predecessors, and any entity in which Kimberly-Clark or its parents have a controlling interest and their current or former officers, directors, and employees; (2) the Court and its officers and employees; and (3) any Settlement Class Members who submitted a valid Request for Exclusion on or before the Opt-Out Deadline. *Id.*

For the following reasons, the Court affirms that it is proper to certify, and hereby does certify, for settlement purposes only, the Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3).

A. Legal Standard

A settlement class must meet the requirements for class certification, just as if the case were to be litigated. *See Amchem v. Windsor*, 521 U.S. 591, 620 (1997). In fact, the requirements of Rule 23 "demand undiluted, even heightened, attention in the settlement context…[because] a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id.*

To certify a class, a party must first demonstrate that the proposed class meets the four threshold requirements specified in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 345 (5th Cir. 2012). The party must then demonstrate that the proposed class meets one of three categories specified in Rule 23(b). *Id.* Plaintiffs here seek to certify the class under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Courts have "great discretion in certifying and managing a class action." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999).

B. Numerosity

Rule 23(a)(1) requires that a proposed settlement class be "so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, there are over a million Settlement Class Members, and numerosity is not in question.

C. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury," such that all their claims can productively be litigated at once. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (internal quotations and citations omitted). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. "Even a single common question will do." *Id.* at 359 (cleaned up). Here, Settlement Class Members' claims depend on common questions of fact regarding Kimberly-Clark's course of conduct relating to the contamination, distribution, and recall of the Wipes, including alleged misrepresentations and omissions relating to their suitability for intended use. Plaintiffs' claims rise and fall on such conduct, which was common to, and similarly harmed, all Settlement Class Members. The Court finds that commonality is satisfied.

D. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of those of the class. Fed. R. Civ. P. 23(a)(3). Typicality does not mean that the claims of the representative parties must be identical to those of the absent members. *See Ligon v. Frito–Lay, Inc.*, 82 F.R.D. 42, 47 (N.D. Tex. 1979) (requiring that "a class representative and a class member...be similarly, not identically, situated"). The class members and the representative Plaintiffs in this case are pursuing claims based on the same legal theory, and all class members allege the same injury. Typicality is thus satisfied.

E. Adequacy of Representation

The adequacy requirement is satisfied when "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Court found in its

Preliminary Approval Order, the Settlement Class Representatives and Class Counsel have adequately represented Settlement Class Members and will continue to do so. ECF No. 120 at ¶¶ 3, 9-10. The Settlement Class Representatives are similarly situated to and do not have any interests antagonistic to absent Settlement Class Members, and they have retained lawyers whom the Court has recognized as being highly experienced in complex class actions, thus satisfying the adequacy requirement.

F. Predominance

This requirement is met where common issues predominate over individual ones. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) ("The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless."). However, Rule 23(b)(3) does not require all questions of law or fact be common. *See also Longden v. Sunderman*, 123 F.R.D. 547, 556 (N.D. Tex. 1988) ("To be sure, individual issues will likely arise in this as in all class action cases[, but] to allow various secondary issues of plaintiffs' claim to preclude certification of a class would render the rule an impotent tool for private enforcement of the securities laws."). Here, dispositive issues of law and fact regarding Kimberly-Clark's course of conduct relating to the contamination, distribution, and recall of Wipes are common to all class members, and these questions predominate over any individual questions.

G. Superiority

This requirement is met where "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Class actions are superior when individual actions would be wasteful, duplicative, or adverse to judicial economy. *Mullen*, 186 F.3d at 627. Class resolution is superior to other available means for the fair and efficient adjudication of the claims in this case. Potential damages suffered by individual class members are relatively modest and would be uneconomical to pursue on an individual basis given

the burden and expense of prosecuting individual claims. Moreover, there is little doubt that resolving all class members' claims jointly, particularly through a class-wide settlement negotiated on their behalf by counsel well-versed in class action litigation, is superior to a series of individual lawsuits and promotes judicial economy.

III. CLASS COUNSEL AND SETTLEMENT CLASS REPRESENTATIVES.

The Court concludes that Austin Moore of Stueve Siegel Hanson LLP; Joshua L. Hedrick of Spencer Fane LLP; Michael R. Reese of Reese LLP; and Jordan S. Palatiello of Lewis Johs Avallone Aviles, LLP have fairly and adequately represented the interests of the Settlement Class Members. Plaintiffs' counsel are highly experienced in class actions and complex litigation and have spent a significant amount of time identifying potential claims in this action, pursuing relevant discovery, and negotiating a well-informed Settlement that provides meaningful relief to Plaintiffs and Settlement Class Members. The Court previously appointed Mr. Moore, Mr. Hedrick, Mr. Reese, and Mr. Palatiello as Interim Class Counsel (ECF No. 120 ¶ 10) and now appoints them as Class Counsel pursuant to Fed. R. Civ. P. 23(g).

The Court further concludes that the Plaintiffs identified in the Settlement Agreement have fairly and adequately represented the interests of the Settlement Class Members and appoints them as Settlement Class Representatives.

IV. FINAL APPROVAL OF CLASS ACTION SETTLEMENT

The Court previously determined that the proposed Settlement meets the requirements of Rule 23(e) such that notice should issue. ECF No. 120 ¶ 2. The Court now determines that the Settlement is fair, reasonable, and adequate and should be approved in a class judgment.

Under Rule 23(e), a court must review any "settlement, voluntary dismissal, or compromise" of the "claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e). Rule

23(e) establishes certain procedures in considering a proposed settlement, each of which will be considered in turn:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Id.

A. Notice Must Be Directed in a Reasonable Manner to All Class Members.

There are "no rigid rules to determine whether a settlement notice satisfies constitutional or Rule 23(e) requirements." *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). Instead, "a settlement notice need only satisfy the broad reasonableness standards imposed by due process." *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) (internal quotation marks omitted). Due process is satisfied if the notice provides class members with the "information reasonably necessary for them to make a decision whether to object to the settlement." *Id.*; *see also Wal–Mart Stores*, 396 F.3d at 114 (explaining that "the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings").

Notice of the Settlement was reasonable and provided ample due process. Notice was disseminated through the procedures provided in the Court's September 27, 2023 Order preliminarily approving class settlement. ECF No. 120. The Notice described, in plain and easily

understood terms, (1) the nature of the claims, issues, and defenses to be decided, as well as the effect of a potential class settlement, (2) the scope of the settlement class, (3) the date and time of the fairness hearing, and (4) the rights of the class members to object or opt out of the settlement. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977) (requiring notice to "contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member"). The Notice also provided a telephone number and a website through which class members could obtain more detailed explanations. No class member objected to the form or content of the notice.

In terms of timing, class members had 40 days from the Notice Date to request exclusion from the class. *See DeJulius v. New Eng. Health Care Emps. Pension Fund*, 429 F.3d 935, 946 (10th Cir. 2005) (notice program upheld as providing sufficient due process even though 70.7% of the class members received fewer than thirty-two days' notice); *Silber v. Mabon*, 18 F.3d 1449, 1452, 1454 (9th Cir. 1994) (due process requirement and Rule 23 satisfied when settlement notices were sent out forty days before the opt-out deadline). Furthermore, the fairness hearing was scheduled over 90 days after the notice date. *See Schwartz v. TXU Corp.*, 2005 WL 3148350, at *11 (N.D. Tex. Nov. 8, 2005) (stating that a gap of 62 days between when notice was first sent out and the fairness hearing was adequate).

Thus, the Court finds that the Notice Plan has been implemented by the Settlement Administrator and the Parties in accordance with the requirements of the Settlement Agreement, and that such Notice Plan, including the utilized forms of Notice, constitutes the best notice practicable under the circumstances and satisfies due process and the requirements of Rule 23 of the Federal Rules of Civil Procedure. The Court finds that the Settlement Administrator and Parties

have complied with the directives of the Preliminary Approval Order, and the Court reaffirms its findings concerning notice as set forth in paragraph 12 thereof. *See* ECF No. 120.

B. The Proposed Settlement Must Be Fair, Reasonable, and Adequate

The Court finds that this Settlement satisfies all requirements of Rule 23(e)(2), reflecting an outstanding result for Settlement Class Members in a case with a significant level of risk. The Settlement requires Kimberly-Clark to pay a non-reversionary amount of at least $6,000,000 in new dollars, and up to $13,500,000, to pay valid claims to Settlement Class Members who purchased recalled Cottonelle Flushable Wipes. Together with the $4,000,000 Kimberly-Clark previously paid as part of its refund program, the Settlement will ensure that at least $10,000,000, and up to $17,500,000, will be spent in connection with reimbursing customers who purchased recalled lots of Cottonelle Flushable Wipes. As set forth below, the factors set forth in Federal Rule of Civil Procedure 23(e) and those identified by the Fifth Circuit for determining the fairness, reasonableness, and adequacy of a proposed class action settlement support finally approving the Settlement here.

1. The Settlement Class Representatives and Plaintiffs' Counsel Have Provided Excellent Representation to the Class

The Court finds that the Settlement Class Representatives and Class Counsel have provided adequate representation to the Settlement Class by diligently pursuing this case in the face of numerous and substantial risks, negotiating a robust Settlement that provides Settlement Class Members with significant relief, and working tirelessly on behalf of Settlement Class Members in the settlement approval process. Further, Class Counsel's view that the Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class, supports approval of the Settlement.

In addition, the Court finds the Settlement Class Representatives have adequately represented the Settlement Class. Each of them has actively participated in the litigation, providing allegations for the Complaint, gathering information for discovery, and working with Class Counsel in the settlement approval process—all of which was essential to Class Counsel's investigation and pursuit of the claims at issue in this action.

2. The Settlement was Negotiated at Arm's Length.

The Court finds that the Settlement is a result of adversarial, arm's-length, informed, and non-collusive negotiations between the Parties. The Parties pursued adversarial litigation for several years prior to reaching the Settlement, and participated in four, full-day mediation sessions guided by the Honorable Justice Deborah Hankinson (Ret.) acting as mediator, which further supports the finding that the Settlement was negotiated at arm's length. *See Quintanilla v. A & R Demolition Inc.*, 2007 WL 5166849, at *4 (S.D. Tex. May 7, 2007) (holding a class action settlement to be free of fraud or collusion when "[t]he settlement was reached through arms-length negotiations after a long, hard-fought mediation with a neutral").

3. The Relief Provided for the Class is Fair, Reasonable, and Adequate.

a. The Costs, Risks, and Delay of Trial and Appeal.

The Settlement requires Kimberly-Clark to pay a non-reversionary amount of at least $6,000,000 in new dollars, and up to $13,500,000, to pay valid claims to Settlement Class Members who purchased recalled Cottonelle Flushable Wipes. Together with the $4,000,000 Kimberly-Clark previously paid as part of its refund program, the Settlement will ensure that at least $10,000,000, and up to $17,500,000, will be spent in connection with reimbursing customers who purchased recalled lots of Cottonelle Flushable Wipes. The Court finds that the relief offered to Class Members in the proposed Settlement is an excellent result for the Class, taking into account the substantial risks of continued litigation. Plaintiffs' Amended Complaint raises

complex legal and factual issues. At a minimum, continued litigation would take a significant amount of time and expense associated with written discovery, depositions, the hiring and preparation of experts, motion practice, trial, and possible appeal. *See Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 652 (N.D. Tex. 2010). Class members, Defendant, and likely witnesses are geographically dispersed across the Unites States, further increasing the costs of discovery. Accordingly, the amount of time it would take to recover on behalf of class members would measure in years rather than months were the Court to disapprove the proposed settlement. *See Schwartz*, 2005 WL 3148350, at *19 (weighing a potential "delay in the receipt of any relief" in favor of approving a proposed settlement).

Thus, the Settlement not only provides certain, substantial, and immediate relief to the Settlement Class now, avoiding the risks, costs, and delays posed by litigation as well as trial and possible appeals, but it also secures the primary relief sought by Plaintiffs. That there have been no objections to the Settlement, only 24 timely opt-outs, and many claims for benefits confirms the adequacy of the relief it provides the Settlement Class Members. The settlement overall "foster[s] the goals of certainty, finality and economy, which lie at the heart of our general preference for settlement of class actions." *Schwartz*, 2005 WL 3148350, at *23.

b. The Method of Distributing Relief is Effective

In addition, the proposed method for distributing relief to the Settlement Class Members is adequate and effective. Pursuant to the notice plan set forth in the Settlement, the Settlement Class was notified of the Settlement directly via email or U.S. Mail. Notice was also provided by publication that included display banner adds that targeted Cottonelle product purchasers, keyword search advertisements utilized on Google Ads, and social media advertising on platforms including Facebook, Instagram, and YouTube. The effectiveness of the Notice Plan, and the positive response to the Settlement to date, confirm this Court's preliminary assessment that "the proposed

method for distributing relief to the Settlement Class Members is adequate and effective." ECF No. 120 ¶ 6.

c. The Terms Relating to Attorneys' Fees Are Reasonable

The Settlement's provisions for awards of attorneys' fees and costs and service payments to the Class Representatives, to be paid by Kimberly-Clark, were negotiated at arms-length between the Parties, and will not diminish the recovery available to Settlement Class Members. In accordance with the terms of the Settlement, Class Counsel timely filed a motion seeking $3,650,000 in attorneys' fees and expenses, and $2,500 service awards for each of the Class Representatives. *See* ECF No. 123 (considered separately below). The Court addresses that motion separately below, but the Court finds the terms of Class Counsel's proposed attorney fee award support approval of the Settlement because the requested fee is proportional to the Class recovery, and the Class Notice informed Settlement Class Members as to the terms of their requested award and Class Counsel filed their fee motion, which was posted on the Settlement Website, well in advance of the deadline for Settlement Class Members to file objections or to exclude themselves from the Settlement. While there are millions of Settlement Class Members, none objected to the requested fee and expense award. Further, the Settlement is not conditioned on the Court's approval of Class Counsel's fee and expense request. Accordingly, this factor supports a finding that the Settlement is fair, reasonable, and adequate and thus the Court's final approval.

4. Stage of the Litigation and Available Discovery.

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012) (internal quotation marks omitted). The Court finds that counsel for the Parties engaged in intensive mediation efforts, including four formal mediation sessions and numerous conferences,

with the assistance of Justice Hankinson. To inform those efforts, the Parties participated in extensive settlement-related discovery to permit counsel to weigh the relative strengths and weaknesses of their respective cases. Under these circumstances, the Court finds this factor supports approval of the Settlement. *See Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977) (noting that "the lack of [formal discovery] does not compel the conclusion that insufficient discovery was conducted" for the purposes of settlement approval). This is not a case in which the attorneys were "groping in darkness" trying to reach a settlement without a sufficient understanding of the case. *See Schwartz*, 2005 WL 3148350, at *19; *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 300 (5th Cir. 2017) ("[I]f the record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork, a court may be acting within its discretion in disapproving the agreement without ever considering whether the agreement's terms are adequate."). At the point the parties reached the settlement, they had "ample information with which to evaluate the merits of the competing positions." *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004).

5. Probability of Plaintiffs' Prevailing on the Merits.

"The probability of the plaintiffs' success on the merits is the most important *Reed* factor, 'absent fraud and collusion.'" *ODonnell v. Harris Cty., Texas*, 2019 WL 4224040, at *11 (S.D. Tex. Sept. 5, 2019). "This factor relates to the 'risks…of trial and appeal,'" *See id.* (citing Fed. R. Civ. P. 23(e)(2)(C)(i)). "In evaluating the likelihood of success, the Court must compare the terms of the settlement with the rewards the class would have been likely to receive following a successful trial." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 287 (W.D. Tex. 2007) (citing *Reed*, 703 F.2d at 172). "This factor favors approving a settlement even when the likelihood of success on the merits is not certain." *Id.*

This factor supports finding that the Settlement is fair, reasonable, and adequate because there are significant obstacles to class-wide judgment in favor of the class on liability and damages. Given these risks, the Settlement provides immediate and substantial benefits to Class Members, including the very relief that this litigation sought to achieve. Thus, this factor supports final approval of the Settlement.

6. Range of Possible Recovery and Certainty of Damages.

This factor focuses on whether the settlement falls "within a reasonable range of recovery, given the likelihood of the plaintiffs' success on the merits." *Klein*, 705 F. Supp. 2d at 656. Courts compare the recovery for the class under the proposed agreement with the likely estimated value of the claims if they went to trial. *Id.* The fact that a proposed settlement may "only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Parker v. Anderson*, 667 F.2d 1204, 1210 n.6 (5th Cir. 1982); *see also In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 483 (S.D.N.Y. 2009) (approving a settlement representing two percent of aggregated expected recovery).

The Court finds that the Settlement, which provides for up to $13,500,000 in new dollars dedicated solely to approved Claims, is an excellent result given the range and certainty of recovery for a significant portion of the Class. While the parties cannot identify the precise number of consumers impacted, over 4,800,000 potential class members received direct notice of the Settlement because of Class Counsel's efforts to secure contact information for consumers through third-party subpoenas. Considering that more than 3,100,000 claims have been submitted, the notice plan and claims process were successful and the Court finds that this factor supports final approval.

7. Opinions of Class Counsel, Class Representatives, and Absent Class Members.

The deadlines to submit Claims, requests for exclusion, and objections have now passed. *See* ECF No. 120. As of today's date, more than 3,100,000 claims have been submitted, only 24 Settlement Class Members have timely requested exclusion, and, to date, no Settlement Class Members have filed or served any objections to the Settlement. Further, the Class Representatives and Class Counsel strongly believe the Settlement is fair, reasonable, adequate, and in the best interest of Settlement Class Members. ECF No. __ ¶ __. "The endorsement of class counsel is entitled to deference, especially in light of class counsels' significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims." *DeHoyos*, 240 F.R.D. at 292; *see Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 346 (N.D. Tex. 2011) ("As class counsel tends to be the most familiar with the intricacies of a class action lawsuit and settlement, 'the trial court is entitled to rely upon the judgment of experienced counsel for the parties.'"). Thus, this factor supports final approval.

8. The Settlement Treats Class Members Equitably Relative to Each Other.

The Court finds that the proposed Settlement treats all Settlement Class Members equitably relative to each other. All Settlement Class Members who submit valid Claims are eligible to recover money spent on Wipes. Because Settlement Class Members who can demonstrate that they suffered non-reimbursed losses have a stronger claim than class members who cannot, the Settlement allows Settlement Class Members who submit proof of purchase the opportunity to recover one hundred percent (100%) of money spent on Wipes, whereas Settlement Class Members that are unable to provide proof of purchase may recover up to five dollars.

C. Parties Seeking Approval Must File a Statement Identifying Any Agreement Made in Connection with the Proposal.

"The spirit of [Rule 23(e)(3)] is to compel identification of any agreement or understanding," written or oral, "that might have affected the interests of class members by altering what they may be receiving or foregoing." *Slipchenko v. Brunel Energy, Inc.*, 2015 WL 338358, at *6 (S.D. Tex. Jan. 23, 2015) (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.631 (2004)). The Parties have satisfied this requirement by filing the Stipulation of Settlement, which publicly discloses the terms of the settlement. *See* ECF No. 117-1.

D. Additional Opt-Out Opportunity

Rule 23(e)(4) provides that "[i]f the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." This only applies "when the opt-out opportunity expired before the members received notice of a proposed settlement." *Slipchenko*, 2015 WL 338358, at *7. This factor is inapplicable here because the members of the class received notice of the Settlement well before the opt-out opportunity expired.

E. Class Member Objections

Class members must be provided an opportunity to object to the proposed settlement. Fed. R. Civ. P. 23(e)(5). While not dispositive, "[c]ourts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections." *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 938 (E.D. La. 2012). The presence of objectors does not necessarily defeat a settlement, and approval can be given even if a significant portion of the class objects. *Klein*, 705 F. Supp. 2d at 661; *see also Reed*, 703 F.2d at 174 (affirming the district court's approval of a settlement despite "the objections of twenty-three of twenty-seven

named plaintiffs and nearly forty percent of the 1,517 member class"). It is not the number of objectors, but the quality of their opinions, that guides the court's review. *See Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 300 (5th Cir. 2017). The Notice sent to the class here informed them of their right to object and outline the process for doing so. To date, there have been no objections.

V. Class Counsel's Motion for Attorneys' Fees, Costs, and Expenses and Settlement Class Representative Service Awards

On December 5, 2023, Class Counsel submitted their Unopposed Motion for Approval of Attorneys' Fees, Expenses and Service Awards. ECF No. 123. Class Counsel applies for attorneys' fees in the total combined amount of $3,547,157. In addition, Class Counsel seeks reimbursement for $102,843 in expenses. Class Counsel also asks for $2,500 Service Awards for each Settlement Class Representative. Notice of this Motion was properly given to the Settlement Class Members, as it was posted on the Settlement Website. Notice of the agreed-upon attorneys' fees, expenses and service awards was also included in the Long Form Notice and in the Frequently Asked Questions section of the Settlement Website. No Settlement Class Member has objected to Class Counsel's Motion. For the reasons set forth herein and in Plaintiffs' briefing, the Court grants the motion for attorneys' fees, expenses, and service awards for Settlement Class Representatives.

A. Attorneys' Fees

The fees and expenses were negotiated at arm's-length by counsel for Plaintiffs and Kimberly-Clark and will be paid by Kimberly-Clark separate from any relief to the Settlement Class Members.

The Court finds Class Counsel's request for fees and expenses is reasonable under the percentage-of-the-fund method typically used by district courts in this Circuit in awarding attorneys' fees in constructive common fund cases. Class Counsel estimates that Kimberly-Clark

will be required to pay the maximum of $13,500,000 in new dollars to satisfy approved Claims. Accordingly, the Court values the constructive fund as $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* ECF No. 123 at 19. Under this valuation, the fee request is 16.2% of the fund.

The Court finds that 16.2% is a reasonable percentage benchmark, and is significantly less than the percentage of fees regularly awarded in this Circuit in comparable cases, which typically range between 30% and 33%. Further, the Court has considered the factors set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.3d 714 (5th Cir. 1974) and finds that:

(a) Class Counsel reasonably expended more than 5,000 hours on the litigation and resolution of this case, given the complexity and evolving nature of the issues and the substantive discovery efforts, mediations, and motion practice.

(b) The novelty and difficulty of the litigation justify the requested attorneys' fees and expenses, as there remain substantial risks of continued litigation, including obstacles to a class-wide judgment in favor of the class on liability and damages.

(c) The fees and expenses requested by Class Counsel are also reasonable in light of the quality of their representation of the class, as indicated by their significant class action, litigation, and trial experience, including experience and expertise in consumer cases, as well as by the favorable results achieved for the Settlement Class.

(d) Class Counsel faced several risks in prosecuting this action, including the inherent risk involved in prosecuting a class action litigation on an entirely contingent basis.

(e) The fees and expenses requested are well below the 30%-33% fee award customarily awarded in the Fifth Circuit.

(f) The requested fees and expenses are reasonable in light of the result achieved for the Settlement Class Members, which offers to make Class Members whole for up to 100% of their economic damages.

Next, the Court finds that an analysis of Class Counsel's lodestar demonstrates the reasonableness of the requested sum in this action. The agreed-upon fees and expenses in this

action are significantly less than Class Counsel's lodestar for their work, even before accounting for the additional hours they have expended since the time of their Motion, and their expenses, which they advanced on an entirely contingent basis.

The Court therefore grants Class Counsel's motion and approves a reasonable fee award of $3,547,157.

B. Litigation Costs and Expenses

Class Counsel also requests reimbursement of $102,843.00 in litigation expenses incurred prosecuting this case. There is no objection to Class Counsel's request for reimbursement of litigation costs and expenses. The Court finds that Class Counsel's expenses incurred were reasonably expended in furtherance of the litigation and therefore approves their request for reimbursement of costs and expenses.

C. Service Awards

Class Counsel also request that each Settlement Class Representative be awarded a service award of $2,500. There is no objection to Class Counsel's request for service awards. The Court finds that the Settlement Class Representatives performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the allegations in the consolidated amended complaint, and reviewing the Settlement Agreement. That work materially advanced the litigation, protected the Class's interests, and ultimately made this Settlement possible. Accordingly, the Court approves the requested service awards of $2,500 for each Settlement Class Representative.

VI. ADDITIONAL MATTERS

The Court held a Final Approval Hearing on March 6, 2024. Following argument from the Parties, and after considering all objections, the Court concludes as follows: (1) this matter is certified as a class action for settlement purposes pursuant to Fed. R. Civ. P. 23(b)(3) and (e); (2)

the Settlement is approved as fair, reasonable, and adequate, and finally approved pursuant to Fed. R. Civ. P. 23(e); (3) the Complaint in this Action, including all claims asserted in the Complaint, is dismissed with prejudice pursuant to the terms of the Settlement Agreement; and (4) Settlement Class Members, except those who timely and validly excluded themselves, are bound by the releases set forth in the Settlement Agreement. The putative class members who timely and validly excluded themselves from the Settlement Class are listed in Exhibit A hereto. Further, because the Settlement is being reached as a compromise to resolve this litigation, including before a final determination of the merits of any issue in this case, no individual listed on Exhibit A may invoke the doctrines of *res judicata*, collateral estoppel, or any state law equivalents to those doctrines in connection with any further litigation against Defendants in connection with the Released Claims. The Parties are ordered to carry out the Settlement as provided in the Settlement Agreement.

A. Releases

Each Settlement Class Member, including Plaintiffs are hereby deemed to have completely and unconditionally released, forever discharged, and acquitted Kimberly-Clark and the Released Parties from all Released Claims as defined by and laid out more fully within the Settlement Agreement. The Settlement Class Members and Plaintiffs are barred and permanently enjoined from asserting, instituting, or prosecuting, either directly or indirectly, any Released Claim, as provided in the Settlement Agreement.

B. Continuing Jurisdiction

The Court hereby dismisses this Action with prejudice, except the Court retains jurisdiction over this action and the Parties, attorneys and Settlement Class Members for all matters relating to the Settlement, including (without limitation) the administration, interpretation, scope, effectuation or enforcement of the Settlement Agreement and this Order. Without limiting the generality of the foregoing, any dispute concerning the Settlement Agreement, including, but not

limited to, any suit, action, arbitration or other proceeding by a Settlement Class Member in which the provisions of the Settlement Agreement are asserted as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection, shall constitute a matter relating to this Order. Nothing in this Order shall preclude any action to enforce the terms of the Settlement Agreement.

C. Third-Party Data.

Unless otherwise agreed by the Parties and retailers, the Settlement Administrator shall use commercially reasonable efforts to destroy all customer information that it received from third-party retailers in connection with this Action within one year following the completion of Settlement administration.

D. Dismissal

This Action, including all claims asserted in the Complaint, is hereby dismissed on the merits, in its entirety, with prejudice and without costs, with the sole exception for individual claims brought by individuals who timely and validly requested exclusion from the Settlement Class as identified in Exhibit A. The Settlement Class Representatives and Settlement Class Members are hereby permanently barred and enjoined (including during the pendency of any appeal taken from this Order) from commencing, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, arbitral or other forum. This permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Order, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay, and directs the Clerk to separately enter a final judgment.

IT IS SO ORDERED.

Dated: _____

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BARBARA M. G. LYNN
United States District Judge