UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

COMMISSIONERS OF PUBLIC WORKS OF THE CITY OF CHARLESTON (d.b.a. Charleston Water System), Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. COSTCO WHOLESALE CORPORATION, CVS HEALTH CORPORATION, KIMBERLY-CLARK CORPORATION, THE PROCTER & GAMBLE COMPANY, TARGET CORPORATION, WALGREEN CO. and WAL-MART, INC., Defendants.	Civil Action No. 2:21-cv-00042-RMG CLASS ACTION PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Representative plaintiff, the Commissioners of Public Works of the City of Charleston (d.b.a. "Charleston Water System") ("Plaintiff"), submits this memorandum of law in support of its motion for preliminary approval of the proposed Settlement with The Procter & Gamble Company ("P&G" or "Defendant") (collectively, the "Parties").[1] The terms of the Settlement are set forth in the Settlement Agreement between the Parties.

I. INTRODUCTION

The Settlement provides crucial injunctive relief to municipal wastewater systems throughout the country, including a commitment by P&G to meet a national municipal wastewater industry flushability standard for its flushable wipes – to resolve all of Plaintiff's Released Claims against P&G during the Settlement Class Period. The Settlement is the result of arm's-length negotiations between Class Counsel and Defense Counsel that began over a year ago. Plaintiff and Class Counsel believe that the Settlement – which largely parallels the settlement with Kimberly-Clark Corporation ("Kimberly-Clark") previously approved by the Court – presents a very good result for the Settlement Class in the face of substantial uncertainty, and will provide wastewater treatment facilities nationwide with significant additional relief from wipes-related clogs and blockages.

In determining whether preliminary approval is warranted, the issue before the Court is whether the Court will likely be able to approve the Settlement under Federal Rule of Civil Procedure ("Rule") 23(e)(2) and certify the Settlement Class for purposes of settlement and entering a judgment. Fed. R. Civ. P. 23(e)(1). The Settlement satisfies each of the elements of Rule 23(e)(2) as well as the factors set forth in *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991). Accordingly, notice of the Settlement should be given to Settlement Class Members, and a hearing scheduled to consider final settlement approval.

[1] Capitalized terms not defined herein are defined in the Stipulation of Settlement entered into between Plaintiff and P&G, dated July 13, 2023 ("Settlement Agreement"). Citations and internal quotations are omitted and emphasis is added throughout unless otherwise noted. A proposed order granting the relief requested herein (the "Notice Order") is attached to the Settlement Agreement, filed herewith, as Exhibit D.

Because the Settlement meets the foregoing criteria and is well within the range of what might be approved as fair, reasonable, and adequate, Plaintiff asks this Court to enter an Order: (1) granting preliminary approval of the Settlement; (2) certifying a Rule 23(b)(2) class for settlement purposes; (3) appointing Plaintiff as Class representative; (4) appointing Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and AquaLaw PLC ("AquaLaw") as Class Counsel; (5) approving the Parties' proposed form and method of giving notice of pendency of the Settlement to the Settlement Class under Rule 32(e)(1); and (6) scheduling a Settlement hearing for final approval of the Settlement and Class Counsel's application for an award of attorneys' fees and expenses incurred in representing the Settlement Class.[2]

II. BACKGROUND OF THE LITIGATION

A. Summary of Plaintiff's Claims and the Litigation History

Plaintiff brought this putative class action on January 6, 2021, ECF No. 1, on behalf of all entities that own and/or operate sewage or wastewater conveyance and treatment systems, including municipalities, authorities and wastewater districts (sewage treatment plant, or "STP Operators") in the United States whose systems were in operation between January 6, 2018 and the date of preliminary approval ("Settlement Class" and the "Settlement Class Period"). Defendants are P&G, Costco Wholesale Corporation, CVS Health Corporation, Target Corporation, Walgreen Co., Wal-Mart, Inc., and Kimberly-Clark[3] (collectively, "Defendants"). Plaintiff alleges that Defendants' deceptive, improper, or unlawful conduct in the design, marketing, manufacturing, distribution,

[2] Given the status of negotiations with the other Defendants, Plaintiff anticipated completing a global settlement with all Defendants and filing a single motion for preliminary approval. In accordance with the Court's instructions at the September 26, 2023 status conference and in its September 27, 2023 Order (ECF No. 195), Plaintiff submits this memorandum of law in support of its motion for preliminary approval of the proposed Settlement with P&G only and anticipates a forthcoming motion for preliminary approval of the remaining agreements consistent with the Court's Order. ECF No. 195. Accordingly, the exhibits to the Settlement Agreement contemplate joint approval and joint notice of the settlements.

[3] Plaintiff's settlement with Kimberly-Clark was fully approved by the Court on January 24, 2022. ECF No. 133.

and/or sale of flushable wipes caused recurring property damage, thus constituting nuisance, trespass, defective design, failure to warn and negligence. ¶¶150-193.[4]

Plaintiff further alleges Defendants' branded flushable wipes (including the "Product")[5] are unsuitable for flushing, making them improperly labeled as "flushable" or "safe for sewer and septic systems." ¶¶28-47. Plaintiff alleged that Defendants' flushable wipes did not disperse in a sufficiently short amount of time (if at all) to avoid clogging or other operational problems, as indicated by independent testing and numerous instances of clogs in wastewater systems nationwide, and thus causes ongoing damage to sewer treatment facilities and STP Operators. ¶¶39-99. Plaintiff based its allegations on a thorough factual analysis, based in part on its own experience with multiple clogs containing flushable wipes and tests conducted regarding the inability of flushable wipes to perform as advertised, shedding light on the likelihood of additional future clogs containing flushable wipes. Plaintiff's experience with flushable wipes includes a massive 12-foot-long clog removed from its system in October 2018 (causing over $140,000 in damages) and another clog in June 2019 (causing approximately $60,000 in damages), among other more routine wipes-related clogs and blockages. *See* ¶¶48-62 and Complaint, Ex. A (ECF No. 85-1).

On December 13, 2021, the Court denied certain Defendants' motion to dismiss for failure to state a claim in its entirety. *See* ECF No. 122. The Court held, *inter alia*, Plaintiff has standing to pursue its claims against the remaining Defendants and that Plaintiff adequately alleged facts to support a permanent injunction. *See id.* Thereafter, Defendants (other than Kimberly-Clark) answered the Complaint and exchanged informal discovery. In September 2022, the Court granted the parties' stipulated protective order and joint protective order under Fed. R. Evid. 502(d) in

[4] The use of "Complaint" refers to Plaintiff's Amended Class Action Complaint, ECF No. 85. Citations to "¶___" refer to the Complaint. The use of "flushable wipes" refers to moist wipe products marketed and labeled as safe to flush, safe for plumbing, safe for sewer and/or septic systems, and/or biodegradable. ¶1.

[5] The Product is defined by the Settlement Agreement as "P&G's Charmin-branded flushable wipes manufactured in the United States." Settlement Agreement ¶1.18.

connection with the production of privileged discovery materials. *See* ECF Nos. 168-169. The parties served document requests, responses and objections to document requests, negotiated an ESI protocol (ECF No. 167) and were engaged in intense and extensive negotiations regarding a protocol for the preservation of physical evidence and an evidentiary stipulation before agreeing to conserve legal resources to focus on global resolution of the Action.

In connection with Plaintiff's investigation and prosecution of its claims, Plaintiff consulted with prominent officials in the wastewater industry, including members of the International Water Services Flushability Group ("IWSFG"), a group of water associations, utilities, and professionals focused on flushability.

B. Summary of the P&G Settlement Negotiations

Counsel for Plaintiff and P&G began discussing the prospect of resolving the Action in August 2022. Over the course of the following months, the parties negotiated compliance with the IWSFG flushability guidelines for its flushable wipes, along with a two-year confirmatory testing requirement, as well as labeling changes. Over a dozen drafts of a memorandum of understanding and settlement stipulation were exchanged. In late January 2023, the parties reached agreement in principle on performance criteria for flushable wipes, independent testing of the Product, labeling commitments and attorneys' fees and expenses. In the subsequent months, Plaintiff and P&G continued to document and negotiate the terms of the injunctive relief. On July 13, 2023, Plaintiff, Class Counsel and counsel for P&G formally executed the stipulation of settlement. Through the Settlement Agreement, Plaintiff ensured P&G would commit to meeting certain flushability standards (including the IWSFG Publicly Available Specification (PAS) 3 ("Slosh Box" Disintegration Test[6])) ("IWSFG 2020: PAS 3"), submit to periodic independent testing, and

[6] The Slosh Box Disintegration Test is a testing metric widely used in the flushable wipes industry, including by certain Defendants' own trade association – "INDA," the Association of the Nonwoven Fabrics Industry – to determine flushability. The IWSFG 2020: PAS 3 Slosh Box Disintegration Test contains a testing methodology and acceptance criteria far more stringent than INDA's own Slosh Box Disintegration

implement modifications to the packaging of both flushable and non-flushable wipes. Settlement Agreement ¶2.1.

C. Terms of the Settlement

The Settlement provides meaningful injunctive relief in response to Plaintiff's claims, including: (1) enhanced flushable Product dispersibility; (2) confirmatory Product performance testing; (3) flushable and non-flushable wipes labeling improvements; and (4) public outreach about the Product's compliance with the IWSFG 2020: PAS 3 criteria. *First*, P&G has agreed to ensure that the Product meets the IWSFG 2020: PAS 3 flushabilty specifications, including an average pass-through percentage of at least 80% after 30 minutes of testing, by 18 months following the Effective Date of final judgment ("Compliance Date") and ensuring that the Product meets all other IWSFG 2020 flushability specifications. Settlement Agreement ¶2.1(a).

Second, the Parties have agreed to certain testing implementation and monitoring, including two years of confirmatory testing to verify that the Product continues to meet the IWSFG 2020: PAS 3 specifications following the Compliance Date, either by (1) hosting periodic independent testing of the Product or (2) submitting the Product to a mutually acceptable lab for independent testing. Settlement Agreement ¶2.1(b).

Third, the Parties have agreed to labeling changes for both flushable and non-flushable products. For flushable products (*i.e.*, the Product), on or after the Compliance Date, P&G will modify the packaging and websites for the Product to add language specifying the bases or sources

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Test contained in the Guidelines for Assessing the Flushability of Disposable Nonwoven Products (GD4) given, *inter alia*, the IWSFG's significantly shorter test duration, lower RPMs (causing less disturbance to the wipes during the test period) and higher percentage "pass through" threshold. *Cf. Publicly Available Specification (PAS) 3:2020 Disintegration Test Methods – Slosh Box*, INTERNATIONAL WATER SERVICES FLUSHABILITY GROUP (Dec. 2020), https://www.iwsfg.org/wp-content/uploads/2021/06/IWSFG-PAS-3-Slosh-Box-Test-2.pdf at 13 *with Guidelines for Assessing the Flushability of Disposable Nonwoven Products*, INDA & EDANA (May 2018), https://www.edana. org/docs/default-source/product-stewardship/guidelines-for-assessing-the-flushability-of-disposable-nonwoven-products-ed-4-finalb76f3ccdd5286df88968ff0000bfc5c0.pdf?sfvrsn=34b4409b_2 at 9.

for the "flushable" claim that appears on its labeling, including that the Product complies with IWSFG 2020 and INDA GD4 guidelines. Settlement Agreement ¶2.1(c)(i). For non-flushable labeling, P&G will meet the "Do Not Flush" labeling standards set forth in Chapter 590 of Assembly Bill No. 818 of California State, which took effect on July 1, 2022 ("AB818"), ***nationwide*** to the extent such products are "Covered Products" as defined in AB818. *Id.* ¶2.1(c)(ii). P&G also agreed that upon the Compliance Date they would ***exceed*** the standards of AB818 insofar as they will include "Do Not Flush" symbols or warnings on, not only the principal display panel, but also at least two additional panels of packaging for "non-flushable" baby wipes products. *Id.* This provides additional notice to consumers nationwide that these baby wipes are not flushable.

Fourth, beyond product improvements and labeling enhancements, P&G has agreed to work with Plaintiff to educate consumers about the Product's compliance with IWSFG 2020: PAS 3. *Id.* ¶2.1(b)(i)-(ii).

As discussed herein, the substantive terms of the Settlement are materially similar to the Kimberly-Clark settlement, which the Court fully approved on January 24, 2022, and which served as a benchmark for much of the Parties' negotiations in reaching the Settlement with P&G. *See generally* Stipulation of Settlement between Plaintiff and Kimberly-Clark ("Kimberly-Clark Agreement"), ECF No. 59-2; ECF No. 133 at 11-12 (finding that the Kimberly-Clark Agreement is "clearly adequate" and observing "that the injunctive relief provided against Kimberly-Clark in the Settlement Agreement mirrors significant portions of the relief which Plaintiff affirmatively seeks in its Amended Complaint."). For example, both P&G and Kimberly-Clark agreed to meet the IWSFG 2020: PAS 3 flushabilty specifications and ensure that their respective flushable wipes products meet all other IWSFG 2020 flushability specifications. *Compare* Settlement Agreement ¶2.1(a), *with* Kimberly-Clark Agreement ¶2.1(a). And both P&G and Kimberly-Clark agreed to two years of confirmatory testing to verify that their respective products continue to meet the IWSFG 2020 PAS 3

specifications. *Compare* Settlement Agreement ¶2.1(b)(iv), *with* Kimberly-Clark Agreement ¶2.1(b)(v). Likewise, both P&G and Kimberly-Clark agreed to comply on a nationwide basis with the most stringent state law governing the labeling of non-flushable wipes existing at the time of the settlements, and exceed those standards by adding "Do Not Flush" warnings or labels on two additional panels for certain non-flushable wipes. *Compare* Settlement Agreement ¶2.1(c)(ii)(1), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(1).

The differences between the settlements primarily concern the product performance compliance date and nuances of the non-flushable wipes labeling improvements, and minor differences in the release language and co-promotion provisions. For example, P&G agreed to meet the requisite product performance criteria by 18 months following the Effective Date while Kimberly-Clark agreed to meet the product performance criteria roughly a year after execution of the Kimberly-Clark Agreement. *Compare* Settlement Agreement ¶2.1(a)(ii), *with* Kimberly-Clark Agreement ¶2.1(a)(ii).[7] And for non-flushable wipes labeling, P&G agreed to meet the "Do Not Flush" labeling standards set forth in AB818, which took effect over a year after the Kimberly-Clark Agreement was executed, while Kimberly-Clark agreed to meet the labeling standards set forth in Section 3 of House Bill 2565 of Washington State, enacted March 26, 2020 ("HB2565"). *Compare* Settlement Agreement ¶2.1(c)(ii)(1), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(2). HB2565 was considered the most stringent labeling law at the time of the Kimberly-Clark settlement. AB818 is widely viewed as the most stringent labeling law in the United States today, including because it requires non-flushable wipes products not only to include the "Do Not Flush" symbol, but ***also*** the phrase "Do Not Flush," on the principal display panel, with the symbol and label each covering at

[7] Kimberly-Clark also represented that its flushable wipes met lower performance criteria at the time of the agreement. Kimberly-Clark Agreement ¶2.1(a)(iii). To assuage any of Plaintiff's and Class Counsel's concerns regarding P&G's ability to achieve timely compliance for the Product, upon request, P&G agreed to provide Plaintiff with periodic updates toward meeting enhanced product performance by the Compliance Date. Settlement Agreement ¶2.1(a)(ii).

least 2 percent of the surface area of the panel, effectively doubling the size of the "Do Not Flush" warning for consumers required by HB2565.[8]

III. PRELIMINARY SETTLEMENT APPROVAL

A. The Law Favors Class Action Settlements

In determining whether to approve the Settlement, the Court should be guided by the principle that "[t]here is a strong judicial policy in favor of settlements, particularly in the class action context." *Reed v. Big Water Resort, LLC*, No. 2:14-cv-01583-DCN, 2016 WL 7438449, at *5 (D.S.C. May 26, 2016); *see also Covarrubias v. Captain Charlie's Seafood, Inc.*, No. 2:10-cv-10-F, 2011 WL 2690531, at *2 (E.D.N.C. July 6, 2011) ("There is a strong judicial policy in favor of settlement, in order to conserve scarce resources that would otherwise be devoted to protracted litigation."); *Crandell v. U.S.*, 703 F.2d 74, 75 (4th Cir. 1983) ("Public policy, of course, favors private settlement of disputes."). Indeed, "[t]he voluntary resolution of litigation through settlement is strongly favored by the courts and is 'particularly appropriate' in class actions." *In re LandAmerica 1031 Exch. Servs., Inc. Internal Revenue Service §1031 Tax Deferred Exch. Litig.*, MDL No. 2054, 2012 WL 13124593, at *4 (D.S.C. July 12, 2012) (quoting *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990)). Settlements of the complex disputes often involved in class actions minimize the litigation expenses of both parties, and also reduces the strain such

[8] Other minor differences in the agreements include: (1) application of the "two additional panel" labeling provision to non-flushable baby wipes in the P&G settlement (*compare* Settlement Agreement ¶2.1(c)(ii)(2), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(3)); (2) a clarifying provision that P&G is permitted to "sell through" any product manufactured prior to the Compliance Date (Settlement Agreement ¶2.1(c)(i)(2)); (3) the omission of language in the P&G Settlement Agreement that was contained in ¶2.1(c)(ii)(3) of the Kimberly-Clark Agreement related to symbol contrast (which is covered in AB818), the timing for labeling modification implementation (discussed at ¶2.1(c)(ii)(2) of the Settlement Agreement) and back panel "Do Not Flush" instructions; (4) a clarification that P&G will bear the costs of notice and administration, which P&G may share with other Defendants that may settle in the near-term, to the extent practicable (Settlement Agreement ¶7.6); (5) the replacement of the "Release by Kimberly-Clark" provision with a mutual release related to the litigation conduct (*compare* Settlement Agreement ¶¶1.6, 4.1, *with* Kimberly-Clark Agreement ¶4.1); and (6) the provisions regarding attorneys' fees (*compare* Settlement Agreement ¶6.1, *with* Kimberly-Clark Agreement ¶6.1).

litigation imposes upon already scarce judicial resources. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

As set forth below, Plaintiff and Class Counsel respectfully submit that the proposed Settlement merits preliminary approval and warrants notice apprising Settlement Class Members of the Settlement and the scheduling of a final Fairness Hearing.

B. The Relevant Factors for Preliminary Approval

Rule 23(e) requires judicial approval for a settlement of claims brought as a class action. Fed. R. Civ. P. 23(e) ("The claims . . . of a certified class – or a class proposed to be certified for purposes of settlement – may be settled . . . only with the court's approval."). The approval process typically takes place in two stages. In the first stage, a court provides preliminary approval of the settlement, pending a final settlement hearing, certifies the class for settlement purposes and authorizes notice of the settlement to be given to the class. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

Pursuant to Rule 23(e)(1), the issue at preliminary approval is whether the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2) provides:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Overlapping with Rule 23(e)(2)(B) (arm's-length negotiation) and Rule 23(e)(2)(C)(i) (adequacy of the settlement based on the costs, risks, and delay of trial and appeal) is the two-level analysis in the Fourth Circuit which includes "consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class." *Gaston v. LexisNexis Risk Sols. Inc*., No. 5:16-cv-00009-KDB-DCK, 2021 WL 244807, at *5 (W.D.N.C. Jan. 25, 2021) (quoting *Jiffy Lube*, 927 F.2d at 158-59). "However, at the preliminary approval stage, the Court need only find that the settlement is within 'the range of possible approval.'" *Id*. As discussed below, the proposed Settlement satisfies each of the factors identified under Rule 23(e)(2), as well as the Fourth Circuit's "fairness" and "adequacy" analysis, and the standard for certification of a class for settlement purposes is met, such that Notice of the proposed Settlement should be sent to the Settlement Class in advance of a final Fairness Hearing.

C. The Proposed Settlement Meets Each of the Rule 23(e)(2) Factors

1. The Settlement Was Negotiated at Arm's Length

The Rule 23(e)(2)(B) factor and the first hurdle under the Fourth Circuit's analysis is a procedural one – "whether the settlement was reached through good-faith bargaining at arm's length." *In re NeuStar, Inc. Sec. Litig*., No. 1:14cv885 (JCC/TRJ), 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015); *see* Rule 23(e)(2)(B) ("the proposal was negotiated at arm's length"). In making this determination, courts in the Fourth Circuit look at four factors: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [] class

action litigation." *Reed*, 2016 WL 7438449, at *6 (quoting *Jiffy Lube*, 927 F.2d at 158-59); *see also Case v. French Quarter III LLC*, No. 2:12-cv-02518-DCN, 2015 WL 12851717, at *7 (D.S.C. July 27, 2015) (quoting same). "Where a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston*, 2021 WL 244807, at *6; *see also Reed*, 2016 WL 7438449, at *6 (there is a presumption of fairness when settlement "is achieved through arms-length negotiations").[9] Here, there can be no question the Settlement was the result of arm's-length negotiations in which there is no hint of collusion.

Looking to the first *Jiffy Lube* factor, the Parties engaged in vigorous negotiations for over a year – which followed Plaintiff's lengthy negotiations with Kimberly-Clark regarding similar injunctive relief that predated the filing of the Action – and Plaintiff would have continued litigating the Action rather than accept Settlement terms that would not take meaningful steps to remedy the recurring harm Plaintiff alleges. As to the second *Jiffy Lube* factor, unlike at the time of the Kimberly-Clark settlement, the Parties here had proceeded well into the discovery phase of the litigation, including exchanging and responding to written discovery requests, and were negotiating a preservation protocol and an evidentiary stipulation before agreeing to conserve legal resources to focus on a resolution of the Action. Moreover, the knowledge of Plaintiff's counsel through previous litigation with certain Defendants regarding their flushable wipes, and Plaintiff's counsel's work with consultants who have long studied flushable wipes and non-flushable wipes, gave Plaintiff a meaningful understanding of the merits of its factual allegations, and the strengths and weaknesses of its legal claims.

The third *Jiffy Lube* factor (the circumstances surrounding the negotiations) also favors settlement here. The negotiations were vigorous and adversarial throughout, and the Parties drew on

[9] Plaintiff recognizes that at least two Circuits have recognized this presumption no longer applies. *See, e.g.*, *Moses v. New York Times Co.*, 79 F.4th 235, 243 (2d Cir. 2023). In any event, as explained herein, the absence of the presumption does not undermine the fact that the Settlement satisfies the Rule 23(e)(2) factors and is otherwise fair and adequate.

their extensive knowledge of the merits of their respective arguments and counsel's involvement in several previous flushable wipes-related actions and the similar Kimberly-Clark settlement. The fact that the Settlement was negotiated at arm's length strongly supports preliminary approval.

Finally, the fourth *Jiffy Lube* factor (the experience of counsel in the area of class action litigation) easily favors approval. As discussed further below, Robbins Geller has an extensive record of success in complex cases and similar class actions, and their experience is discussed at length in the Robbins Geller firm resume, which can be found at www.rgrdlaw.com. Likewise, AquaLaw is a specialty law firm with one of the broadest municipal water practices of any U.S. law firm, representing utilities, water districts and related industry associations nationwide.[10] Class Counsel believe that their reputation and experience gave them a strong position in engaging in settlement negotiations with the Defendant.

2. The Settlement Is Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal

The Rule 23(e)(2)(C)(i) factor (adequacy of relief, taking into account the "costs, risks, and delay of trial and appeal") and the second hurdle under the Fourth Circuit's analysis is the substantive adequacy of the Settlement. This factor is also readily satisfied. Here, the Court considers the following:

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

Case, 2015 WL 12851717, at *7 (quoting *Jiffy Lube*, 927 F.2d at 158-59). These factors weigh heavily in favor of finding the proposed Settlement adequate.

In assessing the proposed Settlement, the Court should balance the benefits afforded to the Settlement Class – including the immediacy and certainty of obtaining injunctive relief – against the

[10] More information about AquaLaw can be found at www.aqualaw.com.

significant costs, risks, and delay of proceeding with the Action. Although Defendants' motions to dismiss were denied (ECF Nos. 121-122), continued litigation against P&G poses substantial risks that make any recovery uncertain. For example, class actions alleging nuisance and trespass can present numerous hurdles to proving liability that can be difficult for plaintiffs to meet in the class action context. *See, e.g.*, *Rowe v. E.I. Dupont De Nemours & Co.*, 262 F.R.D. 451, 457 (D.N.J. 2009) (finding that claims for injunctive relief based on nuisance, trespass, and gross negligence did not meet the requirements for class certification under Rule 23(b)(2)).

Furthermore, even if litigation were to proceed, hurdles to proving liability or even proceeding to trial would remain. For instance, Plaintiff would ultimately need to rely extensively on several expert witnesses to prevail at class certification and ultimately prove its claims. Each expert's testimony would be critical to demonstrating P&G's liability, and the conclusions of each expert would be hotly contested. If, for some reason, the Court determined that even one of Plaintiff's experts should be excluded from testifying at trial, Plaintiff's case would become more difficult to prove. *See Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Even if successful, this process presents considerable expenses. *See Clark v. Duke Univ.*, No. 1:16-cv-1044, 2019 WL 2588029, at *6 (M.D.N.C. June 24, 2019) ("The parties would almost certainly incur substantial additional litigation expense if [the litigation] proceeds through summary judgment briefing to trial[.]").

While Plaintiff believes its claims are strong, it cannot ignore the risks of protracted litigation. There is a fair probability that the Court may accept one or more of P&G's arguments at any point, including at class certification, summary judgment and trial stages. Even if Plaintiff prevails, there is no guarantee that it would be provided the relief afforded by the Settlement, particularly the enhanced labeling changes to both the Product and non-flushable products. *See Sims v. BB&T Corp.*, No. 1:15-cv-732, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) ("the

settlement includes . . . terms beneficial to the class that might not be included in any recovery at trial"). Thus, without the Settlement, there is a very real risk that the Settlement Class will receive lesser relief or nothing at all (*e.g.*, P&G could choose to forgo further flushability performance improvements in order to retain other Product's characteristics, such as strength, in their current form). The benefits presented by the Settlement, particularly when viewed in the context of the risks, costs, delay and uncertainties of further proceedings, weigh heavily in favor of preliminary approval.

The remaining factor – the degree of opposition to the Settlement – will be addressed at the final approval stage, after the Settlement Class Members have been given notice of the proposed Settlement and an opportunity to comment. To date, Plaintiff is unaware of any potential objections to the Settlement by any Settlement Class Member.

3. The Remaining Rule 23(e)(2) Factors Are Also Met

a. Plaintiff and Class Counsel Have Adequately Represented the Settlement Class

Plaintiff and its counsel have adequately represented the Settlement Class as required by Rule 23(e)(2)(A) by diligently investigating and prosecuting this Action on their behalf. Among other things, Plaintiff and Class Counsel investigated and assessed the relevant factual events, including developments in the flushable wipes industry, instances of harm to STP Operators attributable to flushable wipes, the testing of Defendants' flushable wipes, and flushability standards; researched the legal issues underlying Plaintiff's claims; drafted a detailed complaint; withstood motions to dismiss; exchanged discovery; served document requests; negotiated confidentiality and ESI protocols; engaged in exhaustive negotiations surrounding a protocol governing the preservation of physical evidence and an evidentiary stipulation; and participated in extensive settlement negotiations with Defendant. These efforts ultimately resulted in P&G's agreement to substantial injunctive relief on par with the Court-approved settlement with Kimberly-Clark, including a

commitment for Defendant's Product to comply with the wastewater industry's preferred flushability standard, submission to confirmatory Product performance testing, and labeling improvements.

b. The Proposed Method of Distributing Relief to the Settlement Class Is Effective

As the Settlement does not provide for monetary relief, no method of distribution is necessary here. Relatedly, as demonstrated below in §IV, the method of the proposed notice (Rule 23(e)(2)(C)(ii)) is effective. The notice plan includes notice by First-Class direct mail and publication in a leading industry magazine, in accordance with the Court's preferences in connection with the analogous Kimberly-Clark settlement, and direct email notice to major wastewater industry groups and numerous state wastewater associations. Settlement Agreement ¶¶7.2, 7.4. In addition, the notice plan includes issuing a press release containing the Summary Notice and the creation of a settlement-specific website where key documents will be posted, including the Settlement Agreement, Notice, and Notice Order. *Id*. ¶¶7.3-7.4.

c. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses the terms of any proposed award of attorneys' fees. As stated in the Notice and the Settlement Agreement, Class Counsel intend to apply to the Court for awards of attorneys' fees and expenses (including the court costs) not to exceed $350,000. Settlement Agreement ¶6.1. If approved by the Court, P&G will pay Class Counsel up to $350,000 in attorneys' fees and expenses, as the Fee and Expense Award. *Id.* ¶6.2. This provision does not impact the Settlement Class Members' relief.

d. The Settling Parties Have No Other Agreements

Rule 23(e)(2)(C)(iv) requires the disclosure of any other agreements. The Parties have not entered into any other agreements here.

e. Settlement Class Members Are Treated Equitably

The final factor under Rule 23(e)(2) is whether Settlement Class Members are treated equitably. Fed. R. Civ. P. 23(e)(2)(D). As discussed above, the nature of the Settlement's terms (providing for injunctive relief) ensure that the Settlement equitably applies to all Settlement Class Members.

* * *

Thus, each factor identified under Rule 23(e)(2) and *Jiffy Lube* is satisfied. For all of the foregoing reasons, the Court should find that the Settlement is fair, adequate and reasonable, and in Settlement Class Members' best interests.

IV. PROPOSED PLAN OF NOTICE TO THE SETTLEMENT CLASS

Rule 23(c)(2)(A) states, "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A). When a class is certified under Rule 23(b)(2), the court may "direct appropriate notice to the class," but need not follow the strict requirements of class notice for classes certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2)(A); *see also Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 330 n.25 (4th Cir. 2006) ("Unlike Rule 23(b)(3), Rule 23(b)(2) neither requires that absent class members be given notice of class certification nor allows class members the opportunity to opt-out of the class action.").

When a class claim is settled, notice must be provided in a "reasonable manner to all class members who would be bound by the [proposed settlement]." Fed. R. Civ. P. 23(e)(1)(B). "While the rule does not spell out the required contents of the settlement notice, it 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." *Beaulieu v. EQ Indus. Servs., Inc*., No. 5:06-cv-00400-BR, 2009 WL 2208131, at *28 (E.D.N.C. July 22, 2009) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)). Likewise, the due process clause also requires that in a class action, notice of the settlement and an opportunity to be heard must be given to absent class

members. *Cf. Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) ("This Court is of the opinion that the notice given to members of the plaintiff class by publication and by mail, as aforesaid, complied with all requirements of due process, all requirements of Rule 23 of the Federal Rules of Civil Procedure, and constituted the best notice practicable under the circumstances.").

Here, the Settlement provides for three forms of notice, which will include a description of the material terms of the Settlement, Class Counsel's Fee and Expense Application, the date of the Final Approval Hearing and the date by which any objection by Settlement Class Members to any aspect of the Settlement and/or the Fee and Expense Application must be received. Settlement Agreement ¶7.1. First, the Notice (attached to the Settlement Agreement as Exhibit B) will be provided by email to numerous state wastewater associations and major industry groups. *Id.* ¶7.2. Second, the Parties will establish a case-specific website dedicated to the Settlement, which will contain the Notice, the Settlement Agreement and other relevant documents and information. *Id.* ¶7.3. Third, a Summary Notice (attached to the Settlement Agreement as Exhibit C) will be published through a press release issued by the Parties and in an industry publication such as the Water Environment Federation's magazine *Water Environment & Technology*, and mailed directly to identifiable publicly owned STP Operators in the United States via First-Class mail, as Plaintiff and Kimberly-Clark did in connection with the Kimberly-Clark settlement. *Id.* ¶7.4. The contents and method of the Notice therefore satisfy all applicable requirements.

Accordingly, in granting preliminary settlement approval, the Court should also approve the Parties' proposed form and method of giving notice to the Settlement Class.

V. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Under the terms of the Settlement Agreement, the Parties have agreed, for the purposes of the Settlement only, to the certification of the Settlement Class. The Settlement Class is defined as: "All

STP Operators in the United States whose systems were in operation between January 6, 2018 and the date of preliminary approval." Settlement Agreement ¶1.22.[11]

The Fourth Circuit encourages federal courts to "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003). In order to obtain class certification, a plaintiff must establish the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and demonstrate that the action may be maintained under one of the three subsections of Rule 23(b). *See Calderon v. GEICO Gen. Ins. Co.*, 279 F.R.D. 337, 345 (D. Md. 2012). Here, the Parties assert for settlement purposes only that the requirements of Rule 23(a) and (b)(2) have been satisfied.

A. The Proposed Settlement Class Satisfies Rule 23(a)

The proposed Settlement Class here satisfies the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.

1. Numerosity

Rule 23(a)(1) permits class treatment where "the class is so numerous that joinder of all members is impracticable[.]" *See Owens v. Metro. Life Ins. Co.*, 323 F.R.D. 411, 415 (N.D. Ga. 2017). "No consistent standard has been developed for establishing numerosity in class actions." *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075, 1080 (4th Cir. 1976) (citing 7 C. Wright & A. Miller, *Federal Practice & Procedures* §1762 (1972)); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (no specific size is necessary).

The number of STP Operators in the United States is estimated to be over 17,000 based on the Environmental Protection Agency's records. *See* ECF No. 123-1 at 2. Thus, numerosity is

[11] STP Operators refers to "entities that own and/or operate sewage or wastewater conveyance and treatment systems, including municipalities, authorities and wastewater districts." Settlement Agreement at 1.

easily satisfied here. *See Williams v. Henderson*, 129 F. App'x 806, 811 (4th Cir. 2005) (indicating that a class with over 30 members justifies a class).

2. Commonality

To meet the commonality requirement, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This does not require that all, or even most issues be common, but only that common issues exist. "The commonality element is generally satisfied when a plaintiff alleges that '[d]efendants have engaged in a standardized course of conduct that affects all class members.'" *In re Checking Acct. Overdraft Litig.*, 275 F.R.D. 666, 673 (S.D. Fla. 2011).

The proposed Settlement Class also easily satisfies Rule 23(a)(2). Common questions include, but are not limited to:

a) whether Defendants mislabel their flushable wipes so as to have consumers believe that their flushable wipes will not cause harm to sewer systems in their area;

b) whether Defendants' business practices violate South Carolina law;

c) whether Defendants knew or should have known that the labeling on their flushable wipes was false, misleading or deceptive when issued;

d) whether Defendants' flushable wipes cause adverse effects on STP Operators' systems;

e) whether Defendants sell, distribute, manufacture or market flushable wipes in South Carolina and nationwide that are in fact flushable;

f) whether Defendants' flushable wipes are safe for sewer systems; and

g) whether Plaintiff and Class members are entitled to injunctive relief.

Similar actions centering on the labeling of flushable wipes have been found to present common questions of law and fact. *See Kurtz v. Kimberly-Clark Corp.*, 414 F. Supp. 3d 317, 321 (E.D.N.Y. 2019) (finding consumer allegations that Flushable Wipes do not perform as advertised to present common issues of fact and law).

3. Typicality

Rule 23(a)(3)'s typicality requirement asks whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). To be typical, the class representative's claims "cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006).

Here, Plaintiff's and other Settlement Class Members' claims arise out of the same course of conduct by P&G and are based on identical legal theories. As discussed above, Plaintiff alleges that P&G's flushable wipes did not conform to the representations on their packaging, which caused excessive and recurring harm to Settlement Class Members' facilities. These claims are identical to the legal claims belonging to all Settlement Class Members and would present proof of P&G's liability on the basis of common facts supporting the appropriateness of injunctive relief. *See Berry v. Schulman*, 807 F.3d 600, 608-09 (4th Cir. 2015) ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.").

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To meet this requirement, the named class representatives must show that "they will fairly and adequately protect the interests of every putative claimant by showing that they have no interests that are antagonistic to other class members and that they are competent to undertake the case." *Reed*, 2016 WL 7438449, at *4. "The Court should also consider the adequacy of representation by Class Counsel." *Id*. For the first requirement (adequacy of class representatives), Fourth Circuit courts have required that plaintiffs merely show that "Named Plaintiffs' interests are directly aligned with the interests of absent class members." *Id*. For the second requirement (adequacy of class counsel), courts in the Fourth Circuit generally presume

adequacy is met "in the absence of specific proof to the contrary." *Id.*; *see also Case*, 2015 WL 12851717, at *5 (quoting same).

Plaintiff easily satisfies both prongs of the adequacy requirement. The interests of Plaintiff and absent Settlement Class Members align because they each have been harmed by, and/or are at risk of being harmed by, the same course of conduct, and each Settlement Class Member will benefit from the terms of the Settlement. Plaintiff has demonstrated its adequacy and dedication through its active involvement in the case, including participating in discovery and negotiations relating thereto, submitting a declaration in response to certain Defendants' motion to dismiss detailing extensive expenses regarding efforts to address wipes-related issues affecting Plaintiff's system (*see* ECF No. 64-4), and its own attempts to remedy the Complaint's allegations, including publicly discussing flushable wipes-related problems at issue in the Action and attempting to educate the public on related flushability issues (and commitment to further do so through the Settlement).[12] Plaintiff, which has incurred expenses and anticipates incurring additional expenses due to flushable wipes in its capacity as a wastewater utility system, has no interests that are antagonistic to the interests of any of the Settlement Class Members.

Plaintiff also meets the second prong of the adequacy requirement. To date, Class Counsel has invested significant attorney and staff time to this matter. Robbins Geller is a preeminent nationwide plaintiffs' firm specializing in complex class action litigation, and currently serves as lead counsel in other flushable wipes-related litigation. *See* www.rgrdlaw.com. Robbins Geller has served as lead or co-lead counsel in hundreds of class actions in almost every state in the country, and has achieved considerable success, including attaining one of the five largest recoveries in the

[12] *See, e.g.*, *What Not to Flush*, CHARLESTON WATER SYSTEM, http://charlestonwater.com/361/What-Not-to-Flush (last visited Oct. 2, 2023); Andrew Brown, *Charleston Water System sues manufacturers, retailers over 'flushable' toilet wipes*, THE POST AND COURIER (Jan. 8, 2021), https://www.postandcourier.com/business/charleston-water-system-sues-manufacturers-retailers-over-flushable-toilet-wipes/article_99b29254-51c5-11eb-b7fa-eb9a98184e11.html; Settlement Agreement ¶2.1(b)(ii).

Fourth Circuit at the time in *Nieman v. Duke Energy Corp., et al*., No. 3:12-cv-00456 (W.D.N.C.). *See* https://www.rgrdlaw.com/cases-nieman-v-duke-energy-corp.html. Likewise, AquaLaw is a preeminent firm with a wide-ranging municipal water practice, serving public utilities and other entities nationwide and litigating a wide range of disputes in State and federal courts involving water and infrastructure. *See* www.aqualaw.com. The Court previously found Robbins Geller and AquaLaw adequate in appointing members of these firms as class counsel in connection with the Kimberly-Clark settlement. ECF No. 133 at 7.

Accordingly, both Rule 23(a)(4) and Rule 23(g) are satisfied. Plaintiff should be designated as Class Representative of the Settlement Class, and Robbins Geller and AquaLaw should be designated as Class Counsel.

B. The Settlement Class Satisfies Rule 23(b)(2)

Rule 23(b)(2) permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Class actions alleging claims for nuisance, trespass, and/or negligence are commonly certified under Rule 23(b)(2). *See, e.g.*, *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 271 (E.D. Mich. 2001), *aff'd*, 383 F.3d 495 (6th Cir. 2004) (certifying class alleging claims for nuisance and negligence under Rule 23(b)(2)). Here, Plaintiff has similarly requested injunctive relief (from harm caused by the continued design, marketing, manufacturing, distribution and/or sale of flushable wipes), and alleges that Defendants have "refused to act" by failing to adopt and implement appropriate product improvements and labeling changes. *See id*. at 270.

Additionally, "Rule 23(b)(2) classes are 'mandatory,' in that 'opt-out rights' for class members are deemed unnecessary and are not provided under the Rule." *Schulman*, 807 F.3d at 609 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2558 (2011)). Indeed, all Settlement Class

Members will benefit equally from the injunctive relief presented by the Settlement. While Settlement Class Members thus cannot opt out of the Settlement, they may object to the Settlement or express any concerns they may have before final Court approval.

Therefore, Plaintiff respectfully submits that there is good reason and just cause to certify the Settlement Class, for settlement purposes, under Rule 23(b)(2).

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks that the Court grant preliminary approval of the proposed Settlement and enter the proposed Order Granting Motion for Preliminary Approval of Class Action Settlement, submitted as Exhibit D to the Settlement Agreement.

DATED: October 3, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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