UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. KIMBERLY-CLARK CORPORATION, et al., Defendants.	Civil Action No. 1:14-cv-01142-PKC-RML CLASS ACTION
GLADYS HONIGMAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. KIMBERLY-CLARK CORPORATION, Defendant.	Civil Action No. 2:15-cv-02910-PKC-RML CLASS ACTION

SUPPLEMENTAL BRIEF OF THEODORE H. FRANK IN RESPONSE TO THE COURT'S SEPTEMBER 9, 2022 ORDER AND IN FURTHER SUPPORT OF FRANK'S OBJECTION TO PROPOSED CLASS ACTION SETTLEMENT AND ATTORNEYS' FEE REQUEST

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INTRODUCTION

In their supplemental briefs, Plaintiffs and Kimberly Clark argue, *inter alia*, that the settlement is fair and reasonable, the class representatives are adequate, and the notice was sufficient without addressing the critical disproportionality that flunks the settlement under Rule 23(e)—even after the Court repeatedly noted concern about the disparity between the attorneys' fees and actual class recovery at the fairness hearing on September 7, 2022.

Plaintiffs have not provided any updated information about the number of valid claims (or the number deemed invalid) since it filed the Supplemental Declaration of Scott M. Fenwick of Kroll (Dkt. 452) on September 1, 2022. While the class recovery has likely decreased to an even lower amount since then, the class is set to recover, at most, $1,354,267.50 in the aggregate. Over 98% of the class will recover nothing; the majority of class members who do recover will get a mere $7. Meanwhile, the Plaintiffs' attorneys have requested a fee and expense award of $4.1 million, after agreeing to a settlement that pays the fees from a segregated fund such that any reduction cannot be used to augment class recovery and create an appropriate balance between the class and attorney recovery.

The proponents of a settlement bear the burden to demonstrate the settlement is fair, reasonable, and adequate under Rule 23. *Ma v. Harmless Harvest*, 2018 WL 1702740, at *4 (E.D.N.Y. Mar. 31, 2018). The parties have failed to carry that burden here. Neither party offers any argument in their supplemental briefs to justify such a lop-sided result, and they failed to justify it in the first round of briefing. Under Rule 23(e)(2)(C)(ii)-(iii)—and examining "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and the terms of a proposed award of attorneys' fees, including the timing of payment—it is clear that the settlement is unfair and must be rejected. A settlement cannot be fair when it leaves the overwhelming majority of the class with nothing and pays the attorneys triple what the class recovers. Because Frank discusses these arguments at length in his objection, and to avoid burdening the Court, he incorporates herein his objection and arguments at the fairness

hearing rather than repeat them here.

With respect to the adequacy of representation issues addressed by the parties' supplemental briefs, the broad release of state law claims with materially different values in a single settlement class raises adequacy concerns not fully addressed by the parties. While Plaintiffs' counsel may have been incentivized to maximize the total settlement value, counsel had no similar incentive to fairly allocate the proceeds among the class members who were releasing claims with wildly divergent value. Under Supreme Court and Circuit precedent, Rule 23(a)(4) required Plaintiffs to create subgroups with their own representatives who were charged with maximizing the recovery of that subgroup. Otherwise, with a *pro rata* allocation, class members with stronger claims are subsidizing class members with weaker claims, and they are doing so without anyone having advocated for their interests. The parties utterly fail to address this adequacy concern and potential additional reason to deny settlement approval.

ARGUMENT

I. The settlement unfairly pays the class $1.4 million and the attorneys over $4 million.

The most current claims data provided by Plaintiffs show that class members have submitted claims for an aggregate value of only $1,354,267.50. Dkt. 452. This figure will likely be reduced to an even smaller amount, as Plaintiffs have not updated this months-old data to disclose how many of these claims the claims administrator rejected or found invalid. *See* Frank Objection, Dkt. 446 at 6 (the number of invalid claims has ranged from 15% to 87.9% in other class action settlements). Even if the full $1.35 million is considered, however, the settlement is unfairly lop-sided in favor of the attorneys, who seek to recover over $4 million.

Although Plaintiffs promised to "contextualize and further discuss" the claims information in their supplemental briefing, Dkt. 453, their brief lacks any explanation of how this weak result supports settlement approval. In fact, neither party's supplemental brief mentions Rule 23(e)(2)(C) at all, even though this Court asked the parties to provide additional briefing on, *inter alia*, whether the settlement can be fair, reasonable, and adequate. Both parties avoid discussion of the

disproportionate settlement and certainly provide no justification for it. And while Plaintiffs note that the "proxy audience" for the notice plan was approximately 9.3 million individuals nationwide, they fail to explain how the proxy audience was determined and approximated and how it relates to actual Kimberly Clark purchasers comprising the settlement class. *See* Dkt. 456 at 20.

Using the 9.3 million figure as the approximate class size, and the 185, 375 claims received (Dkt. 452), the claims rate for the settlement is a puny 2%. This claims rate is even lower than that in *Pettit*. Dkt. 456 at 23 n.20. About ***98%*** of the class recovered ***nothing*** in exchange for the broad release of claims that precludes the recovery even of actual damages should class members have plumbing problems or other damages due to their use of Kimberly Clark's flushable wipes at a later date.

This result was wholly expected by both parties and their experienced counsel under the settlement terms. First, publication-only notice notoriously results in low claims rates, as detailed in Mr. Frank's objection. Second, the $7 cap on claims by class members who did not retain years-old proofs of purchase for flushable wipes throttled claims by the untold number of class members who simply did not find it worth their time to complete a lengthy claim process for such a meager recovery. Claims rates in such settlements historically are in the single digits. Third, class counsel agreed to a segregated fund such that any reduction in their attorneys' fee award could not be used to augment class recovery. Dkt. 446 at 7-12.

Class counsel and defense counsel in this care are experienced enough to know that the class recovery in this case was certain to be embarrassingly low and would result in about 99% of the class recovering nothing. That didn't stop Plaintiffs' counsel from pursuing an attorneys' fee and expense award of over $4 million and using the inflated and illusory "up to $20 million" made available to the class to try to hide from the Court and the class members the grossly excessive attorneys' fee payout in comparison to the fractional amount paid to the class.

Rule 23(e)(2)(C) guards against such gamesmanship. It requires the Court to scrutinize what the class *actually* receives as well as the terms of any proposed attorneys' fee. *See, e.g.*, *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021); *In re Samsung Top-Load Washing Machine Mktg. Sales*

Practices & Liab. Litig., 997 F.3d 1077, 1094 (10th Cir. 2021); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781-82 (7th Cir. 2014).

The parties do not counter the significant precedent establishing that such a settlement result is unfair and the settlement cannot be approved. *See, e.g. Dennis v. Kellogg,* 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee would be "clearly excessive"); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1051 (9th Cir. 2019) (fee award of 45% of gross cash fund is "disproportionate"); *Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86 n.29 (E.D.N.Y. 2007) (43% of the common fund as a fee "would clearly be excessive"). In fact, they appear unconcerned with either "the effectiveness of any proposed method of distributing relief to the class" or that the class's recovery is commensurate with "the terms of any proposed award of attorney's fees" pursuant to Rule 23(e)(2)(C)(ii)-(iii).

A settlement that is structured to pay the attorneys such an excessive share of the fund is not fair and reasonable under Rule 23(e).

II. The broad release of state law claims with materially different values raises adequacy concerns.

The Court repeatedly noted at the fairness hearing the parties' failure to provide sufficient information about the state law claims that the class is releasing so as to enable the Court to assess the adequacy of the representatives and settlement fairness, particularly in light of the expanded nationwide settlement class. The Court's subsequent order for supplemental briefing on these issues further underscored the Court's need for this information as a fiduciary for the class. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). The parties still fail to provide detailed information about the strength of the various state law claims released or analysis of the Rule 23(a)(4) adequacy concerns that such release raises for the nationwide settlement class.

Plaintiffs may be correct that they sought recovery on a nationwide basis and have been incentivized to maximize potential recovery for the nationwide class as a whole[1] and that (b)(3)

[1] The case law they cite is not convincing on this point. In *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), the appellants did not raise, and the Second Circuit did not address, the propriety of basing a nationwide settlement class on New York GBL claims. Plaintiffs' remaining cases are district court cases that are not binding precedent.

predominance is not defeated for settlement purposes. However, issues potentially arise with Rule 23(a)(4)'s adequacy of representation requirement as it relates to the *allocation* of the recovery among the nationwide class. Rather than detail the differences in state law and the potential recovery for class members, Plaintiffs argue only that the substantial variation in claims among the class members does not defeat predominance.

Regardless of the nobility of Judge Weinstein's purported goal of achieving a global settlement, Rule 23 requires that when a class is comprised of diverse groups, each subgroup must have "separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Neither Plaintiffs nor Kimberly Clark appropriately explain why they believe the binding precedent that "[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented" does not apply here when it is undisputed that class members have claims of materially varying strengths. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011).

Class members had conflicting interests here given the variation in the strength of their released claims and the varying statute of limitations periods under state law. Plaintiffs apparently did not explore these claims even with the expansion to the nationwide class, bolstering the adequacy concerns. Although Texas, Mr. Frank's state of residence, does not provide a statutory penalty for consumers bringing suit under its consumer protection statute, other states provide for significantly higher statutory recoveries. *See, e.g.*, Utah Consumer Sales Practices Act, Utah Code §§ 13-11-1, *et seq.*, 13-11-19 (greater of actual damages or $2000); D.C. Consumer Procedures Act, D.C. Code §§ 28-3904, 28-3905 (greater of $1500 or treble damages); New Hampshire Consumer Protection Act, N.H.R.S.A. §§ 358-A, 358-A:10-a (greater of $1000 or actual damages), Virginia Consumer Protection Act, Va. Code Ann. §§ 59.1-196, 59.1.-204 (greater of $500/$1000 or actual damages). This fact may explain why Plaintiffs have been reluctant to discuss the applicable state consumer protection laws in any detail other than to note the robust nature of GBL § 349 and the potential statute-of-limitations issues for non-New York class members. *See* Dkt. 458 at 18.

With such potentially significant variation in state law—variation that the parties consciously have not fully explored with this Court, Plaintiffs likely should have created subclasses with separate representation to ensure that the settlement appropriately protected the interests of the class. When plaintiffs have created subgroups in other cases with class members who hold varying state law claims, resulting settlements have paid premiums to those class members who are releasing more valuable claims. *See, e.g.*, *Briseño*, 998 F.3d at 1020 (settlement paid additional amounts to New York and Oregon class members as compensation for statutory damages under consumer protection laws); *In re Lithium Ion Batteries Antitrust Litig.*, 853 Fed. App'x 56 (9th Cir. 2021) (affirming 90/10 distribution plan for repealer/non-repealer state class members in antitrust class action); *In re: T-Mobile Customer Data Security Breach Litig.*, Case No. 4:21-md-03019, Dkt. 158-1 (W.D. Mo. July 22, 2022) (providing additional settlement benefit to California class members). As it stands, class members with robust claims are subsidizing class members with weak claims—and they did not have any representative to advocate against such subsidization. A single counsel could not provide adequate representation when class members from different states had competing interests in how the relief was allocated among them. Each subgroup required counsel whose sole duty was to represent an advocate on its behalf. Yet here counsel represented the class collectively and was "obligated to advance the collective interests of the class, rather than those of a subset of class members"; entirely absent was "the advocacy of an attorney representing each subclass" or subgroup as required by Rule 23 to "ensure the interests of that particular subgroup are in fact adequately represented." *Literary Works*, 654 F.3d at 252.

The settlement class lumps together class members who hold claims worth materially different amounts and makes them eligible for the same recovery. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), involved a comparable conflict. There, the proposed class encompassed members who had already manifested asbestos-related injuries, *i.e.*, those with present claims, and those who had been exposed to asbestos but did not show signs of injury, *i.e.*, those with only potential future claims. Thus, the "two subgroups … had competing interests in the distribution of a settlement whose terms reflected 'essential allocation decisions designed to confine compensation

and to limit defendants' liability." *Literary Works*, 654 F.2d at 250 (quoting *Amchem*, 521 U.S. at 627). As a result, "the adversity among subgroups require[d] that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem*, 521 U.S. at 627 (internal quotations omitted). *See also Ortiz*, 527 U.S. at 857 (groups holding claims of significantly different value had conflicting interests that should have been addressed with "reclassification with separate counsel").

Just as in *Amchem* and *Ortiz*, the adequacy requirement of Rule 23(a)(4) is called into question here, where there was no "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627.

Finally, while Plaintiffs and Kimberly Clark have remarked on the slightly greater per-claim recovery in this settlement compared to the *Belfiore* and *Pettit* settlements, they appear oblivious that class members are providing Kimberly Clark with a broader release of claims in this case and therefore that broader release is worth more. That broader release almost certainly accounts for the higher recovery, not any better representation. *See* Dkt. 456 at 23; Dkt. 458 at 15-16.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Mr. Frank's objection (Dkt. 446) and at the fairness hearing, the Court should reject the proposed settlement and fee award or, at a minimum, award no more than 25% of the actual value of the settlement benefit to the class.

Dated: October 24, 2022

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Certificate of Service

The undersigned certifies she electronically filed the foregoing via the CM/ECF system for the Eastern District of New York, thus sending a copy to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Dated: October 24, 2022

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