UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

**OBJECTOR THEODORE H. FRANK'S**
**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law:

## INTRODUCTION

1. On February 21, 2014, D. Joseph Kurtz filed the present class action lawsuit against Kimberly-Clark Corporation ("Kimberly Clark") and Costco Wholesale Corporation ("Costco") (collectively, "Defendants") in this Court. Seeking damages and injunctive relief, the lawsuit asserted claims on behalf of Kurtz and others similarly situated for violations of New York Deceptive Practices Act General Business Law ("GBL") §§ 349-350 and the New Jersey Consumer Fraud Act § 56:8-1 and alleging negligent misrepresentation, unjust enrichment, and breach of express warranties based on Defendants' claims that their wipes products were "flushable" and "safe" for sewer and septic systems when the wipes products allegedly were not suitable for disposal by flushing down a toilet, were not regarded as flushable by municipal sewage system operators, did not disperse upon flushing, and routinely damaging or clogging plumbing pipes, septic systems, and sewage lines and pumps. Dkt. 1.

2. On November 18, 2014, the Court granted expedited discovery for purposes of class certification. Defendants inspected Dr. Kurtz's home plumbing system and took his deposition. Dr. Kurtz's counsel deposed Kimberly Clark's 30(b)(6) deponents, and produced documents relating to labeling, market and consume research, trade organizations, communications with municipalities, and customer complaints.

3. The parties filed motions for and against certification with supporting expert reports on issues relating to damages, Dr. Kurtz's plumbing system. In June and July 2015, the Court held a two-day "Science Day" hearing so that it could better understand how flushable wipes work and perform.

4. On May 20, 2015, Gladys Honigman (together with Kurtz, "Plaintiffs") filed a class action on behalf of herself and others similarly situated alleging similar claims against Kimberly Clark,

also seeking damages and relief. On February 27, 2017, the Court stayed the *Honigman* case pending resolution of the motion for class certification in the *Kurtz* case because the issues in the cases were "largely the same." Dkt. 292 at 6.

5. On March 27, 2017, the Court certified a class consisting to "[a]ll persons and entities who purchased Kimberly-Clark Flushable Products in the State of New York between February 21, 2008 and March 1, 2017…." Dkt. 296 at 130. Defendants petitioned for appellate review under Rule 23(f). The U.S. Court of Appeals for the Second Circuit granted review and remanded, ruling that "further development of the record is appropriate" to determine whether Defendants' predominance argument has any merit. *Kurtz v. Costco Wholesale Corp.*, 768 Fed. App'x 39, 40 (2d Cir. 2019).

6. On remand, this Court reasserted the class certification. Dkt. 382. Kimberly Clark appealed. The Second Circuit affirmed the class certification order as to the damages class under Rule 23(b)(3), reversed the order as to the injunctive relief under Rule 23(b)(2), and remanded for further proceedings in this Court. *See Kurtz v. Kimberly-Clark Corp.*, No. 17-1856 (2d Cir. 2020); Dkt. 293-1.

7. Litigation proceeded. On December 30, 2021, the parties notified the Court that they had reached an agreement in principle to settle Plaintiffs' claims against Kimberly Clark. Dkt. 421. The Court entered a Rule 23(e)(1)(B) order authorizing a class notice plan for a fairness hearing. Dkt. 439.

8. Before this Court is Plaintiffs' motion for final approval of the settlement, an award of attorneys' fees and expenses, and class representative payments. Dkt. 442.

9. The motion was opposed by class member Theodore H. Frank, who filed an objection on August 16, 2022, on behalf of himself and the entire class under Rule 23(e)(5). Plaintiffs filed a reply in support of settlement approval and their attorneys' fee award and in oppositions to the objection. The Court has considered these filings and the supporting declarations.

10. The Court held a fairness hearing on September 7, 2022. Counsel for Plaintiffs, Kimberly Clark, and Frank presented argument.

11. The Court ordered supplemental briefing on (1) why Plaintiffs are adequate representatives for a nationwide settlement class, and (2) whether the proposed Settlement Agreement can be fair, reasonable, and adequate, and ordered the parties to reconvene for a supplemental fairness hearing on November 7, 2022. Plaintiffs, Kimberly Clark, and Frank filed supplemental briefs and presented argument. The Court has considered these filings, the supporting declarations, and additional presentations.

12. For the reasons stated below, the Court denies class certification, denies approval of the settlement and denies the motion for attorneys' fees and representative plaintiffs' awards as moot.

## I. Jurisdiction and Parties

13. Plaintiffs allege that they are purchasers of Kimberly Clark flushable wipes products who suffered economic injury from purchasing defective flushable wipes and would not have purchased the flushable wipes and/or paid the purchase price for the flushable wipes if they knew that flushing the wipes would cause the wipes to become clogged in sewer or septic systems. Plaintiffs brought putative class actions on behalf of U.S. purchasers of, *inter alia*, Kimberly Clark flushable wipes products.

14. Though no one challenges Article III jurisdiction, the Court has an independent obligation to assure itself of jurisdiction. Plaintiffs' complaints have alleged redressable injury-in-fact to a class of Kimberly Clark flushable wipes purchasers that satisfies the requirements of Article III.

15. Defendant Kimberly Clark is a Delaware corporation with its principal place of business in Texas.

16. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d), as the matter in controversy exceeds $5 million, exclusive of interest and costs, and is a class action of more than 100 potential class members in which Plaintiffs are citizens of a state different from the Defendant.

## II. Settlement

17. On April 5, 2022, Plaintiffs moved for preliminary approval of a settlement with Kimberly Clark. Dkt. 430. "Preliminary approval" is a misnomer; since the 2018 amendments to

Rule 23, courts do not grant "preliminary approval," but simply issue a decision directing notice of the settlement. Rule 23(e)(1)(B). The Court, without the benefit of adversarial presentation, and relying on Plaintiffs' representations in the unopposed motion, granted the motion on May 19, 2022, after making edits to the class notice. Dkts. 435, 439.

18. The settlement would settle the claims of a proposed opt-out Rule 23(b)(3) nationwide class broader than the damages class of New York purchasers certified for litigation. The settlement class included "all individuals over the age of 18 who purchased the Products not for the purpose of resale, during the Settlement Class Period. Excluded from the Class are: (1) the Honorable Pamela K. Chen, the Honorable Robert M. Levy, the Honorable Wayne R. Andersen (Ret.), and any member of their immediate families; (2) any of Kimberly-Clark's officers, directors, employees, or legal representatives; and (3) any person who timely opts out of the Settlement Class." "Products" was defined as "Kimberly-Clark's flushable wipes sold in the United States during the Settlement Class Period under the Cottonelle, Scott, Huggies Pull-Ups, Poise, or Kotex brands." Dkt. 439 at 2.

19. The settlement provided that each settlement class member who submitted a valid claim without proof of purchase would receive a payment of seventy cents for each package of wipes purchased during the class period, up to a maximum recover of $7.00. It further provided that each settlement class member who submitted a valid claim corroborated by proof of purchase would receive a payment of $1.10 for each package purchased during the class period, up to a maximum of $50.60. Settlement, Dkt. 432-1 (Ex. 1) ¶ 2.4. If the value of the claims exceeded $20 million, then claims would be paid on a *pro rata* basis, up to the $20 million cap. *Id.* ¶ 2.5.

20. On September 1, 2022, Plaintiffs filed a declaration from the claim administrator disclosing that class members had filed 185,375 claims with an aggregate value of $1,354,267.50. Of those claims, 179,902 were claims without a proof of purchase, with a total value of $1,103,511.50. Class members had filed only 5,473 claims with a proof of purchase, with a total value of $250,756.00. Dkt. 452. The objector notes that even this $1.35 million figure may be exaggerated, because claims administrators frequently deny a large percentage of claims after a fairness hearing (Dkt. 446 at 6), and no one challenges this. But as we shall see below, the Court will generously assume *arguendo* the class

will receive the full $1.35 million, and come to the same conclusion as it would if it performed further investigation on the actual recovery to the class.

21. The settlement broadly releases, as to the class members, "all claims, suits, debts, liens, demands, rights, causes of action, continuing prosecutions, obligations, controversies, damages, costs, expenses, attorneys' fees, or liabilities, of any nature, whether arising under local, state, or foreign law, whether by statute, regulation, contract, common law, or equity, that arise from or relate to the claims and allegations in the Complaints, including, but not limited to, Unknown Claims, and the acts, facts, omissions, or circumstances that were or could have been alleged by Plaintiffs in the Actions related to any wipe products (flushable and non-flushable) currently or formerly manufactured, marketed, or sold by Kimberly-Clark or any of its affiliates." Settlement ¶ 1.24.

22. The settlement proposes a class representative payment of $10,000 for Dr. Kurtz and $5,000 for Ms. Honigman. Settlement ¶ 6.2.

23. The settlement provides that class counsel may apply to the Court for an award from Kimberly Clark of attorneys' fees and expenses of up to $4,100,000. Settlement ¶ 6.1. This amount is separate from the $20 million maximum payout to the class.

## III. Class Certification

24. In evaluating a proposed class action settlement, "[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation" of the settlement. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). In making this evaluation, the Court has "a fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987).

25. The class here has approximately 9.3 million members, based on the proxy audience determined by the settlement administrator. Dkt. 456 at 20. There is no question that Rule 23(a)(1)'s numerosity standard is met.

26. Rule 23(a)(2) commonality requires that the claims are "of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an

issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This standard is satisfied by the common questions, including whether Kimberly Clark's actions violated New York GBL §§ 349 and 350 and whether Plaintiffs and members of the class are entitled to monetary relief.

27. Under Rule 23(a)(3), a class representative must possess the same interest and suffer the same injury as the class members. Plaintiffs allege that they and members of the class suffered economic injury from purchasing defective flushable wipes and would not have purchased the flushable wipes and/or paid the purchase price for the flushable wipes if they knew that flushing the wipes would cause the wipes to become clogged in sewer or septic systems. Because the claims of Plaintiffs and the absent class members concern the same alleged conduct by Kimberly Clark, and arise from the same legal theories, Rule 23(a)(3)'s typicality requirement is satisfied.

28. The adequate representation requirement of Rule 23(a)(4) is not met because of the material differences in state-law claims that class members are releasing under the settlement. Settling parties in many other consumer class-action cases structure settlements to pay residents of some states more than others because of those material differences. While Plaintiffs have every incentive to maximize the *total* recovery, they have no incentive to allocate the settlement funds fairly among class members who are releasing claims of materially different value. With a *pro rata* recovery, class members with high-value claims are subsidizing class members with low-value claims without any representative advocating for a fair allocation. Plaintiffs cannot simultaneously represent the two sets of class members because they cannot have had "an interest in maximizing compensation for *every* category." *In re Literary Works in Elec. Databases*, 654 F.3d 242, 252 (2d Cir. 2011) (emphasis in original). Rule 23(a)(4) requires subclassing, or, at the minimum, separate representation in the settlement negotiations.

29. Because the single class as currently constituted without separate representation does not satisfy Rule 23(a)(4), it cannot be certified.

**IV. Rule 23(e)(2) Settlement Fairness Inquiry**

30. Because the class cannot be certified, the Court need not decide whether it would have approved the settlement, but, because of the possibility of a Rule 23(f) appeal on class certification, it does so for economy of judicial resources and to guide the settling parties going forward.

31. To protect absent class members, courts have a duty to make sure that class counsel have not bargained away the rights of the class. "The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

32. To combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own," the district court must act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement. *Id.* The representatives assume a fiduciary obligation to the class, and the Court, through its oversight responsibility, assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

33. "The concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted). The Court's oversight role thus does not end at making sure that the parties engaged in arm's length settlement negotiations. "[T]the adversarial process—or … 'hardfought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717.

34. The Court cannot approve a settlement unless it determines that it is fair, reasonable, and adequate. The Court analyzes this standard based on the factors listed in Rule 23(e)(2), as well as

the factors set forth in *Grinnell*, 495 F.2d 448. There is no presumption in favor of settlement approval; the proponents of the settlement bear the burden of demonstrating 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).

## V. Frank Objection

35. Here, class member Theodore H. Frank filed a timely objection on behalf of the entire class. Dkt. 446.

36. Frank is Director of Litigation at the non-profit public-interest law firm, Hamilton Lincoln Law Institute, which is the home of the Center for Class Action Fairness, which he founded. Frank has won several cases relating to objections to settlements he deems unfair; as the Seventh Circuit recently wrote, "Frank's track record—which now includes his success in this case—speaks for itself." *In re Stericycle Sec. Litig.*, 35 F.4th 555, 572 & n.11 (7th Cir. 2022) (citing cases). That said, the merits of an objection do not rise or fall on the identity of an objector. *Id.* While Frank is the only objector, the whole point of any class action is to aggregate claims that would be too burdensome to litigate individually. It is thus unsurprising that few class members speak up to object to settlements over small-dollar claims, and no adverse inference should be drawn from this fact that only a public-interest attorney has done so. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (reversing settlement approval of a coupon settlement where Frank's client was the only objector).

37. Frank objects that the settlement cannot be approved under Rule 23(e) because it disproportionately benefits the attorneys. The Court agrees.

38. The 2018 amendments to Rule 23 created a new Rule 23(e)(2), listing factors a Court must consider before approving a settlement as "fair, reasonable, and adequate." "Rule 23(e)(2) assumes that a class settlement is invalid." *Briseño*, *v. Henderson*, 998 F.3d 1014, 1030 (9th Cir. 2021) (citation omitted). It is class counsel, not Frank, who "voluntarily accepted a fiduciary obligation towards members of the putative class," and bears the "heavy burden" imposed upon them by Rule 23.

39. Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." The Court's Rule 23(a)(4) class-certification analysis above, identifying intraclass conflicts, requires it to answer this question in the negative. In addition, the Court looks disfavorably upon the settlement terms that favor class counsel at the expense of the class. Class counsel owes a fiduciary duty to the class not to structure a settlement so that they are the primary beneficiaries. *Briseño*, 998 F.3d at 1024-25; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014); *Redman*, 768 F.3d at 638-39.

40. Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." The Court accepts Plaintiffs' representation that this occurred, and no one accuses the parties of a reverse auction or other express collusion. However, satisfying the Rule 23(e)(2)(B) requirement is necessary, but not sufficient by itself. *Briseño*, 998 F.3d at 1031. While class counsel and defendants have proper incentives to bargain effectively over the size of a settlement, they have no such constraints on allocating it between the payments to class members and the fees for class counsel—unless courts police that allocation. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011); *see also Pampers*, 724 F.3d at 717. Self-dealing can occur even in an arm's-length negotiation. The Court addresses self-dealing in its Rule 23(e)(2)(C) analysis.

41. The allocation issue is addressed in Rule 23(e)(2)(C), which requires the Court to consider whether

> (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)[.]

42. With respect to Rule 23(e)(2)(C)(i), Plaintiffs identify several potential hurdles they would need to overcome to prevail on their claims. *See* Dkt. 443 at 15-16; Dkt. 456 at 23-24. The total

class relief of about $5.5 million--$1,354,267.50 (out of a maximum class payment of $20 million) and a $4.1 million attorneys' fee and cost payment—satisfies the Rule 23(e)(2)(C)(i) standard given the obstacles to success Plaintiffs identify.

43. The disproportion of the *allocation* of that $5.45 million settlement benefit ($1.35 million for the class and $4.1 million for Plaintiffs' attorneys) is troubling under Rules 23(e)(2)(C)(ii) and (iii). Even if the case were entirely meritless, class counsel's fiduciary duty requires it to proportionately share that windfall with the class. It would be absurd and create perverse incentives if class counsel could receive a higher fee when they bring a bad case than when they bring a meritorious one.

44. Under Rule 23(e)(2)(C)(ii), courts examine how effectively the settlement actually distributes relief to the class, including the method of processing class-member claims. Here, the distribution was woefully inadequate. While the settlement purports to make available up to $20 million for the class, the claims process resulted in class members recovering at most $1,354,267.50.

45. That leaves the adequacy of the settlement with respect to "the terms of any proposed award of attorney's fees." This language in Rule 23(e)(2)(C)(iii) makes no sense *unless* it creates a proportionality standard matching that in *Redman*. A settlement benefit that is adequate if the attorneys negotiated a $400,000 fee for themselves may not be adequate if the attorneys negotiated a $4 million fee for themselves. For example, if this were a pure common fund of $5.45 million, it would be absurd for the Court to award over 70% of the fund to the attorneys.

46. But this is not a pure common fund because the "the terms of any proposed award of attorney's fees" in the settlement segregates the attorney fee from the class benefit. If the Court were to attempt to correct the disproportion by reducing the attorneys' fee to 25% of the actual benefit to the class, the reduction would redound to Kimberly Clark, rather than to the class. *Pearson*, 772 F.3d at 786. This is unfair to the class. Kimberly Clark, for better or worse, was willing to pay $5.45 million to settle the case. There is "no apparent reason the class should not benefit from the excess allotted" to attorneys' fees. *Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1059-60 (9th Cir. 2019). This is nothing if not self-dealing. While the Court could correct this disproportion by reallocating money

from the attorneys' fees to the class in a common-fund case, the segregated fund here prevents the Court from doing so. In combination with the disproportionality, the segregated fund makes this settlement unfair under Rule 23(e)(2).

47. Plaintiffs argue (Dkt. 456 at 22) that settlement negotiations were at arms-length and negotiations included a mediation with the honorable Wayne R. Anderson. Which is why the Court accepted that the settlement met the standard of Rule 23(e)(2)(B). But a settlement must satisfy *both* Rule 23(e)(2)(B) and Rule 23(e)(2)(C). As discussed above, the parties need not expressly "collude" for class counsel to self-deal and structure a settlement so that it is disproportionately benefits class counsel; arm's length negotiations do not protect against unfair allocation issues.

48. There is no evidence that Rule 23(e)(2)(C), the adverse effects on the class of the segregated fee structure, the judicial precedents this Court relies upon, or the interests of absent class members were considered by the mediator or in the mediation at all. There is no reason he would: the parties did not engage in mediation to adjudicate whether a settlement met the muster of Rule 23(e), but to help the parties "get to yes" in settlement negotiations. Unfortunately, the best way to "get to yes" is for class counsel and the defendant to structure a settlement to shortchange absent class members not at the table. No collusion is needed to do this: just a defendant and class counsel acting in their own self-interest without regard to class counsel's fiduciary duty to the class. In any event, even if the mediation *did* consider Rule 23(e) settlement fairness, it cannot bind this Court or the class, which has a due process right to notice and a hearing that did not occur before the mediator. It would violate due process to defer to the mediator, especially when a private mediator financially relies upon the repeat business of negotiating parties. *See generally* Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers,* 2 U. MICH. J. L. REFORM 80 (2013).

49. Rule 23(e)(2)(C)(iii) also requires the Court to consider the timing of the fee payment. The settlement provides that Kimberly Clark must pay class counsel their Rule 23(h) award within 30 days of the Court's order awarding attorneys' fees, regardless of when the class's claims are paid. Settlement § 6.4. This provision prioritizing fees is a "suspicious feature" that indicates unfairness. *See Eubank v. Pella Corp.*, 753 F.3d 718, 724 (7th Cir. 2014).

50. The Court therefore sustains Frank's objection: the settlement fails to satisfy Rule 23(e)(2)(C)(iii), and must be rejected.

51. There appear to be no side agreements under Rule 23(e)(3), and thus nothing to consider under Rule 23(e)(2)(C)(iv).

52. Rule 23(e)(2)(D) requires the Court to evaluate whether "the proposal treats class members equitably relative to each other." Neither the Plaintiffs nor Frank discuss this provision. But, as discussed above, the Settlement pays the same *pro rata* amount per claim regardless of the strength of the claims that each class member is releasing. Perhaps there is a valid argument that supports paying all class members equally, but Plaintiffs have not provided one despite acknowledging the variations in claims being released, and they have the burden of proof on all Rule 23(e)(2) issues. Given the forfeiture, the Court cannot conclude that Rule 23(e)(2)(D) is satisfied. The Court would have been much more confident about this issue had separate representation been provided as Rule 23(a)(4) requires.

## VI. *Grinnell* Factors

53. In determining whether a settlement is fair, reasonable, and adequate, the Court may also consider (1) the complexity, expense, and duration of the litigation; (2) the class's reaction to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the defendants' ability to withstand a greater judgment; and (8) the range of reasonableness of the settlement fund in light of best possible recovery and all attendant litigation risks. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Most of these factors are subsumed in the Rule 23(e)(1)(C)(i) analysis above.

54. This was a complex case that was heavily litigated over the better part of a decade and, as the history of the litigation suggests, involved risk that Plaintiffs would not be able to establish liability. Although Kimberly Clark could withstand a greater judgment, and as discussed above, the Court finds the amount of the settlement fund adequate. The class reaction was largely one of

indifference. While only one class member objected, only about 2% of the class filed a claim. As objecting is a costly and burdensome process, and the claims process also involved time and effort, consumers who stood to recover a maximum of $50 reasonably may have decided not to participate.

55. In conjunction with the problems identified in Section V, the settlement fails to satisfy Rule 23(e)(2), and the Court would deny settlement approval.

### VII. Attorneys' Fees

56. Because the Court denies class certification and denies settlement approval, the request for attorney's fees and costs is denied as moot.

### VIII. Representative Awards

57. Because the Court denies class certification and denies settlement approval, the Court denies the request for representative awards as moot.

## CONCLUSION

58. For these reasons, the Court denies class certification, denies settlement approval, and sustains Frank's objections in part as discussed above. The requests for attorneys' fees and incentive awards are denied as moot.

Dated: ____________________, 2022

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Honorable Pamela K. Chen

Dated: October 24, 2022

Respectfully submitted,

*/s/ Anna St. John*

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