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

Plaintiffs,

- against -

KIMBERLY-CLARK CORPORATION and COSTCO WHOLESALE CORPORATION,

Defendants.

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GLADYS HONIGMAN; and D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated

Plaintiffs,

-against-

KIMBERLY-CLARK CORPORATION,

Defendant.

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MEMORANDUM & ORDER
14-CV-1142 (PKC) (RML)

15-CV-2910 (PKC) (RML)

PAMELA K. CHEN, United States District Judge:

In these two cases, on behalf of two putative classes, Plaintiffs D. Joseph Kurtz ("Kurtz") and Gladys Honigman ("Honigman") seek final certification of a settlement class and approval of a settlement agreement. The proposed settlement applies to all adult consumers who bought Kimberly-Clark Corporation's ("KCC") "flushable wipes" in the United States between 2008 and 2022. Although the motion is opposed by one putative class member, the Court grants it for the reasons stated below.

BACKGROUND

I. Procedural History

KCC is a Delaware company that manufactures and markets wipes labeled "flushable" globally. (*Kurtz v. Kimberly-Clark Co.*, No. 14-CV-1142 (PKC) (RER), (E.D.N.Y. Feb. 21, 2014) (the "*Kurtz Action*"), Dkt. 1, ¶ 7; *id.* Dkt. 81, at 11.) Two putative classes have alleged in separate suits that KCC misled consumers by falsely advertising that their wipes are flushable when they actually are not. In 2014, Kurtz sued KCC, *inter alia*, for negligent misrepresentation, breach of express warranty, unjust enrichment, and violations of New York's General Business Law §§ 349–50. (*Id.* Dkt. 1, ¶¶ 99–105, 106–10, 111–22, 128–31.) Honigman sued KCC on the same claims in 2015, and her action has generally remained dormant since 2017. (*See Honigman v. Kimberly-Clark Co.*, No. 15-CV-2910 (PKC) (RER), (E.D.N.Y. May 20, 2015), Dkt. 1, ¶¶ 98–119.); *see also Kurtz v. Kimberly-Clark Corp.*, 320 F.R.D. 104, 107 (E.D.N.Y. 2017) ("*Kurtz I*"). In 2017, then-presiding judge, the Honorable Jack B. Weinstein certified Kurtz's litigation class, only for New York consumers, and rejected Kurtz's request to certify a national class action. *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 555 (E.D.N.Y. 2017) ("*Kurtz II*"). KCC twice appealed that decision, but the Second Circuit eventually affirmed. *See Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 59 (2d Cir. 2020). After Judge Weinstein's retirement in 2022, this case was reassigned to the undersigned. Plaintiffs promptly moved for preliminary settlement approval and renewed their request to certify and bind a new nationwide class of consumers who had purchased KCC wipes between 2008 and 2022.[1]

[1] Unless otherwise stated, all citations to the docket from this point and onwards refer solely to the *Kurtz Action*. (*Kurtz v. Kimberly-Clark Co.*, No. 14-CV-1142 (PKC) (RER), (E.D.N.Y. Feb. 21, 2014)).

II. The Settlement Agreement

A. Contents of the Agreement

The Settlement Agreement (the "Agreement") generally binds all individuals over 18 who purchased KCC's flushable wipes—sold under the brand names Cottonelle, Scott, Huggies Pull-Ups, Poise, or Kotex—in the United States between February 21, 2008, and May 19, 2022, subject to limited exceptions. (*See generally* Dkt. 432-1., ¶¶ 1.26, 1.32, 1.35; *see also* Dkt. 439.) KCC does not admit liability but agrees to create a $20 million fund for compensating the class. (Dkt. 432-1, ¶¶ 2.5, 7.3.)

The Agreement establishes two tiers of recovery based on proof of purchase. (*Id.* ¶¶ 1.27, 2.4.) Consumers with proof of purchase—a label, barcode, or an itemized sales receipt—can receive up to $50.60, and those without such proof of purchase can receive up to $7. (*Id.* ¶¶ 1.27, 2.4.) Consumers can only recover once, for either purchases they can prove or for purchases they cannot. (*Id.* ¶ 2.4.)[2] Claims must have been submitted by August 17, 2022, and any unclaimed funds revert to KCC. (*Id.* ¶ 2.4 (noting that the "Agreement does not create any vested property interest or unclaimed property rights for [class members] who do not file" claims)); Dkt. 437, at ECF 18.)[3] If the value of the claims exceeds the fund of $20 million, the compensation will be pro-rated. (Dkt. 432-1, ¶ 2.5.) After approval, a Claim Administrator will review all claim forms, and any defective claims will be automatically denied. (*Id.* ¶ 2.6.) KCC will be released from all

[2] Recovery is limited to one claim per household, which is defined as all individuals who share a single physical address. (Dkt. 432-1, ¶¶ 1.16, 2.4.) For example, a family of four individuals who share a home and are members of a single household can submit no more than one joint request to recover up to $7, without proof of purchase, or up to $50.60, with proof of purchase.

[3] Citations to "ECF" refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

liability other than for personal injury, and Plaintiffs Kurtz and Honigman stand to receive up to $10,000 and $5,000, respectively, while their counsel may receive up to $4,100,000, subject to the Court's approval. (*Id.* ¶¶ 1.24, 6.1–6.4, 7.1(a)–(b).) KCC will pay Plaintiffs and their Counsel from a separate fund, with any unawarded fees reverting to KCC. (*Id.* ¶¶ 2.4, 6.1–6.4.)[4]

B. Notice and Claims

From June to August 2022, using purchase data and online advertisements, Plaintiffs disseminated notice of the two lawsuits and proposed settlement to the public to reach a target audience of approximately 9.3 million people between the ages of 18-54 who are assumed to have purchased KCC's wipes. (Dkt. 457-1, ¶¶ 9, 11.) Whenever an advertisement appeared on the screen of such purchaser—whether it was seen or not—Plaintiffs' software counted it as an "impression." (*Id.* ¶ 13.) Plaintiffs counted a total of 161,700,000 "impressions" and 570,000 visits to their settlement website. (*Id.* ¶¶ 1, 4, 17.) To date, Plaintiffs have received at least 185,375 claims, with 179,902 being without proof of purchase, and 5,473 being with proof of purchase. (*See* Dkt. 452, ¶¶ 2–3.) The total value of claims received is at least $1,354,267.50, with $1,103,511.50 for claims without proof of purchase and $250,756 for proof of purchase claims. (*Id.*) Up to 7,099 claims relate to purchases made in New York. (Dkt. 453.) Thus, a little less than $19 million of the compensation fund will revert to KCC following approval of the settlement.

[4] This is known as a "kicker" provision. *See In re Samsung*, 997 F.3d 1077, 1088 (10th Cir. 2021) ("A true 'kicker' . . . allows 'all fees not awarded [to class counsel to] revert to defendants rather than be added to the *cy pres* fund or otherwise benefit the class.'") (citation omitted).

III. Fairness Hearing

A. Final Approval Motion

On August 3, 2022, Plaintiffs requested final approval of the settlement and applied for fees. (Dkts. 442–45.) Plaintiffs seek $4,100,000, consisting of $3,961,668.77 in attorneys' fees, $138,331.23 in litigation expenses and charges, and $10,000 and $5,000 in service fees for Kurtz and Honigman, respectively. (Dkt. 443, at 2.) Class Counsel, who are members of a mid-size law firm in Queens, represent that 29 legal professionals spent 5,662.88 hours on the matter over the last eight years, with partners billing between $800 to $1350 per hour, associates billing between $250 to $575 per hour, and "staff attorneys" billing up to $445 per hour. (Dkt. 445, at ECF 8.)

B. Objector's Claims

On August 16, 2022, Attorney Theodore H. Frank ("Objector") filed an objection to the settlement, arguing that it failed to pass muster under Rule 23(e).[5] (Dkt. 446, at 1.) Objector claims that the Court has a fiduciary responsibility to the settlement class and should reject the Agreement if there are "subtle signs that class counsel have allowed [the] pursuit of their own self-interests and that of certain class members to infect the negotiations." (*Id.* at 3 (quoting *In re Dry Max Pampers*, 724 F.3d 713, 715 (6th Cir. 2013)). He identifies four "red flags," including the small number of approved claims, disproportionate fees for class counsel, an onerous claim-making process, and a "kicker" provision. (*Id.* at 6, 9, 12, 13–15.) Alternatively, he suggests reducing Class Counsel's fees to align with the actual class recovery. As indicated, the Court

[5] Attorney Frank is the founder of the Center for Class Action Fairness, part of the Hamilton Lincoln Law Institute, whose attorneys represent Frank in this action and routinely appeal class settlements across the country. (*See* Frank Decl., Dkt. 446-1, ¶¶ 3, 15–18.) Attorney Frank is a resident of the District of Columbia and alleges that he is a member of the settlement class based on his purchases of KCC wipes in Virginia and Texas during the class period. (*Id.* ¶ 5.)

approves the settlement; however, it will address the amount of attorneys' fees to be awarded in a separate and subsequent proceeding. (*Id.* at 1.)

* * *

On September 7, 2022, the Court held a Final Approval Hearing. (09/07/2022 Minute Entry.) After which, the Court asked for supplemental briefing on: (1) the release clauses, (2) the adequacy of representation, and (3) the fairness of the settlement. (09/09/2022 Docket Entry.) The Parties timely responded, and a Supplemental Approval Hearing took place on November 7, 2022. (11/07/2022 Minute Entry.) This matter is now ripe for resolution.

STANDARD OF REVIEW

"Before approving a class settlement agreement, [if the class was not previously certified,] a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). Although when certifying a class for settlement purposes, "a district court need not inquire whether the case, if tried, would present intractable management problems," all other elements of Rule 23 still "demand undiluted, even heightened, attention[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "The district court [is] required to exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference." *In re Traffic Exec. Ass'n-E. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980); *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 78 (E.D.N.Y. 2007) ("Certification and fairness criteria are important even though the parties have agreed to settle[.]" (cleaned up)). "If the class satisfies the requirements of Rules 23(a) and (b), then the district court must separately evaluate whether the settlement agreement is 'fair, reasonable, and adequate' under Rule 23(e)." *In re Am.*, 689 F.3d at 238. Importantly, courts bear a "fiduciary responsibility" to the class to ensure settlement fairness when approving a

settlement class. *In re Warner Commc'ns Secs. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) (citations omitted).

DISCUSSION

I. The Settlement Class is Certified

A. Legal Standard

To certify a settlement class, the Court must find that Fed. R. Civ. P. 23(a)'s requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation are satisfied. *See In re Am.*, 689 F.3d at 238 (citations omitted); *see also In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (same). "The salience of the 'adequacy' factor, Fed. R. Civ. P. 23(a)(4), is particularly acute in settlement class situations." *Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359, 366 (E.D.N.Y. 2014) (citation omitted); *Gallego v. Northland Grp. Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) ("In the context of a request for settlement-only class certification, the protection of absentee class members takes on heightened importance."). The requirement ensures that the class representatives "fairly and adequately protect the interests of the class [and] serve[] to uncover conflicts of interest between [them] and the class they seek to represent, as well as the competency and conflicts of class counsel." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016) (cleaned up). Furthermore, "to certify a Rule 23(b)(3) [settlement] class, [plaintiffs] must show that common questions of law or fact 'predominate' over purely individual questions and that a class action is 'superior' to other methods of resolving the dispute." *In re Am.*, 689 F.3d at 239.

B. Application

1. Numerosity, Typicality, and Commonality are Met

The Parties agree that the numerosity, typicality, and commonality requirements are met. The Court concurs with this assessment. As to numerosity, Rule 23 requires a determination that "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "Impracticable does not mean impossible, and a precise enumeration or identification of class members is not required." *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 397 (E.D.N.Y. 2022) (cleaned up). Notably, "[c]ourts in the Second Circuit presume numerosity at a level of 40 members." *Id.* (citations and internal quotations marks omitted). Here, the class size, estimated by Plaintiffs, is millions of consumers, with 185,375 claims already submitted as of August 30, 2022. (Dkt. 452, ¶¶ 2–3.) Hence, the numerosity requirement is plainly met.

Rule 23 likewise requires a finding that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). "Even a single common question" is enough. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, at 359 (2011). Here, a shared question of law exists for all class members, *i.e.*, whether KCC's manufactured and marketed wipes were indeed flushable. This shared question successfully establishes commonality.

Finally, "[t]ypicality requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class members." *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010) (citing Fed. R. Civ. P. 23(a)(3)). This requirement "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (cleaned up) (citing *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)). Here, Plaintiffs assert that they have purchased the flushable wipes in question and are seeking compensation for damages arising from the alleged misrepresentation

of the wipes. The class is seeking the same claims. Thus, the Court concludes that the claims are typical.

2. Class Representatives are Adequate

The adequacy of Plaintiffs as class representatives under Rule 23(a)(4) is disputed by the Objector. The Court, however, concludes that they are adequate. "Class actions are an exception to the rule that only the named parties conduct and are bound by litigation." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 717 (2d Cir. 2023) (citation omitted). To justify deviation from the rule, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (citing *Wal-Mart Stores, Inc.*, 564 U.S. at 348–49). To be adequate, a proposed class "representative must have [(1)] an interest in vigorously pursuing the claims of the class, and [(2)] have no interests antagonistic to the interests of other class members." *In re Payment*, 827 F.3d at 231 (citation omitted); *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[D]istrict courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members.").

First, the Court agrees that Plaintiffs' attorneys are qualified and capable of litigating the matter, satisfying the first adequacy factor. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (observing that the first factor centers on whether "plaintiff's attorneys are qualified, experienced and able to conduct the litigation"). Class Counsel claim adequacy due to their nine-year litigation experience in this matter.[6] But, considering that "adequate representation of a particular claim is determined by the alignment of interests of class

[6] In connection with this issue, Plaintiffs disagree with the Court's comment that evidence explored in "discovery has largely been confined to New York." (Dkt. 456, at 7.) Plaintiffs dispute this, citing the fact that they traveled at least once to Wisconsin for a deposition and that various entities related to this matter are incorporated nationwide. (*Id.*) The Court views this argument as bordering on frivolous and disregards it.

members, not proof of vigorous pursuit of that claim [in fact]," the Court rejects that argument as misdirected. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 111 (2d Cir. 2005). Nonetheless, evidence shows that Class Counsel are qualified. Class Counsel are part of a 200-lawyer firm with offices across the country that has successfully litigated dozens of collective and class actions in recent decades, some in this district. (Dkt. 445, ECF 25–71 and ECF 39 (discussing *In re Payment Card Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11 (E.D.N.Y. 2019)).) Lead counsel in this matter, Attorney Vincent M. Serra, graduated from law school in 2005 and has successfully litigated at least two similar class actions in the past. (*Id.* at ECF 145.) Thus, the Court has no concern about Class Counsel's ability to adequately prosecute this matter.

Turning to the second prong, the Court finds no fundamental conflict among the class representatives, class members, or between class members themselves. Objector posits a potential Rule 23(a)(4) conflict due to the nationwide nature of the class, where class members possess different causes of actions under varying state law regimes while Plaintiffs can only proceed under New York law. (Dkt. 460, at 4–5.) However, the existence of a theoretical tension between claims of varying strengths is insufficient to invalidate a class. A conflict must be "fundamental," going "to the very heart" of the litigation. *Charron*, 731 F.3d at 250. Differences in claim values are not fundamental conflicts as class actions aim to enable low-value claims to recover despite high litigation costs. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 347–49 (3d Cir. 2010) (finding "no merit in objectors' argument that state law differences created conflicts among class members that defeat adequacy of representation and preclude certification of a nationwide class" in the absence of any other showing of conflict). Objector's argument appears to be that a class cannot be certified if different state-law regimes allow some class members to recover, for

example, $20 and others only $0.01, because then the class member's claim that is 2,000 times stronger than the other claim, is "subsidizing" the weaker claim. This reasoning, however, ignores the fact that without certification, both the class members and their representatives would rarely, if ever, recover anything due to the high cost of litigating low-value claims through trial. Therefore, Objector's argument contradicts the "policy [of aggregation] at the very core of the class action mechanism[.]" *Amchem*, 521 U.S. at 617 (citation omitted). The Court, thus, declines to adopt Objector's interpretation of the law—which unduly focuses on the theoretical incompatibility of individual class member's causes of action.

Instead, as other courts have recently noted, the crucial inquiry is whether claimants with different claims could recover different amounts in reality, making their interests materially dissimilar. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1276 (11th Cir. 2021). Here, that possibility is remote. The Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, is particularly instructive. 521 U.S. 591 (1997). There, during the asbestos-litigation crisis, a district court conditionally approved a mass settlement agreement for individuals affected by past exposure to asbestos products manufactured by over 20 different companies. *Id.* at 597–601. The Supreme Court found that Rule 23(a) adequacy was not satisfied, noting that the named parties sought to represent a single class including individuals with diverse medical conditions, both manifested and latent. *Id.* at 626. The class members who were already suffering injuries wanted to receive immediate payments for their harm, an interest that fundamentally conflicted with the interests of exposure-only class-members, who wanted to secure a generous fund for their uncertain future. *Id.* at 626–27.

The Second Circuit's decision in *In re Literary Works in Electronic Databases Copyright Litigation* is also instructive. 654 F.3d 242 (2d Cir. 2011). In *Literary*, there were three groups of

claims (Categories A, B, and C) based on different provisions of the Copyright Act, with varying strengths and prospects for recovery. *Id.* at 246. The settlement proposal included a limit on recovery for all claims, and if the limit was reached, Category C claims would be reduced first, potentially resulting in no recovery for Category C-only plaintiffs. *Id.* The Second Circuit found that the adequacy requirement of Rule 23(a)(4) was not met because the settlement structure made Category A and Category B claims "more lucrative" than Category C claims. *Id*. at 252, 254. In effect, the class was plagued by a fundamental conflict: the class representatives, which also included plaintiffs with Category C claims only, created a disparity amongst the claims and forced Category C class members "to advance the collective interests of the class, rather than those of the subset of class members whose claims mirrored their own." *Id.* at 252–54.

This case differs significantly from *Amchem* and *Literary*. First, unlike in *Amchem*, the Court does not find any true disparity among the claims or the interests of the claimants. All class members suffered past harm from the alleged fraud, and the consequences have already manifested. Objector has not described any risk that latent harm would manifest itself in the future and divide the class.[7] Additionally, all the class members have an interest in immediate compensation for past harm; they would have received comparable amounts, either nothing or almost nothing, had they tried to litigate their cases individually, rendering their claims effectively indistinguishable in value. Second, in stark contrast to *Literary*, the settlement before the Court ensures that all class members will recover regardless of the theoretical strength of their

[7] In this regard, the Court specifically notes that the settlement only binds "individuals" who "purchased" the flushable wipes. (Dkt. 432-1, ¶ 1.32.) Thus, by its terms, the settlement does not reach hotels or other commercial properties that did not directly purchase the products but whose guests used them on the commercial entities' premises. As such, it is unnecessary for the Court to speculate on whether larger facilities, equipped with more complex sewage systems, might present markedly different claims stemming from wipe congestion issues in the future.

unmitigated claims. Thus, the "competing interests in the distribution of a settlement" are not in conflict. *Cf. Amchem*, 521 U.S. at 626.

3. The Requirements of Predominance and Superiority are Met

It is undisputed, and the Court finds, that the requirements of Rule 23(b) are met. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (citation omitted). This "predominance requirement is satisfied if: (1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof." *In re Petrobras Sec.*, 862 F.3d 250, 270 (2d Cir. 2017) (cleaned up). In this case, the crucial question is whether the wipes subject to this action were marketed falsely as "flushable." That question is "essential to the claims of all putative class members," and the "same evidence will suffice for each [class] member [to answer it]." *In re Payment Card*, 330 F.R.D. at 56 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 451 (2016)). While individual questions will remain as to the extent of the harm caused to each class member, "'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23(b)(3)." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (citation omitted); *In re Payment Card*, 330 F.R.D. at 57 ("Although individual class members would be impacted to different degrees by the alleged behavior, these individual issues, such as differences in individual damages assessments, are largely minimized in the settlement context."). Indeed, "while predominance may be difficult to demonstrate in mass tort cases [where] individual stakes are high and disparities among class members [are] great," *In re Payment Card*, 330 F.R.D. at 55, the requirement is "readily met in certain cases alleging consumer . . . fraud[.]" *Amchem*, 521 U.S. at 625.

The requirement of superiority is likewise satisfied. "The Superiority Requirement asks courts to balance, in terms of fairness and efficiency, the advantages of a class action against those of alternative available methods of adjudication." *Kaplan v. S.A.C. Cap. Advisors, L.P*, 311 F.R.D. 373, 383 (S.D.N.Y. 2015). "Rule 23(b)(3) [] lists four factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—which courts should consider in [certifying the class]." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (citation omitted). "[M]anageability is, by far, the most critical concern in determining whether a class action is a superior means of adjudication." *Id.* (quotation omitted).

The possibility of complex choice-of-law issues or diverse state-law claims causing trial delays has little impact on the viability of the settlement class. Such matters only affect the manageability of the trial, and, here, there will be no trial if the settlement is approved. *See Amchem,* 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial"); *see also Jabbari v. Farmer*, 965 F.3d 1001, 1007 (9th Cir. 2020) (holding that "[f]or purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable") (discussing *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539 (9th Cir. 2019)).

IV. The Settlement Agreement is Fair

The Court finds that the settlement is fair. "A court may approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion." *Wal–Mart Stores*, 396 F.3d at 116 (internal quotations omitted). Traditionally, courts in this Circuit assess fairness using the *Grinnell* factors:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class 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 ability of the defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, at 463 (2d Cir. 1974). On December 1, 2018, Rule 23(e) was amended and new mandatory factors were introduced, which courts have interpreted as "add[ing] to, rather than displac[ing], the *Grinnell* factors." *In re Payment Card*, 330 F.R.D. at 29. These factors are:

> (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.

See Fed. R. Civ. P. 23(e)(2); *see also* 2018 Advisory Notes to Fed. R. Civ. P. 23 (e)(2) (classifying the first two factors as procedural, and the latter two as substantive). Therefore, the Court, in its analysis below, considers both sets of factors, guided by the principle that it is "bound to scrutinize the fairness of the settlement agreement with even more than the usual care" where settlement and certification occur simultaneously. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Charron*, 731 F.3d at 250 ("Where settlement and certification proceed simultaneously, courts must give heightened attention to the requirements of Rule 23(a)."); *accord In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig*., 55 F.3d 768, 788 (3d Cir. 1995) ("[S]ettlement

classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action.").

A. The Settlement is Untainted by Self-Interest

The Court begins by addressing Objector's assertions that the proposed settlement is tainted by Plaintiffs' and Class Counsel's self-interest.[8] Citing out-of-circuit authority,[9] Objector suggests that any "subtle signs" or "red flags" indicating self-serving actions by the lawyers at the class's expense require rejection of the settlement. However, there are two problems with this argument. First, Objector cites no Second Circuit precedent that follows the "red flags" approach. Generally, the Second Circuit confines its analysis to the *Grinnell* factors. *See, e.g.*, *Hyland v. Navient Corp.*, 48 F.4th 110, 121 (2d Cir. 2022) (assessing fairness in light of the *Grinnell* factors); *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 762–63 (2d Cir. 2020) ("In assessing the adequacy of a class action settlement, district courts in this Circuit consider the *Grinnell* factors"); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019) (same). Second, even crediting Objector's argument and recognizing the importance of allocation methods for the class, the Court disagrees that this settlement is unduly tainted by self-interest.

Objector's primary argument centers around the 2018 Amendment to Rule 23, specifically Rule 23(e)(2)(C). *See* Fed. R. Civ. P. 23(e)(2)(C) (requiring proposed relief to be adequate, taking into account costs, risks, and delay of trial and appeal, effectiveness of proposed method of

[8] Overall, Objector devotes little attention to the *Grinnell* factors, instead emphasizing that the Court's fiduciary duty and statutory factors require an evaluation of what the class will actually receive.

[9] *See* Dkt. 446 at 3 (citing at length Sixth Circuit precedent); *id.* at 4–5 (discussing at length Third Circuit precedent).

distributing relief and claim-processing, terms of attorneys' fees award, and settlement agreement). Objector reads the amendment as mandating an assessment of the class's utilization of the settlement, as opposed to a broad prediction of the fairness of the offer considering what the class could have obtained at trial. (Dkt. 446, at 12 (Objector arguing that "Rule 23(e) fairness inquiry evaluates what the class *actually* received." (emphasis in the original)).) The Court, however, finds nothing to suggest that the updated factors were designed to dramatically shift the emphasis of the *Grinnell* factors and mandate an evaluation of the class's actual recovery. *See* Fed. R. Civ. P. 23(e)(2), Advisory Committee Notes, 2018 Amendments ("The goal of this amendment is not to displace any [circuit court] factor[.]"); *Hernandez v. Between the Bread 55th Inc*., 496 F. Supp. 3d 791, 799 (S.D.N.Y. 2020) (same). In fact, Rule 23 mentions the evaluation of a "proposal," not an outcome. *See* Fed. R. Civ. P. 23(e)(2) ("Approval of the *Proposal*" (emphasis added)). This language indicates a forward-thinking evaluation. *See id.* Advisory Committee Note ("The relief that the settlement *is expected* to provide to class members is a central concern." (emphasis added)); *see also* 4 Newberg and Rubenstein on Class Actions § 13:51 (6th ed.) (discussing Fed. R. Civ. P. 23(e)(2)). Furthermore, consistent with the *Grinnell* factors, Rule 23(e)(2)(C) provides that the adequacy of the settlement should be assessed "taking into account," among other things, "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). Thus, under all relevant Rule 23 standards, the key factor is whether the compensation available to the settlement class is fair and adequate, and not the extent to which the class takes advantage of the offer presented to them.

The primary cases upon which Objector relies— *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) and *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935

(9th Cir. 2011)—do not apply here.[10] Putting aside the fact these out-of-circuit authorities predate the 2018 amendment on which Objector relies, the Court finds them inapposite.

In *Baby Prods.*, the class sought recompense for alleged collusion involving baby products costing up to $300 each. 708 F.3d at 169–70. The settlement offered a 20% refund to those with proof of purchase, and $5, less than 2% of the cost, to others. *Id.* at 171, 174–75. A *cy pres* provision channeled unpaid amounts to third parties. *Id.* at 169. Most claimants fell into the $5 compensation category, resulting in only $3 million being paid to the class out of a $20+ million settlement fund, with the majority going to third parties. *Id.* at 174–75. Under these circumstances, with the crucial fact seemingly being that most of the class recovered less than 2% of the cost of the product, the Third Circuit vacated the settlement, ordering further investigation for fairness. *Id.* at 175–76. Here, Objector does not dispute that class members (and households) without proof of purchase in this case will be fairly compensated. As discussed below, these members are set to receive an amount seven times greater than the minimum cost of one unit of flushable wipes and nearly half of the maximum cost of one unit. (Dkt. 443, at 6 (describing the $7 limit for claims without proof of purchase); Dkt. 444, ¶ 38.) Therefore, in contrast to *Baby Prods.*, in this case, any unclaimed funds will result from class members failing to accept the settlement offer, not from an inherently deficient offer. Hence, *Baby Prods.*—which does not

[10] The Court notes that while Objector cites a host of authorities, he seldom discusses the holding or facts of them. (*See generally* Dkts. 446, 460.) Objector's most cited case, *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021), relies on principles articulated by the Ninth Circuit in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). Thus, the Court views *In re Bluetooth* as Objector's leading authority. Similarly, the only reported case whose facts and holding Objector actually discusses is *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), which the Court discusses in this section. (*See* Dkt. 446, at 4–5.) In his Reply, Objector substantively discusses *Amchem* and *Literary*, (Dkt. 460, at 6–7), which the Court addressed *supra*.

stand for the sweeping principle that courts are required to focus on what the class actually receives—does not apply here.

Similarly, *In re Bluetooth* involved a fundamentally inadequate offer to the class. The class in question sought damages based on the defendants' failure to disclose the risk of noise-induced hearing loss linked to their wireless Bluetooth headsets. 654 F.3d at 938–39. The settlement at issue required the defendants to publish acoustic safety information, pay $100,000 in *cy pres* awards to nonprofit organizations, pay attorneys' fees up to $800,000, and pay $12,000 to the class representatives. *Id.* at 939–40. The district court approved the settlement and awarded the attorneys $850,000 in fees, as well as $12,000 to be distributed among the nine representative plaintiffs. *Id.* at 949. The Ninth Circuit vacated the settlement, citing three glaring indicators of collusion: first, that the settlement provided no monetary compensation of any kind to the class but offered a high award to the lawyers; second, that the settlement included a "clear sailing provision" that prevented defendants from challenging any request for attorneys' fees; and third, that any fees not awarded would be returned to the defendants. *Id.* at 946–49. Thus, *Bluetooth* too concentrated on the inherent deficiency in the settlement offer to the class rather than the actual compensation the class received, which the Ninth Circuit found to be grossly unfair. Here, unlike the class in *Bluetooth*, the class will receive monetary compensation, there is no "clear sailing" provision, and the amount of fees that Class Counsel will receive will be determined by the Court and has yet to be determined.

Further, and regardless, the Court disagrees that an impermissible self-interest is present just because Class Counsel may request for more than the class recovered. The settlement offered a $20 million fund to the class, surpassing even the maximum amount that Class Counsel would have been allowed to receive. Objector argues that this claims-made settlement gives higher

recovery only to class members able to produce a proof-of-purchase, a process it views as onerous. (Dkt. 446, at 15–19; *id.* at 8 ("[C]ounsel receive a disproportionate distribution of the settlement, obtaining an ample reward for themselves while about 99% of the class recovers no monetary compensation in exchange for a release of their claims." (citing *In re Bluetooth*, 654 F.3d at 947).) However, despite Objector's skepticism, claims-made settlements, with proof-of-purchase, are not inherently unfair and are regularly permitted. *See, e.g.*, *Baby Prods.*, 708 F.3d at 170 (approving a claims-made settlement based on proof-of-purchase in principle, assuming further fairness findings by the district court). Indeed, as discussed further below, Objector's argument ignores the unique risks that the class members in this case, especially those without proof of purchase, would face if their claims were to go to trial. Finally, under the proposed settlement here, the Court retains the authority to determine the appropriate amount of Class Counsel's fees.

The Court also rejects Objector's argument that temporary website glitches show, or even suggest, ill intent by Class Counsel, (Dkt. 446, at 12), or that the absence of additional benefits to the class invalidates the settlement (*id.*). Ultimately, Objector wishes for a more lucrative settlement for the class; but the Court is tasked with assessing the fairness of the existing one. Fair does not mean superior, or even ideal. Because the Court deems the settlement fair in all aspects—as it does below—the settlement cannot be viewed as self-serving simply because the class did not fully utilize it or because other elements could have enhanced it.

Thus, the objection to the settlement as being tainted by Plaintiffs' and Class Counsel's self-interest is overruled.

B. The Settlement is Substantively and Procedurally Fair

A settlement's fairness is gauged by "looking at both the negotiating process by which it was achieved and the settlement's terms—that is, procedural and substantive fairness." *In re*

Citigroup Inc. Bond Litig., 296 F.R.D. 147, 154 (S.D.N.Y. 2013) (citing *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). In scrutinizing a settlement's fairness, courts adhere to "the strong judicial policy favoring settlements of class action suits." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474 (S.D.N.Y. 2013) (cleaned up). Indeed, "[c]lass action suits [often and] readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 330 (E.D.N.Y. 2010) (citation omitted). In deciding whether a settlement is fair, "[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 265 (E.D.N.Y. 2009) (citing *Grinnell*, 495 F.2d at 462).

1. Procedural Fairness

Rule 23(e)(2)(A)–(B) require a finding of "procedural fairness, as evidenced by the fact that the proposal was negotiated at arm's length." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019). "The procedural fairness inquiry requires the court to scrutinize the negotiation process in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 478 (E.D.N.Y. 2016) (citation omitted). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc.*, 396 F.3d at 116 (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (same).

The Court finds that the presumption of fairness applies here. The settlement in this matter emerged after more than nine years of rigorous litigation, entailing substantial discovery, motion practice, and two appeals to the Second Circuit. (Dkt. 444, ¶¶ 6, 19–24.) The robust prosecution of the underlying claims, prior to settlement, evidences procedural fairness. *See Graff*, 132 F. Supp. 3d at 479 (finding procedural fairness when, among other things, "the [p]arties have in fact conducted substantial discovery (written and depositions), have briefed and argued extensive discovery motions[.]"); *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (finding fairness when "[c]lass counsel prosecuted this complicated. . . case for over four and a half years"). The settlement negotiations, initiated in 2018, were also fair. (Dkt. 444, ¶ 27.) Over time, the Parties attended several multi-day settlement sessions at KCC's offices in Neenah, Wisconsin, and conducted several follow-up video conferences. (*Id.*) In July 2020, the Parties participated in a mediation session with the Honorable Wayne R. Andersen (Ret.). (*Id.* ¶ 29.) In September 2021, KCC presented a formal settlement proposal, culminating in the April 5, 2022, settlement agreement now under Court review. (*Id.* ¶ 29–30.) Resulting from years of negotiations, comprehensive discovery, and multiple hearings—this settlement satisfies the requirements of Rule 23(e)(2)(A)–(B).

2. Substantive Fairness

Next, the Court considers each of the *Grinnell* factors to assess substantive fairness, recognizing that "[i]n finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 493 (S.D.N.Y. 2018) (cleaned up). Here, nearly every *Grinnell* factor favors approving the Agreement.

(a) The Expected Complexity, Expense and Likely Duration of the Litigation Support Approval

The first *Grinnell* factor largely overlaps with the first statutory factor under Rule 23(e)(2)(C)(i). As to both, the Court notes that this case has already spanned nine years of intensive litigation, with the prospect of litigation of this matter through trial presenting a daunting and long path of extensive and complex motion practice, including challenges to experts, and high fees and costs. A settlement, by contrast, provides "relief without the delay, risk, and uncertainty of trial and continued litigation." *In re Namenda*, 462 F. Supp. 3d at 312. While each member of the class alleges to have been defrauded, "the amounts are likely too small for each member to afford to adequately pursue his or her claim in separate litigation." *Hernandez v. Immortal Rise, Inc.,* 306 F.R.D. 91, 100 (E.D.N.Y. 2015). Further, "litigation would result in additional expense, including costly depositions of opt-in plaintiffs and others, motion practice, trial preparation, trial and appeal, that could meaningfully decrease possible recovery for plaintiffs." *Flores v. Mamma Lombardi's of Holbrook, Inc*., 104 F. Supp. 3d 290, 299 (E.D.N.Y. 2015). Thus, the first factor supports approving the settlement.

(b) The Reaction of the Class to the Settlement Has Been Overwhelmingly Positive

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp*., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). "Courts have found this factor to weigh in favor of approval where the majority of class members have not objected to or opted out of a settlement." *Flores*, 104 F. Supp. 3d at 300. Differently put, a few dissenters do not necessarily indicate a poorly received settlement. *See id.* 301 (finding that three objections from a class of 4,000 members signaled a positive class response); *Dupler v. Costco Wholesale Corp*., 705 F. Supp. 2d 231, 239 (E.D.N.Y.2010) ("Of the 11,800,514 class members, only 127 opted out and 24 objected.

Such a small number of class members seeking exclusion or objecting indicates an overwhelmingly positive reaction of the class"); *Stinson v. City of New York*, 256 F. Supp. 3d 283, 293 (S.D.N.Y. 2017) (concluding that for a settlement where more than 900 thousand notices were sent—five objections and 30 exclusion requests represented an "overall low number" suggesting "general approval"). Here, as of August 2022, only 16 class members have sought exclusion from the class. (Dkt. 444, ¶ 32.) Out of the 185,546 claims received to date, only one objection has been lodged. (Dkt. 452, ¶ 2; *see also* Dkt. 446.) Thus, the Court finds that this settlement, overall, has been well received. Notably, the fact that a relatively small number of class members submitted claims is not decisive. *Stinson*, 256 F. Supp. 3d at 291 (noting that "claims made settlements regularly yield response rates of 10 percent or less" (cleaned up)); *see also* 4 Newberg and Rubenstein on Class Actions § 12:17 (6th ed.) ("Given the small value of most class action claims, it should not be surprising that few class members bother to spend the time filing a claim"). "It is the absence of significant exclusions or objections that courts in this Circuit regularly consider, not low response rates." *Stinson*, 256 F. Supp. 3d at 290. Accordingly, given the low number of objections and exclusions, the second factor generally favors the settlement.

(c) Plaintiffs are Sufficiently Informed About this Action

"The third *Grinnell* factor considers the amount of discovery completed, with a focus on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Namenda*, 462 F. Supp. 3d at 312. Here, extensive discovery was exchanged between the Parties, including expert opinions, deposition statements, and scientific materials. (*See generally* Dkt. 444.) Thus, this factor supports the settlement. *See Hernandez*, 306 F.R.D. at 100 (observing that the third factor was satisfied because class counsel conducted an "investigation and legal research into the merits,"

along with "interviewing plaintiffs and class members, and analyzing documents turned over by defendant").

(d) Plaintiffs Face Risks to Establish Liability and Damages

"Litigation inherently involves risks." *Flores*, 104 F. Supp. at 303 (citation omitted). This case is no exception. Plaintiffs would face several substantial risks if this case proceeded to trial. First, Plaintiffs' case hinges on their ability to prove, through expert testimony, a price premium. Absent such proof, their class would disintegrate. *See Passman v. Peloton Interactive, Inc*., No. 19-CV-11711 (LJL), 2023 WL 3195941, at *27 (S.D.N.Y. May 2, 2023) (declining class certification of misrepresentation claim brought under the New York General Business Law due to plaintiffs' inability to establish a price premium—their only method of evading individualized examination that would undermine predominance). As Plaintiffs admit, it is uncertain whether they would be able to establish a price-premium, causation, and injury. *Id.* at * 21 ("Under the price-premium theory . . . the plaintiff must still show that the alleged misstatement *caused* the price premium." (emphasis in the original)). Indeed, Plaintiffs recognize the risk that their expert testimony would not fare well at trial. (Dkt. 443, at 15 ("[T]here is no guarantee that [the expert testimony] would hold up to similar – and likely even more severe scrutiny – at trial.").)

Further, "[e]ven assuming that Plaintiffs prevailed on liability, the existence and amount of damages would have been hotly contested at trial." *In re Namenda*, 462 F. Supp. 3d at 313. As prior opinions in this case have noted, Plaintiffs' request for statutory damages—as a class—under New York law might raise "[c]omplex *Erie* problems" at trial. *Kurtz v. Kimberly-Clark Corp*., 414 F. Supp. 3d 317, 336 (E.D.N.Y. 2019) ("*Kurtz III*"), *aff'd in part and rev'd in part on other grounds*, *Kurtz v. Costco Wholesale Corp*., 818 F. App'x 57 (2d Cir. 2020). This is because New York law clearly states that class actions cannot proceed unless specifically authorized by the

relevant statute. N.Y. CPLR § 901(b) ("Unless a statute creating or imposing a penalty . . . specifically authorizes the recovery thereof in a class action, an action to recover [it] may not be maintained as a class action."). Here, Plaintiffs have pursued a federal class-action lawsuit and invoked New York General Business Law—despite its lack of explicit provision for collective recovery. These factual and legal complexities convince the Court that Plaintiffs would face substantial risks if they proceed either to summary judgment or trial.

(e) Defendant's Ability to Withstand a Greater Judgment is Irrelevant

The seventh factor is "typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement." *Namenda*, 462 F. Supp. 3d at 315. Thus, absent a defendant in financial straits, the seventh factor rarely bears on the analysis and is usually "neutral." *Id.*

(f) The Eighth and Ninth Factors Regarding Range of Reasonableness Favor Settlement

"The final two *Grinnell* factors [regarding the range of reasonableness of the settlement in light of the best possible recovery] are typically considered together." *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 432 (S.D.N.Y. 2016). "[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal–Mart Stores, Inc.*, 396 F.3d at 119 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). The mere "fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455.

The proposed settlement allows the class to recoup $20 million for their alleged harm. As a nearly best-case scenario, Plaintiffs could recover statutory damages under New York law,

amounting to $50 per class-member. Assuming the Administrator's assessment is accurate, and the class includes roughly 9 million people—the total amount of recovery for the class for statutory damages would be around $450 million. Hence, assuming the Court approves the settlement, the class is set to recover about 4% of the full recovery. On the other end of the spectrum, class members' request for actual damages, *i.e.,* the "price premium" they paid for the flushable wipes, is far less than $50 per class member. The "price premium," according to Plaintiffs' expert, was about 6.2% over the sale price. *See Kurtz III*, 414 F. Supp. 3d at 327. KCC has suggested during the case that the "retail prices of its wipes vary widely depending on the product and the retailer, ranging from $0.99 to $16.99" since 2010. *Kurtz II*, 321 F.R.D. at 515.[11] Thus, the class of roughly 9 million individuals stands to receive far less than $450 million in actual damages based on a price premium theory. For example, the worst-case scenario at trial would be proof that each class member purchased a minimum amount of wipes, presumed by the Agreement to be 10 units, priced at $0.99, and retained no proof of purchase. Based on Plaintiffs' expert view that class members paid an unfair price premium of 6.2% per unit, each class member would be entitled to recover approximately $0.6138 (or 10 x $0.06138). This would result in a total class recovery slightly over $5.7 million. Compared to this potential minimum total recovery, the Agreement provides the class a substantial benefit.

In other words, as is often true in class actions, "the range of potential damages [is] wide . . . and depend[s] on precisely what the jury would find." *In re Namenda.*, 462 F. Supp. 3d at 315. Due to the inherent risk of class-action lawsuits, courts often approve settlements awarding

[11] In this regard, the Complaint contains the following allegation: "For example, Cottonelle Fresh Care Flushable Cleansing Cloth Refill[s] cost $0.04 per wipe and Kirkland Signature Moist Flushable Wipes cost $0.028 per wipe, whereas comparable wipes by Huggies and Pampers that are not labeled as flushable sell for $0.02 per wipe, or nearly half the cost of flushable wipes." (Dkt. 1, ¶ 89.)

plaintiffs only a small portion of the possible trial recovery. *Id.* (collecting cases where recovery ranged from 6% to 10.6% of maximum recovery at trial). It is crucial to note that the Court does not "consider this [settlement] in a vacuum," but instead views it "in light of the legal and evidentiary challenges that would face the Plaintiffs in the absence of a settlement." *Perez v. Ultra Shine Car Wash, Inc*., No. 20-CV-782 (KMK), 2022 WL 2129053, at *3 (S.D.N.Y. June 14, 2022) (noting cases where courts approved settlements awarding 4% of the maximum possible recovery because the record suggested that plaintiffs might struggle to prove their claims). After nine years of the litigation, as the Administrator notes, "an exact or even estimated class size is impossible to calculate given the lack of adequate sales data." (Dkt. 457, ¶ 9.) The many legal and factual uncertainties in this record make potential recovery to the class unpredictable. The settlement offer surpasses the class's minimum reasonable recovery amount. Thus, "[g]iven the complexity and risk" of this case, including the legal and factual unknowns that are part of any trial, the fund before the Court falls within the range of fair recoveries to the class. *In re Namenda*., 462 F. Supp. 3d at 315.

The remaining statutory factors—the proposed method of distribution, the terms of the attorneys' fees, and equitable treatment among class members, *see* Fed. R. Civ. P. 23(e)(2)(C)–(D)—are largely subsumed into the concept of reasonableness. Nonetheless, given the objection in this case, the Court also specifically considers the proposed method of distribution separately. As to the method of distribution, "[a] claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *In re Payment Card*, 330 F.R.D. at 40. At bottom, while the plan of distribution must be fair, it "need not be perfect." *Id.* (cleaned up). Here, the plan of distribution was made in consultation with an experienced Claims Administrator. (Dkts. 432-2, 444, 450-1.) That plan provides that, within 14

days of the Court's issuance of the Preliminary Approval Order, the Claims Administrator will establish a settlement website—containing various informational materials and notices in downloadable form—as well as a toll-free information line. (Dkt. 437, at 2.) The Administrator will then implement, at least 45 days before the Final Approval Hearing, a notice plan designed to reach approximately 72% of the class. (*Id.* at ECF 2–3.) Class members can submit claims via U.S. mail or electronically. (*Id.* at ECF 26–27.) The Claims Administrator will be responsible for processing claim forms, validating claims, and preventing fraudulent claims. (Dkt. 432-1, ¶ 2.6.) It will then determine which claims are valid within 30 days after the settlement becomes final and distribute payments up to 60 days after that. (*Id.* ¶¶ 2.6, 2.9.) The Court finds that this proposed plan ensures an "equitable and timely distribution of [the] settlement fund without burdening the process in a way that will unduly waste the fund." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 695 (S.D.N.Y. 2019) (citation omitted).[12] The final factor, therefore, supports approving this settlement.

[12] Objector filed a declaration stating that in July 2022, he struggled with the settlement website and criticized his inability to file a claim without a customer ID number. (Dkt. 446-1, ¶ 7.) His attempts to reach help via the toll-free telephone line were thwarted by automated messages. (*Id.* ¶ 7.) Despite these obstacles, Objector eventually filed a claim in August 2022. (*Id.* ¶ 8.) At the November 7, 2022, Supplemental Fairness Hearing, Class Counsel Serra asserted that these issues were isolated instances. (Dkt. 463, at 44–45.) A sworn declaration in the record, from one of the Claims Administrator's principals, states the same. (Dkt. 450-2.) Under these circumstances, and with the benefit of hearing argument from the Parties and Objector, the Court does not find that the distribution plan is inadequate or unduly burdens class members' reasonable recovery in this case.

CONCLUSION

For the reasons stated above, the Court hereby finally approves the settlement agreement and certifies the settlement class. The sole objection against the settlement is hereby overruled. On September 19, 2023, at 2 PM, the Parties and Objector shall appear in Courtroom 4F North for a hearing where Class Counsel's fees will be decided and awarded.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: June 12, 2023
Brooklyn, New York