

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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| COMMISSIONERS OF PUBLIC WORKS OF) | Civil Action No. 2:21-cv-00042-RMG |
| THE CITY OF CHARLESTON (d.b.a.) | |
| Charleston Water System), Individually and on) | <u>CLASS ACTION</u> |
| Behalf of All Others Similarly Situated,) | |
| Plaintiff,) | REPLY TO NORTH SHORE WATER |
| vs.) | RECLAMATION DISTRICT (NSWRD) |
|) | OBJECTION TO PROPOSED |
|) | SETTLEMENT |
| COSTCO WHOLESALE CORPORATION,) | |
| CVS HEALTH CORPORATION,) | |
| KIMBERLY-CLARK CORPORATION, THE) | |
| PROCTER & GAMBLE COMPANY,) | |
| TARGET CORPORATION, WALGREEN) | |
| CO. and WAL-MART, INC.,) | |
| Defendants.) | |
| _____) | |

Plaintiff, the Commissioners of Public Works of the City of Charleston (d.b.a. “Charleston Water System”), submits this reply to the North Shore Water Reclamation District’s Objection to the Proposed Settlement.¹

Despite the robust notice plan implemented by the Settling Parties, including a direct mailing of over 17,000 notices to Settlement Class Members, the Court has received only a *single* objection to the proposed Settlement as of the December 29, 2021 objection deadline. *See* ECF No. 126. This fact alone demonstrates that the Settlement is a remarkable achievement.² And the objection – submitted by the North Shore Water Reclamation District (“NSWRD”) of Gurnee, Illinois – does not object to any specific or substantive provision, benefit, or other aspect of the Settlement itself, or to the requested attorneys’ fee award. Rather, NSWRD objects to the process by which the Settlement was obtained, and to the class action and related settlement provisions of Rule 23 in general.

NSWRD states, for example, that the proposed Settlement binds Settlement Class Members “without providing notice of the litigation or allowing participation” by such Class members in the settlement negotiations. ECF No. 126 at 1.³ As the Settling Parties provided notice of the litigation under the Court-approved Settlement notice program – which included, in addition to the above-mentioned First-Class Mail notice, email notice, publication in a widely-circulated industry magazine, a press release, and a Settlement Website – NSWRD presumably takes issue with not

¹ *See* ECF No. 126. All capitalized terms that are not otherwise defined herein have the same meanings ascribed to them in the Memorandum of Law in Support of: (1) Plaintiff’s Motion for Final Approval of Class Action Settlement; and (2) Class Counsel’s Application for an Award of Attorneys’ fees and Expenses (“Final Approval Brief”), ECF No. 123-1, and Settlement Agreement, ECF No. 11-1.

² *See* ECF No. 127; *cf.* *NACWA Commends Settlement in Wipes Litigation*, NACWA (Apr. 26, 2021), <https://www.nacwa.org/news-publications/press-release-details/press-release/2021/04/26/nacwa-commends-settlement-in-wipes-litigation>.

³ Pin cites for docket entries (“ECF”) refer to page numbers generated by the CM/ECF system.

being notified of the litigation when it was filed, or of the confidential settlement process which began even before Plaintiff brought the action. But as the Court is aware, there is no requirement to notify putative class members of a litigation at the time of filing, or to solicit the engagement of putative class members in settlement communications in real-time.

NSWRD also argues that the proposed Settlement “improperly intrudes upon the sovereign authority granted to the majority of [] public treatment agencies to adopt and enforce laws that govern the use and operation of their respective treatment works by limiting the public treatment agencies to obtain injunctive relief to stop actions that have been deemed unlawful[.]” *Id.* at 1. The proposed Settlement, however, does no such thing. NSWRD, and any Settlement Class Member for that matter, is free to support or object to any laws that may govern its operation. The Settlement does *not*, as NSWRD contends, restrict its ability to address suspected unlawful actions, or otherwise regulate what is discharged into its sewer system or wastewater facilities, other than foreclosing it from filing a lawsuit against Kimberly-Clark seeking similar injunctive relief as provided for in the Settlement. Rather, at its core, the proposed Settlement simply provides a mechanism for improving the dispersibility of a major manufacturer’s flushable wipes products and requires enhanced labeling of non-flushable wipes, thereby providing uniform relief to Settlement Class Members nationwide. Accordingly, nothing in the proposed Settlement eliminates NSWRD’s “lawful authority to regulate” activities affecting its operation. *Id.* at 2. NSWRD has the exact same authority to regulate the discharge of wipes into its system after approval of the Settlement as it did before approval.

Furthermore, NSWRD takes issue with the process by which Plaintiff, through its capacity as a representative on behalf of a Rule 23(b)(2) putative class seeking injunctive relief, has “circumvent[ed] [] well-established peer networks” to achieve its “preferred resolution” of a problem that affects the municipal wastewater industry as a whole. ECF No. 126 at 2. But this argument,

like others made by NSWRD, ignores the legal authority under which the Settling Parties have operated – *i.e.*, Rule 23 – which provides for certification only after a finding that “the interests of all of the class members will be fairly and adequately represented by the named plaintiffs and class counsel.” *Berry v. Schulman*, 807 F.3d 600, 612 (4th Cir. 2015). And “Rule 23(e)’s settlement approval process provides additional protection, ensuring that Rule 23(b)(2) class members receive notice of a proposed settlement and an opportunity to object, and that a ‘settlement will not take effect unless the trial judge—after analyzing the facts and law of the case and considering all objections to the proposed settlement—determines it to be fair, adequate, and reasonable.’” *Id.*⁴ That procedural due process does not grant opt-out rights to NSWRD and other Settlement Class Members under Rule 23(b)(2) is inconsequential given the aforementioned procedural safeguards, and because “individualized adjudications are unnecessary” in an action brought on behalf of a class seeking uniform injunctive relief. *Id.* at 611-12.

Nor has Kimberly-Clark “chosen” a “municipal operator with which to negotiate to establish a regulatory framework” applicable to all wastewater agencies nationwide, regardless of local or other circumstances.⁵ ECF No. 126 at 2. As discussed above, the proposed Settlement does not constitute (or even resemble) a “regulatory framework” at all, and federal, state, and local governments are free to adopt more stringent or different dispersibility and labeling laws if they choose. The only real right that NSWRD releases under the Settlement is its ability to sue Kimberly-Clark for similar injunctive relief in the future. But NSWRD has not provided an argument, or

⁴ In this sense, the proposed Settlement is no different than others that have been approved in cases brought by municipalities or other government agencies. *See, e.g., City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 912 (S.D. Ill. 2012).

⁵ For sake of clarity, ***Plaintiff*** – not Kimberly-Clark – chose this venue to address its ongoing problem with wipes. Therefore, there is nothing “truly novel” about the settlement procedure and negotiations here as Kimberly-Clark did not “choose the venue in which to negotiate a solution” to a problem that would bind all Settlement Class Members. ECF No. 126 at 2.

supporting authority, as to why the specific relief obtained in the proposed Settlement is insufficient to address any concerns with respect to the dispersibility of Kimberly-Clark's flushable wipes and labeling of its non-flushable wipes. Indeed, the unprecedented relief obtained here can only help any of NSWRD's ongoing or future efforts to address problems associated with Kimberly-Clark's wipes.

While Plaintiff certainly empathizes with NSWRD's desire to "have a voice in the process" to address the problems at issue in the litigation, its objection, filed publicly on the Court's docket, is evidence itself of NSWRD's ability to provide input on this matter.⁶ *Id.* at 1. And NSWRD's objection must be viewed in the context of over 17,000 Settlement Class Members who received First-Class Mail Notice of the proposed Settlement (and may have seen notice elsewhere), and did *not* object, along with the letters of support submitted by dozens of Settlement Class Members. For example, a letter signed by 33 individuals representing virtually every Settlement Class Member in the state of South Carolina expressed "unqualified support" for the proposed Settlement, and in particular Kimberly-Clark's commitment to make flushable wipes that "will pass the national municipal flushability test," and "willingness to fairly label their non-flushable products so that consumers will understand . . . that such products are not designed to be flushed." ECF No. 127 at 4. Such efforts, according to these entities, "will go a long way to minimize the wipes-related impacts to our systems over time." *Id.* Likewise, water associations in Missouri and Virginia submitted letters providing their "unanimous and unqualified support" for the proposed Settlement that will at least partially alleviate the "daily headache" that wipes cause for their utilities. *Id.* at 1, 10.

⁶ Moreover, entities through which municipal wastewater treatment agencies have historically joined together "to address common problems," as NSWRD admits (ECF No. 126 at 1), were consulted and provided input throughout the settlement process. *See, e.g.*, ECF No. 123-2 at ¶¶9-10, 12-13 (discussing current and former IWSFG member involvement in litigation and settlement process).

For these reasons, and those set forth in the Final Approval Brief, Plaintiff respectfully requests that the Court enter an order granting final approval of the Settlement and awarding the requested attorneys' fees and expenses.⁷

DATED: January 12, 2022

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⁷ While the Notice clearly stated that any Settlement Class Member may appear and/or testify at the Final Approval Hearing, NSWRD has said that it “does not intend to personally appear, present witnesses and/or testify at the Final Approval Hearing.” ECF No. 126 at 2.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 12, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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