UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

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

Representative Plaintiff, the Commissioners of Public Works of the City of Charleston (d.b.a. "Charleston Water System") ("Plaintiff"), respectfully files this motion for an Order granting preliminary approval of the class action settlements with Costco Wholesale Corporation, CVS Health Corporation, Target Corporation, Walgreen Co., and Wal-Mart, Inc. (collectively, the "Settling Defendants") (collectively with Plaintiff, the "Parties") that resolves all of Plaintiff's Released Claims against the Settling Defendants during the Settlement Class Period.[1] For the reasons set forth in the accompanying Memorandum, Plaintiff respectfully moves the Court for an Order:

1. Granting preliminary approval of the Settlements;

2. Certifying a Rule 23(b)(2) class for settlement purposes;

3. Appointing Plaintiff as Class Representative;

4. Appointing Robbins Geller Rudman & Dowd LLP and AquaLaw PLC as Class Counsel;

5. Approving the Parties' proposed form and method of providing notice of the pendency of the Settlements to the Settlement Class under Rule 23(e)(2); and

6. Scheduling a Settlement hearing for final approval of (a) the Settlements set forth in the Stipulations of Settlement, and (b) Class Counsel's application for an award of attorneys' fees and expenses incurred in representing the Settlement Class.

In support of this Motion, Plaintiff incorporates by reference its Memorandum in Support and the Stipulations of Settlement and supporting Exhibits, which are filed simultaneously herewith.

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[1] Capitalized terms not defined herein are defined in the Stipulations of Settlement, dated October 11, 2023 and October 26, 2023.

DATED: October 26, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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

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Representative plaintiff, the Commissioners of Public Works of the City of Charleston (d.b.a. "Charleston Water System") ("Plaintiff"), submits this memorandum of law in support of its motion for preliminary approval of the proposed Settlements with Costco Wholesale Corporation ("Costco"), CVS Health Corporation ("CVS"), Target Corporation ("Target"), Walgreen Co. ("Walgreens"), and Wal-Mart, Inc. ("Wal-Mart") (collectively, the "Settling Defendants") (collectively with Plaintiff, the "Parties").[1] The terms of the Settlements are set forth in the Settlement Agreements between the Parties submitted herewith.

I. INTRODUCTION

The Settlements provide critical injunctive relief to municipal wastewater systems throughout the country, including a commitment by the Settling Defendants to meet a national municipal wastewater industry flushability standard for their flushable wipes and labeling improvements for non-flushable wipes – to resolve all of Plaintiff's Released Claims against the Settling Defendants during the Settlement Class Period – and bring a complete resolution to the Action. The Settlements are the result of arm's–length negotiations between Class Counsel and Defense Counsel, with the assistance of mediator Michael Ungar, Esq., that began over a year ago. Plaintiff and Class Counsel believe that the Settlements – which largely parallel the settlement with Kimberly-Clark Corporation ("Kimberly-Clark") previously approved by the Court and the recently filed settlement with The Procter & Gamble Company ("P&G") – present a very good result for the Settlement Class in the face of substantial uncertainty, and will provide wastewater treatment facilities nationwide with significant additional relief from wipes-related clogs and blockages.

In determining whether preliminary approval is warranted, the issue before the Court is

[1] Capitalized terms not defined herein are defined in the Stipulations of Settlement entered into between: Plaintiff and Costco, CVS, and Target, dated October 11, 2023 ("Costco, CVS, and Target Agreement"); Plaintiff and Walgreens, dated October 26, 2023 ("Walgreens Agreement"); and Plaintiff and Wal-Mart, dated October 26, 2023 ("Wal-Mart Agreement") (together, the "Settlement Agreements"). Citations and internal quotations are omitted and emphasis is added throughout unless otherwise noted. A proposed order granting the relief requested herein (the "Notice Order") is attached to the Settlement Agreements, filed herewith, as Exhibit D.

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

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

II. BACKGROUND OF THE LITIGATION

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

Plaintiff brought this putative class action on January 6, 2021, ECF No. 1, on behalf of all entities that own and/or operate sewage or wastewater conveyance and treatment systems, including municipalities, authorities and wastewater districts (sewage treatment plant, or "STP Operators") in

[2] In accordance with the Court's instructions in its September 27, 2023 Order (ECF No. 195 ¶1), Plaintiff submitted its motion for preliminary approval of the proposed Settlement with P&G on October 3, 2023 (ECF No. 197) ("P&G Agreement") and was directed to file its motion for preliminary approval of the Settlements with the Settling Defendants by October 26, 2023. *See* ECF No. 195 ¶2. Given that Plaintiff anticipated global resolution and the filing of a single motion for preliminary approval of the various settlements, the exhibits to the Settlement Agreements contemplate joint approval and joint notice of the Settlements.

the United States whose systems were in operation between January 6, 2018 and the date of preliminary approval ("Settlement Class" and the "Settlement Class Period"). Defendants are P&G, Costco, CVS, Target, Walgreens, Wal-Mart, and Kimberly-Clark[3] (collectively, "Defendants"). Plaintiff alleges that Defendants' deceptive, improper, or unlawful conduct in the design, marketing, manufacturing, distribution, and/or sale of flushable wipes caused recurring property damage, thus constituting nuisance, trespass, defective design, failure to warn and negligence. ¶¶150-193.[4]

Plaintiff further alleges Defendants' branded flushable wipes (including the "Products")[5] are unsuitable for flushing, making them improperly labeled as "flushable" or "safe for sewer and septic systems." ¶¶28-47. Plaintiff alleged that Defendants' flushable wipes did not disperse in a sufficiently short amount of time (if at all) to avoid clogging or other operational problems, as indicated by independent testing and numerous instances of clogs in wastewater systems nationwide, and thus causes ongoing damage to sewer treatment facilities and STP Operators. ¶¶39-99. Plaintiff based its allegations on a thorough factual analysis, based in part on its own experience with multiple clogs containing flushable wipes and tests conducted regarding the inability of flushable wipes to perform as advertised, shedding light on the likelihood of additional future clogs containing flushable wipes. Plaintiff's experience with flushable wipes includes a massive 12-foot-long clog removed from its system in October 2018 (causing over $140,000 in damages) and another clog in June 2019 (causing approximately $60,000 in damages), among other more routine wipes-related

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

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

[5] The Products are defined by the respective Settlement Agreements as "moist wipes products labeled as flushable and manufactured by Nice-Pak or other flushable wipes manufacturer and sold in the United States by Defendants under their store-brands (*e.g.*, up & up™, CVS Health™, Total Home®, or Kirkland Signature)" (Costco, CVS, and Target Agreement ¶1.18); "moist wipes products labeled as flushable and manufactured by Nice-Pak or other flushable wipes manufacturers and sold in the United States by Defendant under its store-brands (*e.g.*, Walgreens, Well Beginnings)" (Walgreens Agreement ¶1.18); and "moist wipes products labeled as flushable and manufactured by Rockline and sold in the United States by Defendant under their store-brands Equate and Great Value" (Wal-Mart Agreement ¶1.18).

clogs and blockages. *See* ¶¶48-62 and Complaint, Ex. A (ECF No. 85-1).

On December 2, 2021, the Court denied Costco, CVS, and Target's motion to dismiss the Complaint under the doctrine of primary jurisdiction (*see* ECF No. 121), and on December 13, 2021, the Court denied certain Defendants' motion to dismiss for failure to state a claim in its entirety. *See* ECF No. 122. The Court held, *inter alia*, that Plaintiff has standing to pursue its claims against the remaining Defendants and had adequately alleged facts to support a permanent injunction. *See id.* Thereafter, Defendants (other than Kimberly-Clark) answered the Complaint and exchanged informal discovery. In September 2022, the Court granted the parties' stipulated protective order and joint protective order under Fed. R. Evid. 502(d) in connection with the production of privileged discovery materials. *See* ECF Nos. 168-169. The parties served document requests, responses and objections to document requests, negotiated an ESI protocol (ECF No. 167) and were engaged in intense and extensive negotiations regarding a protocol for the preservation of physical evidence and an evidentiary stipulation before agreeing to focus on global resolution of the Action.

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

B. Summary of the Settlement Negotiations

In May 2022, in connection with a proposed mediation in another pending flushable wipes litigation, *Kurtz v. Kimberly-Clark Corporation, et al.*, No. 1:14-cv-01142-PKC-RML (E.D.N.Y.), a certified consumer class action on behalf of New York purchasers of Kimberly-Clark and Costco's flushable wipes, counsel for Plaintiff and Costco raised the possibility of resolving Plaintiff's claims against Costco, CVS, and Target in the Action. In August 2022, counsel for Plaintiff and counsel for Walgreens discussed the prospect of including Walgreens in the settlement negotiations with Costco,

CVS, and Target, given the involvement of a common flushable wipes supplier in the negotiations - Nice-Pak Products, Inc. ("Nice-Pak"). Over the course of the following months, the parties exchanged drafts of a term sheet and, in November 2022, attended (along with representatives of Nice-Pak) a full-day mediation with mediator Michael Ungar, Esq., a respected neutral who has successfully mediated other flushable wipes cases, covering both actions. Despite their good-faith efforts, the parties did not reach an agreement to settle the Action at that time. Thereafter, with the assistance of Mr. Ungar, the parties further negotiated the contours of an agreement involving compliance with IWSFG flushability guidelines, confirmatory testing, and labeling changes for non-flushable wipes. During this time, the parties exchanged additional drafts of the term sheet.

The parties reached an agreement in principle on the substantive terms of an agreement to resolve the claims against Costco, CVS, Target, and Walgreens and executed a term sheet in March 2023. Subsequently, the parties began negotiating attorneys' fees. With the continued assistance of Mr. Ungar, the parties concluded fee negotiations to resolve claims against Walgreens in June 2023 and to resolve claims against Costco, CVS, and Target in August 2023. Thereafter, Plaintiff began negotiating the stipulations of settlement, executing a stipulation with Costco, CVS, and Target on October 11, 2023, and with Walgreens on October 26, 2023. Nice-Pak is a signatory to the stipulation with Costco, CVS, and Target.

Counsel for Plaintiff and Wal-Mart first began discussing the prospect of resolving the Action in the summer of 2021, with Plaintiff providing Wal-Mart an initial draft stipulation in August 2021. Counsel continued their discussions in October and November 2021. While these preliminary discussions did not result in an agreement, counsel resumed their discussions in February 2022, with Plaintiff providing Wal-Mart an outline of proposed labeling changes and independent testing of the Products. In July 2022, Defendant began working on a memorandum of

understanding ("MOU"), and the parties continued discussing proposed terms throughout the remainder of the year. In early 2023, after months of unsuccessful negotiations, counsel for Plaintiff and Wal-Mart discussed exploring mediation with the assistance of Mr. Ungar, and Wal-Mart provided Plaintiff with a draft partial MOU in February 2023. In advance of the mediation, the parties continued to exchange drafts of the MOU and submitted a joint mediation submission. The parties participated in a full-day mediation session on March 30, 2023, attended by Class Counsel, Counsel for Wal-Mart, Wal-Mart's in-house counsel, and various Rockline Industries ("Rockline")[6] business and legal personnel. At the end of the full-day mediation session, the parties reached an agreement in principle on various terms, including proposed labeling changes for non-flushable wipes and independent testing of the Products. Thereafter, the parties began negotiating a stipulation of settlement and attorneys' fees, ultimately reaching an agreement on fees in late September 2023 and executing the Stipulation on October 26, 2023.

Through the Settlement Agreements, Plaintiff ensured the Settling Defendants would commit to meeting certain flushability standards (including the IWSFG Publicly Available Specification (PAS) 3 ("Slosh Box" Disintegration Test[7])) ("IWSFG 2020: PAS 3"), submit to periodic independent testing, and implement modifications to the packaging of non-flushable wipes. Settlement Agreements ¶2.1.

[6] Rockline is the supplier of Wal-Mart's Equate and Great Value-branded flushable wipes, is a non-party in the Action, and is a party to the Wal-Mart Agreement.

[7] The Slosh Box Disintegration Test is a testing metric widely used in the flushable wipes industry, including by certain Defendants' own trade association – "INDA," the Association of the Nonwoven Fabrics Industry – to determine flushability. The IWSFG 2020: PAS 3 Slosh Box Disintegration Test contains a testing methodology and acceptance criteria far more stringent than INDA's own Slosh Box Disintegration Test contained in the Guidelines for Assessing the Flushability of Disposable Nonwoven Products (GD4) given, *inter alia*, the IWSFG's significantly shorter test duration, lower RPMs (causing less disturbance to the wipes during the test period) and higher percentage "pass through" threshold. *Cf. Publicly Available Specification (PAS) 3:2020 Disintegration Test Methods – Slosh Box*, INTERNATIONAL WATER SERVICES FLUSHABILITY GROUP (Dec. 2020), https://www.iwsfg.org/wp-content/uploads/2021/06/IWSFG-PAS-3-Slosh-Box-Test-2.pdf at 13 *with Guidelines for Assessing the Flushability of Disposable Nonwoven Products*, INDA & EDANA (May 2018), https://www.edana. org/docs/default-source/product-stewardship/guidelines-for-assessing-the-flushability-of-disposable-nonwoven-products-ed-4-finalb76f3ccdd5286df88968ff0000bfc5c0.pdf?sfvrsn=34b4409b_2 at 9.

C. Terms of the Settlements

The Settlements provide meaningful injunctive relief in response to Plaintiff's claims. *First*, Costco, CVS, Target, and Walgreens have agreed to ensure that the Products meet the IWSFG 2020: PAS 3 flushabilty specifications, including an average pass-through percentage of at least 80% after 30 minutes of testing by April 1, 2024, and ensuring that the Products meet all other IWSFG 2020 flushability specifications. Costco, CVS, and Target Agreement ¶2.1(a); Walgreens Agreement ¶2.1(a). Wal-Mart has committed that the Products currently meet the same IWSFG 2020: PAS 3 flushabilty specifications, and that the Products likewise meet all other IWSFG 2020 flushability specifications. Wal-Mart Agreement ¶2.1(a).

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

Third, the Settling Defendants have agreed to labeling changes for non-flushable products. Costco, CVS, Target, and Walgreens have agreed to meet the "Do Not Flush" labeling standards set forth in Chapter 590 of Assembly Bill No. 818 of California State, which took effect on July 1, 2022 ("AB818"), Section 3 of House Bill 2565 of Washington State, which took effect on March 26, 2020 ("HB2565"), and Section 1 of House Bill 2344 of Oregon State, which took effect on September 25, 2021 ("HB2344"), ***nationwide*** to the extent such products are "Covered Products" as defined in AB818, HB2565, and HB2344. Costco, CVS, and Target Agreement ¶2.1(c)(iii); Walgreens Agreement ¶2.1(c)(iii). Wal-Mart has likewise agreed to implement consistent labeling nationwide for its non-flushable products, which will bring these products' labeling in compliance with the aforementioned state laws throughout the country. Wal-Mart Agreement ¶2.1(c)(ii). The Settling

Defendants also agreed that they would ***exceed*** these requisite standards insofar as they will include "Do Not Flush" symbols or warnings on, not only the principal display panel, but also at least two additional panels of packaging for "non-flushable" baby wipes products. Costco, CVS, and Target Agreement ¶2.1(c)(iii); Walgreens Agreement ¶2.1(c)(iii); Wal-Mart Agreement ¶2.1(c)(i). This provides critical additional notice to consumers nationwide that these baby wipes are not flushable.

The substantive terms of the Settlements are materially similar to both the Kimberly-Clark settlement, which the Court approved on January 24, 2022 and served as a benchmark for much of the Parties' negotiations in reaching the Settlements with the Settling Defendants, and the P&G Agreement. *See generally* Stipulation of Settlement between Plaintiff and Kimberly-Clark ("Kimberly-Clark Agreement"), ECF No. 59-2; ECF No. 133 at 11-12 (finding that the Kimberly-Clark Agreement is "clearly adequate" and observing "that the injunctive relief provided against Kimberly-Clark in the Settlement Agreement mirrors significant portions of the relief which Plaintiff affirmatively seeks in its Amended Complaint"). For example, the Settling Defendants and/or their suppliers, P&G, and Kimberly-Clark all agreed to meet the IWSFG 2020: PAS 3 flushabilty specifications and ensure that their respective flushable wipes products meet all other IWSFG 2020 flushability specifications. *Compare* Settlement Agreements ¶2.1(a), P&G Agreement ¶2.1(a), *with* Kimberly-Clark Agreement ¶2.1(a). And the Settling Defendants, P&G, and Kimberly-Clark agreed to two years of confirmatory testing to verify that their respective products continue to meet the IWSFG 2020 PAS 3 specifications. *Compare* Settlement Agreements ¶2.1(b)(ii), P&G Agreement ¶2.1(b)(iv), *with* Kimberly-Clark Agreement ¶2.1(b)(v). Likewise, the Settling Defendants, P&G, and Kimberly-Clark have all agreed to include "Do Not Flush" warnings or labels on two additional panels (separate and apart from their obligation to provide such warnings or labels on the principle display panels) for certain non-flushable wipes, and to either comply on a nationwide basis with the

standards of the most stringent state laws governing the labeling of non-flushable wipes existing at the time of the settlements or commit to implement consistent labeling (in compliance with those laws) nationwide. *Compare* Costco, CVS, and Target Agreement ¶2.1(c)(iii), Walgreens Agreement ¶2.1(c)(iii), Wal-Mart Agreement ¶2.1(c)(i)-(ii), P&G Agreement ¶2.1(c)(ii)(1)-(2), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(1)-(3).

The differences between and among the settlements primarily concern the product performance compliance dates and nuances of the non-flushable wipes labeling improvements, minor differences in co-promotion provisions, and inclusion of certain non-parties who have manufactured and/or supplied many of the Products – Nice-Pak in the Costco, CVS, Target, and Walgreens agreements, and Rockline in the Wal-Mart Agreement.[8] For example, Rockline agreed that Wal-Mart's flushable wipes currently meet the requisite product performance criteria, Costco, CVS, Target, and Walgreens agreed to meet the performance criteria by April 1, 2024 (less than six months after execution of the agreements), and P&G agreed to meet the performance criteria by 18 months following the Effective Date, while Kimberly-Clark agreed to meet the performance criteria roughly a year after execution of the Kimberly-Clark Agreement. *Compare* Settlement Agreements ¶2.1(a)(ii), P&G Agreement ¶2.1(a)(ii), *with* Kimberly-Clark Agreement ¶2.1(a)(ii). And for non-flushable wipes labeling, Costco, CVS, Target, and Walgreens agreed to meet the "Do Not Flush" labeling standards set forth in AB818 and HB2344 nationwide, which took effect after the Kimberly-Clark Agreement was executed, in addition to HB2565, the law specified in the Kimberly-Clark Agreement. *Compare* Costco, CVS, and Target Agreement ¶2.1(c)(iii), Walgreens Agreement ¶2.1(c)(iii), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(2).[9] HB2565 was considered the most

[8] Plaintiff discusses the differences between the Kimberly-Clark and P&G settlements in Plaintiff's memorandum of law in support of the P&G Agreement. *See* ECF No. 197-1 at 6-8 and n.8; *see also* P&G Agreement (ECF No. 197-2).

[9] Wal-Mart agreed to makes its non-flushable wipes labeling consistent in all states. Wal-Mart Agreement ¶2.1(c)(ii). Coupled with its obligation to comply with California's wipes labeling law (AB818), Wal-Mart's nationwide labeling commitment retains the same effect as the other agreements given that Wal-Mart's labeling will comply with the most

stringent labeling law at the time of the Kimberly-Clark settlement. AB818 is widely viewed as the most stringent labeling law in the United States today, including because it requires non-flushable wipes products not only to include the "Do Not Flush" symbol, but ***also*** the phrase "Do Not Flush," on the principal display panel, with the symbol and label each covering at least 2 percent of the surface area of the panel, effectively doubling the size of the "Do Not Flush" warning for consumers required by HB2565.[10]

III. PRELIMINARY SETTLEMENT APPROVAL

A. The Law Favors Class Action Settlements

In determining whether to approve the Settlements, the Court should be guided by the principle that "[t]here is a strong judicial policy in favor of settlements, particularly in the class action context." *Reed v. Big Water Resort, LLC*, 2016 WL 7438449, at *5 (D.S.C. May 26, 2016); *see also Covarrubias v. Captain Charlie's Seafood, Inc*., 2011 WL 2690531, at *2 (E.D.N.C. July 6, 2011) ("There is a strong judicial policy in favor of settlement, in order to conserve scarce resources that would otherwise be devoted to protracted litigation."); *Crandell v. U.S.*, 703 F.2d 74, 75 (4th Cir. 1983) ("Public policy, of course, favors private settlement of disputes."). Indeed, "[t]he

stringent state law nationwide. And while P&G agreed to meet the "Do Not Flush" labeling standards set forth in AB818 only, as discussed herein, the Washington and Oregon laws do not add any additional requirements that are not contained in the California law.

[10] Other minor differences in the agreements include: (1) application of the "two additional panel" labeling provision to non-flushable baby wipes in the Settlements Agreements (*compare* Costco, CVS, and Target Agreement ¶2.1(c)(iii), Walgreens Agreement ¶2.1(c)(iii), Wal-Mart Agreement ¶2.1(c)(i), P&G Agreement ¶2.1(c)(ii)(2), *with* Kimberly-Clark Agreement ¶2.1(c)(ii)(3)); (2) a provision that if any of the Settling Defendants stop purchasing flushable wipes manufactured by Nice-Pak or Rockline the Settlements will not impose any obligations on Nice-Pak or Rockline regarding the non-Nice-Pak or Rockline manufactured flushable wipes (Settlement Agreements ¶2.1(e)); (3) the omission of language in the Settlement Agreements that was contained in ¶2.1(c)(ii)(3) of the Kimberly-Clark Agreement related to symbol contrast (which is covered in AB818) and back panel "Do Not Flush" instructions; (4) a clarification that the Settling Defendants and/or their suppliers will bear the costs of notice and administration, which the Settling Defendants may share amongst themselves and with P&G, to the extent practicable (Settlement Agreements ¶7.5, P&G Agreement ¶7.6); (5) the omission of certain flushable wipes labeling provisions in the Settlement Agreements (Kimberly-Clark Agreement ¶2.1(c)(i), P&G Agreement ¶2.1(c)(i)); (6) the timing for, and length of, implementation of the non-flushable wipes labeling enhancements (Costco, CVS, and Target Agreement ¶2.1(c)(i), Walgreens Agreement ¶2.1(c)(i), Wal-Mart Agreement ¶2.1(c)(i)-(ii), (vi), P&G Agreement ¶2.1(c)(ii), Kimberly-Clark Agreement ¶2.1(c)(ii)); (7) nuances in the "Product Endorsement" and "Acknowledgement and Endorsement" sections of the agreements (Settlement Agreements ¶2.1(d), P&G Agreement ¶2.1(d), Kimberly-Clark Agreement ¶2.1(d)); and (8) the provisions regarding attorneys' fees (Settlement Agreements ¶6.1, P&G Agreement ¶6.1, Kimberly-Clark Agreement ¶6.1).

voluntary resolution of litigation through settlement is strongly favored by the courts and is 'particularly appropriate' in class actions." *In re LandAmerica 1031 Exch. Servs., Inc. Internal Revenue Service §1031 Tax Deferred Exch. Litig.*, 2012 WL 13124593, at *4 (D.S.C. July 12, 2012) (quoting *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990)). Settlements of the complex disputes often involved in class actions minimize litigation expenses of both parties and reduce the strain such litigation imposes upon scarce judicial resources. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

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

B. The Relevant Factors for Preliminary Approval

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

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

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

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

Overlapping with Rule 23(e)(2)(B) (arm's-length negotiation) and Rule 23(e)(2)(C)(i) (adequacy of the settlement based on the costs, risks, and delay of trial and appeal) is the two-level analysis in the Fourth Circuit which includes "consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class." *Gaston v. LexisNexis Risk Sols. Inc.*, 2021 WL 244807, at *5 (W.D.N.C. Jan. 25, 2021) (quoting *Jiffy Lube*, 927 F.2d at 158-59). "However, at the preliminary approval stage, the Court need only find that the settlement is within 'the range of possible approval.'" *Id.* As discussed below, the proposed Settlements satisfy each of the factors identified under Rule 23(e)(2), as well as the Fourth Circuit's "fairness" and "adequacy" analysis, and the standard for certification of a class for settlement purposes is met, such that Notice of the proposed Settlements should be sent to the Settlement Class in advance of a final Fairness Hearing.

C. The Proposed Settlements Meet Each of the Rule 23(e)(2) Factors

1. The Settlements Were Negotiated at Arm's Length

The Rule 23(e)(2)(B) factor and the first hurdle under the Fourth Circuit's analysis is a procedural one – "whether the settlement was reached through good-faith bargaining at arm's length." *In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015); *see*

Rule 23(e)(2)(B) ("the proposal was negotiated at arm's length"). In making this determination, courts in this Circuit look at four factors: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [] class action litigation." *Reed*, 2016 WL 7438449, at *6 (quoting *Jiffy Lube*, 927 F.2d at 158-59). "Where a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston*, 2021 WL 244807, at *6; *see also Reed*, 2016 WL 7438449, at *6 (there is a presumption of fairness when settlement "is achieved through arms-length negotiations").[11] Here, there is no question the Settlements were the result of arm's-length negotiations with no hint of collusion.

Looking to the first and second *Jiffy Lube* factors, unlike at the time of the Kimberly-Clark settlement, the Parties here had proceeded well into the discovery phase of the litigation, including exchanging and responding to written discovery requests, and were negotiating a preservation protocol and an evidentiary stipulation before agreeing to conserve legal resources to focus on a resolution of the Action. Moreover, the knowledge of Plaintiff's counsel through previous litigation with certain Defendants regarding their flushable wipes, and Plaintiff's counsel's work with consultants who have long studied flushable wipes and non-flushable wipes, gave Plaintiff a meaningful understanding of the merits of its factual allegations, and the strengths and weaknesses of its legal claims.

The third *Jiffy Lube* factor (the circumstances surrounding the negotiations) also favors settlement here. The Parties engaged in vigorous negotiations for over a year – which followed Plaintiff's lengthy negotiations with Kimberly-Clark regarding similar injunctive relief that predated the filing of the Action and paralleled Plaintiff's negotiations with P&G – and participated in

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

mediations with Mr. Ungar, who facilitated considerable post-mediation discussions. The negotiations were vigorous and adversarial throughout, and the Parties drew on their extensive knowledge of the merits of their respective arguments and counsel's involvement in several previous flushable wipes-related actions and the similar Kimberly-Clark settlement. The fact that the Settlements were negotiated at arm's length strongly supports preliminary approval.

Finally, the fourth *Jiffy Lube* factor (the experience of counsel in the area of class action litigation) easily favors approval. As discussed further below, Robbins Geller has an extensive record of success in complex cases and similar class actions, and their experience is discussed at length in the Robbins Geller firm resume, which can be found at www.rgrdlaw.com. Likewise, AquaLaw is a specialty law firm with one of the broadest municipal water practices of any U.S. law firm, representing utilities, water districts and related industry associations nationwide.[12] Class Counsel believe that their reputation and experience gave them a strong position in engaging in settlement negotiations with the Settling Defendants.

2. The Settlements Are Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal

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

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

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

Case v. French Quarter III LLC, 2015 WL 12851717, at *7 (D.S.C. July 27, 2015) (quoting *Jiffy Lube*, 927 F.2d at 158-59). These factors weigh heavily in favor of finding the proposed Settlements adequate.

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

Furthermore, even if litigation were to proceed, hurdles to proving liability or even proceeding to trial would remain. For instance, Plaintiff would ultimately need to rely extensively on several expert witnesses to prevail at class certification and ultimately prove its claims. Each expert's testimony would be critical to demonstrating the Settling Defendants' liability, and the conclusions of each expert would be hotly contested. If, for some reason, the Court determined that even one of Plaintiff's experts should be excluded from testifying at trial, Plaintiff's case would become more difficult to prove. *See Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Even if successful, this process presents considerable expenses. *See Clark v. Duke Univ.*, 2019 WL 2588029, at *6 (M.D.N.C. June 24, 2019) ("The parties would almost certainly incur substantial additional litigation expense if [the litigation] proceeds through summary judgment briefing to trial[.]").

While Plaintiff believes its claims are strong, it cannot ignore the risks of protracted litigation. There is a fair probability that the Court may accept one or more of the Settling Defendants' arguments at any point, including at class certification, summary judgment and trial stages. Even if Plaintiff prevails, there is no guarantee that it would be provided the relief afforded by the Settlements, particularly the enhanced labeling changes to the non-flushable products. *See Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) ("the settlement includes . . . terms beneficial to the class that might not be included in any recovery at trial"). Thus, without the Settlements, there is a very real risk that the Settlement Class will receive lesser relief or nothing at all (*e.g.*, the Settling Defendants could choose to forgo further flushability performance improvements in order to retain other of the Products' characteristics, such as strength, in their current form). The benefits presented by the Settlements, particularly when viewed in the context of the risks, costs, delay and uncertainties of further proceedings, weigh heavily in favor of preliminary approval.

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

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

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

Plaintiff and its counsel have adequately represented the Settlement Class as required by Rule 23(e)(2)(A) by diligently investigating and prosecuting this Action on their behalf. Among other things, Plaintiff and Class Counsel investigated and assessed the relevant factual events, including developments in the flushable wipes industry, instances of harm to STP Operators

attributable to flushable wipes, the testing of Defendants' flushable wipes, and flushability standards; researched the legal issues underlying Plaintiff's claims; drafted a detailed complaint; withstood motions to dismiss; exchanged discovery; served document requests; negotiated confidentiality and ESI protocols; engaged in exhaustive negotiations surrounding a protocol governing the preservation of physical evidence and an evidentiary stipulation; and participated in extensive settlement negotiations with the Settling Defendants. These efforts ultimately resulted in the Settling Defendants' agreement to substantial injunctive relief similar to the relief provided by the Court-approved settlement with Kimberly-Clark, including a commitment for the Settling Defendants' Products to comply with the wastewater industry's preferred flushability standard, submission to confirmatory performance testing of the Products, and labeling improvements.

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

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

c. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses the terms of any proposed award of attorneys' fees. As stated in the Notice and agreements, Class Counsel intend to apply to the Court for awards of attorneys'

fees and expenses (including the court costs) not to exceed $1,900,000 (inclusive of the $350,000 agreed-to fee with P&G). Settlement Agreements ¶6.1; P&G Agreement ¶6.1. If approved by the Court, the Settling Defendants and/or their suppliers, along with P&G, will pay Class Counsel up to $1,900,000 in attorneys' fees and expenses, as the Fee and Expense Award. Settlement Agreements ¶6.1; P&G Agreement ¶6.2. These provisions do not impact the Settlement Class Members' relief.

d. The Settling Parties Have No Other Agreements

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

e. Settlement Class Members Are Treated Equitably

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

* * *

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

IV. PROPOSED PLAN OF NOTICE TO THE SETTLEMENT CLASS

Rule 23(c)(2)(A) states, "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A). When a class is certified under Rule 23(b)(2), the court may "direct appropriate notice to the class," but need not follow the strict requirements of class notice for classes certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2)(A); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006) ("Unlike Rule 23(b)(3), Rule 23(b)(2) neither requires that absent class members be given notice of class

certification nor allows class members the opportunity to opt-out of the class action.").

When a class claim is settled, notice must be provided in a "reasonable manner to all class members who would be bound by the [proposed settlement]." Fed. R. Civ. P. 23(e)(1)(B). "While the rule does not spell out the required contents of the settlement notice, it must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Beaulieu v. EQ Indus. Servs., Inc.*, 2009 WL 2208131, at *28 (E.D.N.C. July 22, 2009) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)). Likewise, the due process clause also requires that in a class action, notice of the settlement and an opportunity to be heard must be given to absent class members. *Cf. Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) ("This Court is of the opinion that the notice given to members of the plaintiff class by publication and by mail, as aforesaid, complied with all requirements of due process, all requirements of Rule 23 of the Federal Rules of Civil Procedure, and constituted the best notice practicable under the circumstances.").

Here, the Settlements provide for three forms of notice, which will include a description of the material terms of the Settlements, Class Counsel's Fee and Expense Application, the date of the Final Approval Hearing and the date by which any objection by Settlement Class Members to any aspect of the Settlements and/or the Fee and Expense Application must be received. Settlement Agreements ¶7.1. First, the Notice (attached to the Settlement Agreements as Exhibit B) will be provided by email to numerous state wastewater associations and major industry groups. *Id.* ¶7.2. Second, a case-specific website will be established dedicated to the Settlements, which will contain the Notice, the Settlement Agreements and other relevant documents and information. *Id.* ¶7.3. Third, a Summary Notice (attached to the Settlement Agreements as Exhibit C) will be published through a press release issued by the Parties and in an industry publication such as the Water

Environment Federation's magazine *Water Environment & Technology*, and mailed directly to identifiable publicly owned STP Operators in the United States via First-Class mail, as Plaintiff and Kimberly-Clark did in connection with the Kimberly-Clark settlement. *Id.* ¶7.4. The contents and method of the Notice therefore satisfy all applicable requirements.[13]

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

V. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Under the terms of the Settlement Agreements, the Parties have agreed, for the purposes of the Settlements only, to the certification of the Settlement Class. The Settlement Class is defined as: "All STP Operators in the United States whose systems were in operation between January 6, 2018 and the date of preliminary approval." Settlement Agreements ¶1.22.[14]

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

[13] Counsel for Wal-Mart informed Plaintiff's counsel for the first time this afternoon that Wal-Mart was incorrectly named in the Complaint as "Wal-Mart, Inc." The entity that is named as a party to the Wal-Mart Agreement is "Walmart Inc." Given the timing of this notification, the exhibits to the Settlement Agreements (and the references herein) refer to defendant as "Wal-Mart" or "Wal-Mart, Inc." Plaintiff will ensure the Notice and Summary Notice exhibits reflect the proper entity name before they are published.

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

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

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

1. Numerosity

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

The number of STP Operators in the United States is estimated to be over 17,000 based on the Environmental Protection Agency's records. *See* ECF No. 123-1 at 2. Thus, numerosity is easily satisfied here. *See Williams v. Henderson*, 129 F. App'x 806, 811 (4th Cir. 2005) (indicating that a class with over 30 members justifies a class).

2. Commonality

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

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

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

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

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

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

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

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

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

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

3. Typicality

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

Here, Plaintiff's and other Settlement Class Members' claims arise out of the same course of conduct by the Settling Defendants and are based on identical legal theories. As discussed above, Plaintiff alleges that the Settling Defendants' flushable wipes did not conform to the representations on their packaging, which caused excessive and recurring harm to Settlement Class Members' facilities. These claims are identical to the legal claims belonging to all Settlement Class Members and would present proof of the Settling Defendants' liability on the basis of common facts supporting the appropriateness of injunctive relief. *See Berry v. Schulman*, 807 F.3d 600, 608-09 (4th Cir. 2015) ("[B]ecause of the group nature of the harm alleged and the broad character of the

relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.").

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To meet this requirement, the named class representatives must show that "they will fairly and adequately protect the interests of every putative claimant by showing that they have no interests that are antagonistic to other class members and that they are competent to undertake the case." *Reed*, 2016 WL 7438449, at *4. "The Court should also consider the adequacy of representation by Class Counsel." *Id.* For the first requirement (adequacy of class representatives), Fourth Circuit courts have required that plaintiffs merely show that "Named Plaintiffs' interests are directly aligned with the interests of absent class members." *Id.* For the second requirement (adequacy of class counsel), courts in the Fourth Circuit generally presume adequacy is met "in the absence of specific proof to the contrary." *Id.*; *see also Case*, 2015 WL 12851717, at *5 (quoting same).

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

related flushability issues (and commitment to further do so through the Settlements).[15] Plaintiff, which has incurred expenses and anticipates incurring additional expenses due to flushable wipes in its capacity as a wastewater utility system, has no interests that are antagonistic to the interests of any of the Settlement Class Members.

Plaintiff also meets the second prong of the adequacy requirement. To date, Class Counsel has invested significant attorney and staff time to this matter. Robbins Geller is a preeminent nationwide plaintiffs' firm specializing in complex class action litigation, and currently serves as lead counsel in other flushable wipes-related litigation. *See* www.rgrdlaw.com. Robbins Geller has served as lead or co-lead counsel in hundreds of class actions in almost every state in the country, and has achieved considerable success, including attaining one of the five largest recoveries in the Fourth Circuit at the time in *Nieman v. Duke Energy Corp., et al*., No. 3:12-cv-00456 (W.D.N.C.). *See* https://www.rgrdlaw.com/cases-nieman-v-duke-energy-corp.html. Likewise, AquaLaw is a preeminent firm with a wide-ranging municipal water practice, serving public utilities and other entities nationwide and litigating a wide range of disputes in State and federal courts involving water and infrastructure. *See* www.aqualaw.com. The Court previously found Robbins Geller and AquaLaw adequate in appointing members of these firms as class counsel in connection with the Kimberly-Clark settlement. ECF No. 133 at 7.

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

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

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

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

Additionally, "Rule 23(b)(2) classes are 'mandatory,' in that 'opt-out rights' for class members are deemed unnecessary and are not provided under the Rule." *Schulman*, 807 F.3d at 609 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2558 (2011)). Indeed, all Settlement Class Members will benefit equally from the injunctive relief presented by the Settlements. While Settlement Class Members thus cannot opt out of the Settlements, they may object to the Settlements or express any concerns they may have before final Court approval.

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

VI. CONCLUSION

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

DATED: October 26, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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