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. DUDE PRODUCTS, INC., Defendant.	Civil Action No. 2:24-cv-02935-RMG CLASS ACTION **ORDER AND OPINION**

Before the Court is Plaintiff's motion for preliminary approval of class action settlement. (Dkt. No. 5). For the reasons set forth below, the Court grants Plaintiff's motion.

I. Background

In this putative class action, Plaintiff, on behalf of itself and all others similarly situated, alleges that Defendant DUDE Products, Inc. designs, markets, manufactures, distributes, and/or sells wipes labeled as "flushable" which are not actually flushable. These wipes allegedly damage sewer systems across the country. Plaintiff brings these claims for nuisance, trespass, strict products liability, failure to warn, and negligence. Plaintiff's Complaint seeks prospective injunctive relief and reasonable attorney's fees and costs for Class Counsel.

Plaintiff moved for preliminary approval of a settlement reached between itself and DUDE Products, Inc. (Dkt. No. 5). Attached to the motion was a full copy of the Parties' Stipulation of Settlement. (Dkt. No. 5-2). Defendant DUDE Products, Inc. did not oppose Plaintiff's motion.

II. Standard

Class certification and preliminary approval of a class settlement are governed by Rule 23 of the Federal Rules of Civil Procedure. Courts have recognized that "a potential settlement is a relevant consideration when considering class certification." *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 WL 13008138, at *1 (D.S.C. July 31, 2012). "If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) *abrogated on other grounds by Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (affirming that "[s]ettlement is relevant to a class certification"). However, certification of a class for the purposes of settlement must still satisfy the pertinent requirements under Rule 23. *Id.* Accordingly, the Court will first consider whether provisional class certification is appropriate under Rule 23 because it is a prerequisite to preliminary approval of a class action settlement.

To certify a class, Plaintiff must demonstrate that the proposed class certification satisfies the prerequisites set forth within both Rule 23(a) and Rule 23(b). Rule 23(a) empowers the Court to certify a class action when (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class as a whole ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). Fed. R. Civ. P. 23(a). In addition, Rule 23(b) requires that questions of law or fact common to members of the class predominate over those affecting individual members of the class and a class action is a superior means of resolving the controversy. Fed. R. Civ. P. 23(b).

Plaintiff bears the burden of showing by a preponderance of the evidence that class certification is appropriate under Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–351

(2011). Class Certification is a two-step process. First, a plaintiff must establish that each of the four requirements of Rule 23(a) is met: numerosity, commonality, typicality, and adequacy of representation. *Id.* at 349. Second, she must establish that at least one of the bases for certification under Rule 23(b) is met. Where, as here, a plaintiff seeks to certify a class under Rule 23(b)(2), it must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

III. Discussion

A. Conditional Certification of Settlement Class

Plaintiff moves this Court to certify a settlement class pursuant to Fed. R. Civ. P. 23(b)(2). The "Settlement Class" is composed of "All STP Operators in the United States whose systems were in operation between May 9, 2021 and the date of preliminary approval." (Dkt. No. 5-2 at 6). An "STP Operator" is an entity that "owns and/or operates a sewage or wastewater conveyance and treatment systems, including municipalities, authorities, and wastewater districts." (*Id.* at 3).

As mentioned above, the Court must determine whether the proposed settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23. The requirements that must be met under Rule 23(a) are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. In addition, the Plaintiff must satisfy one of the subsections of Rule 23(b) for each of their proposed classes.

The Court holds that the Settlement Class satisfies the numerosity requirement of Rule 23(a)(1). The Parties have indicated the number of STP Operators in the United States likely exceeds 17,000. (Dkt. No. 5 at 17). Numerosity is easily satisfied. *See Williams v. Henderson*, 129 Fed. App'x 806, 811 (4th Cir. 2005) (indicating that a class with over 30 members justifies a class).

The Court further finds that the commonality requirement of Rule 23(a)(2) is met. The commonality requirement – at least as it relates to a settlement class – is "not usually a contentious one: the requirement is generally satisfied by the existence of a single issue of law or fact that is common across all class members and thus is easily met in most cases." 1 Newberg on Class Actions § 3:18 (5th ed.); *see also Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C. 2008) (noting that "[t]he commonality requirement is relatively easy to satisfy") (quoting *Buchanan v. Consol. Stores Corp.*, 217 F.R.D. 178 187 (D. Md. 2003)). The Parties have enumerated various common questions which show the requirement is met, (Dkt. No. 5 at 17-18), such as whether "Defendant mislabeled its Flushable Wipes so as to have consumers believe that its Flushable Wipes will not cause harm to sewer systems in their area" and "whether Defendant's Flushable Wipes are safe for sewer systems."

The typicality requirement of Rule 23(a)(3) is also met. Typicality requires the class representatives' claims to be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is also satisfied if the plaintiff's claim is not "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. That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006). Here, there is a sufficient link between Plaintiff's claims and those of absent class members. Like absent class members, Plaintiff is a STP Operator which has allegedly suffered damages caused by flushable wipes. *See* (Dkt. No. 5 at 18) (describing similar alleged harms suffered by STP Operators outside of South Carolina). In sum, Plaintiff and the Settlement Class Members' claims arise out of the same alleged course of conduct by Defendants and are based on identical legal theories. Accordingly, the typicality requirement is met. *Deiter*, 436 F,3d

at 466 ("The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so goes the claims of the class.'").

The Court further finds that Plaintiff and its counsel are adequate representatives of the Settlement Class. In reaching this determination, the Court has considered whether the proposed class representative will fairly and adequately protect the interests of the class. *Knight v. Lavine*, No. 1:12-CV-611, 2013 WL 427880 at *3, 2013 U.S. Dist. LEXIS 14855 (E.D. Va. Feb. 4, 2013).

First, the Court finds that the Plaintiff has no interests that are antagonistic to the interests of the Settlement Class and is unaware of any actual or apparent conflicts of interest between it and the Settlement Class.

Second, the Court finds proposed Class Counsel to be competent to undertake this litigation. Class Counsel have extensive experience in class actions, including with litigating claims like those here. Class Counsel have also demonstrated robust prosecution of analogous class claims in *Commissioners of Public Works of the City of Charleston v. Costco Wholesale Corp., et al*., No. 2:21-cv-00042-RMG (D.S.C.) (the "*Charleston* Action"). Accordingly, the Court is satisfied Plaintiff and Class Counsel – Robbins Geller Rudman & Downd LLP and AquaLaw PLC – are adequate representatives of the conditional Settlement Class under Rule 23(a)(4).

In addition to the requirements of Rule 23(a), a proposed class action must satisfy one of the sections of Rule 23(b). *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). With respect to Rule 23(b)(2), parties seeking class certification must show that the defendants have "acted or refused to act on grounds generally appliable to the class, thereby making appropriate final injunctive relief … with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

The Court finds that as to the Settlement Class, Defendant has acted on grounds generally appliable to the class as a whole. Here, the Settlement Agreement treats all Settlement Class

Members alike in granting them the benefits of the relief Defendant would provide. As discussed above, Defendant would, *inter alia*, agree to alter certain products and provide for new labeling on others. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2557, 180 L.Ed.3d 374 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (citation omitted). The Proposed Settlement thus satisfies the elements of Rule 23(b)(2).

In sum, for the sole purpose of determining: (i) whether this Court should finally approve the Proposed Settlement as fair, reasonable, and adequate; and (ii) whether the Court should dismiss this litigation as against Defendants as detailed in the Settlement Agreement, the Court hereby certifies a conditional settlement class as follows:

1. Settlement Class: All STP Operators in the United States whose systems were in operation between May 9, 2021 and the date of preliminary approval.

2. Excluded from the Settlement Class are counsel of record (and their respective law firms) for any of the Parties, employees of Defendant, and any judge presiding over this action and their staff, and all members of their immediate families.

If the proposed Settlement Agreement is not finally approved, is not upheld on appeal, or is otherwise terminated for any other reason, the Settlement Class shall be decertified; the Settlement Agreement and all negotiations, proceedings, and documents prepared, and statements made in connection therewith, shall be without prejudice to any party and shall not be deemed or construed to be an admission or confession by any party of any fact, matter, or proposition of law; all parties shall stand in the same procedural position as if the Settlement Agreement had not been

negotiated, made, or filed with the Court; and the Parties shall be permitted to pursue their respective appeals to the United States Court of Appeals for the Fourth Circuit.

B. Appointment of Class Counsel and Class Representative

Having certified the settlement class under Rule 23(b)(2), the Court is now required to appoint Class Counsel under Rule 23(g). Fed. R. Civ. P. 23(g)(1)(A). Having considered the work Plaintiff's counsel have done in identifying and investigating potential claims in this action, counsel's experience in handling complex litigation, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class, the following law practices are designated Class Counsel under Rule 23(g)(1):

1. Robbins Geller Rudman & Dowd LLP; and
2. AquaLaw PLC

Plaintiff is appointed Class Representative.

C. Preliminary Approval of the Proposed Settlement

At the preliminary approval stage, the Court must decide as to the fairness, reasonableness, and adequacy of the settlement terms. Fed. R. Civ. P. 23(e)(2); *see also* Manual for Complex Litigation (Fourth) ("MCL"), § 21.632 (4th ed. 2004). The Fourth Circuit has bifurcated this analysis into consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class. *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991). However, at the preliminary approval stage, the Court need only find that the settlement is within "the range of possible approval." *Scott v. Family Dollar Stores, Inc.*, No. 3:08-cv-00540-MOC-DSC, 2018 WL 1321048, at *3, 2018 U.S. Dist. LEXIS 41908 (W.D.N.C. Mar. 14, 2018); *Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (citing *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983)).

The Fourth Circuit has set forth the factors to be used in analyzing a class settlement for fairness: (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue. *Jiffy Lube*, 927 F.2d at 158-59.

The Court finds that the settlement reached in this case was the result of a fair process. Although negotiated during the preliminary stages of the litigation, as outlined in Plaintiff's motion, the proposed settlement was the result of an investigation and communications between the Parties over the course of several months. (Dkt. No. 5 at 2-5) Significantly, Plaintiff states that it and its counsel drew on their extensive knowledge of the merits of the Parties' likely respective positions and Plaintiff and counsel's involvement in several flushable wipes-related actions, including in the intensely-litigated *Charleston* Action. (*id.*) The negotiations here were a natural extension of five successful settlements in the *Charleston* Action, and the settlement here, in turn, parallels the terms of those settlements and furthers the goal of the Parties to ensure Defendants' wipes are truly flushable and consistent with international flushability guidelines supported by the wastewater industry. (*id.*)

Therefore, while the Proposed Settlement was negotiated before discovery was complete, the Court finds that the Parties' experience litigating similar issues and Class Counsel's experience negotiating previous flushable wipes settlements indicate this settlement was negotiated at arms' length. *See In re Lupron Marketing and Sales Practices Litigation*, 228 F.R.D. 75, 94 (D. Mass. 2005) ("The storm warnings indicative of collusion are a 'lack of significant discovery and [an extremely expedited settlement of questionable value accompanied by an enormous legal fee.'")

(quoting *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 801, 31 Fed. R. Serv. 3d 845 (3d Cir. 1995)).

The Settlement Agreement provides for injunctive relief requiring Defendant to (1) meet certain flushability standards, (2) submit to periodic independent testing, and (3) implement modifications to the packaging of non-flushable wipes. (Dkt. No. 5-2). Additionally, Plaintiff states, and the Court finds, that the substantive terms of the Settlement Agreement are materially similar to the already approved settlements in recent class action settlements between Plaintiff and other flushable wipes manufacturers, retailers, and distributors, including Kimberly-Clark Corporation, Costco Wholesale Corporation, CVS Health Corporation, The Procter & Gamble Company, Target Corporation, Walgreen Co., and Wal-Mart, Inc. *See generally Charleston* Action.

The Court finds that the Settlement Agreement is within the range of possible approval. *See Toyota Antitrust Litigation*, 564 F. Supp. at 1384. In an analysis of the adequacy of a proposed settlement, the relevant factors to be considered may include: (1) the relative strength of the case on the merits, (2) any difficulties of proof or strong defenses the plaintiff and class would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, (5) the degree of opposition to the proposed settlement, (6) the posture of the case at the time settlement was proposed, (7) the extent of discovery that had been conducted, (8) the circumstances surrounding the negotiations, and (9) the experience of counsel in the substantive area and class action litigation. *See Jiffy Lube*, 927 F.2d at 159; *West v. Cont'l Auto., Inc.*, No. 3:16-cv-00502, 2018 WL 1146642 at *4, 2018 U.S. Dist. LEXIS 26404 (W.D.N.C. Feb. 5, 2018).

Plaintiff argues that continued litigation against Defendant poses substantial risks that make any recovery uncertain and that the immediacy and certainty of obtaining injunctive relief weigh in favor of finding the Proposed Settlement as adequate. Further, the Court observes that the injunctive relief provided against Defendant in the Settlement Agreement mirrors significant portions of the relief which Plaintiff affirmatively seeks in its Complaint. In sum, the likelihood of substantial future costs weighed against the uncertainty of future litigation favors approving the proposed settlement. *See Sims v. BB&T Corp.*, No. 1:15-CV-732, 2019 WL 1995314, at *4-5 (M.D.N.C. May 6, 2019).

D. Notice of the Proposed Settlement Class

Notice to class members upon settlement of class claims should be conducted in a "reasonable manner." *See* Fed. R. Civ. P. 23(e)(1)(B); *see also* Wright and Miller's Federal Practice and Procedure, Civil § 1786 ("The first specific question to be dealt with in determining the quality of the notice typically is whether individual notice must be given. In actions under Rules 23(b)(1) and 23(b)(2), the court is only directed to give 'appropriate notice to the class,' leaving the type of notice discretionary."); 2 McLaughlin on Class Actions § 6.17 (17th ed.) (noting "courts have consistently held that first-class mail address to class members' last known address and publication of a summary notice in appropriate press medium are sufficient to satisfy the notice requirements of … 23(e) for advising class members of a proposed settlement").

As outlined in the Settlement Agreement (*See* Dkt. No. 5-2) and in Plaintiff's motion (Dkt. No. 5), "Notice" consists of the following: (1) First-Class direct mailed notice to the publicly owned sewage treatment plant operators located in the United States, (Dkt. No. 5-2, ¶ 7.4); (2) Publication of a Summary Notice, Ex. C, (*id.* at 41), of one-half page in size once in both the print and online editions of the Water Environment Federation's magazine *Water Environment &*

Technology, (*id.*); (3) Transmittal by email of the Notice of Settlement, Ex. B, (*id.* at ¶ 7.1), to roughly 23 national and local water organizations (*id.* at ¶ 7.2); (4) a Settlement website (*id.* at ¶ 7.3); (5) Publication of a Summary Notice via press release issued by the Parties (*id.* at ¶ 7.4); and (6) notice of the Proposed Settlement to federal and state officials as required by the Class Action Fairness Act of 2005 (*id.* at ¶ 7.6).

Based on the nature of the proposed injunctive relief, the Court finds the Notice plan as described in filings with the Court (Dkt. No. 5-2 at 14-16) is reasonable and adequate.

IV. Conclusion

For the reasons stated above, the Court **GRANTS** Plaintiff's motion for preliminary settlement approval (Dkt. No. 5). Within seven (7) days of the entry of this Order, the Parties shall file a Proposed Timeline for Proposed Settlement for the Court's consideration.

DATED: May 31, 2024

s/ Richard Mark Gergel
THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE