UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re Procter & Gamble Aerosol Products Marketing and Sales Practices Litigation

Case No. 2:22-md-3025

Judge Michael H. Watson

Magistrate Judge Chelsey Vascura

This document relates to: ALL CASES

THE PROCTER & GAMBLE COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

The Court's preliminary approval order found that the Settlement "is the product of arm's length negotiations through a neutral, experienced mediator," "comes after adequate investigation of the facts and legal issues," and provides adequate relief "taking into account the costs, risks, and delay of trial and appeal and the proposed method of distributing compensation to the Settlement Class." Preliminary Approval Order ("Prelim. Approval Order"), ECF No. 45, at 11. Those observations were well founded: the Settlement provides Settlement Class Members certainty of outcome in a set of cases where the outcome was far from certain.[1] As this Court noted when it preliminarily approved the Settlement, "the Settlement seems particularly fair given the significant hurdles plaintiffs could face in attempting to litigate their claims on a class-wide basis." Prelim. Approval Order at 21.

The Court's preliminary assessment has been borne out in the Settlement Class's reaction, which is overwhelmingly positive. Nearly 280,000 validated claims were filed, 263,193 of which requested monetary payments and 16,700 of which requested product vouchers. Together, the value of the monetary relief to the Settlement Class is approximately $3,094,751. Only two class members opted out, and none have objected.

Another court recently granted final settlement approval in a very similar MDL of class action claims that a company sold products contaminated by benzene. *See In re Johnson & Johnson Aerosol Sunscreen Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2023 WL 2284684 (S.D. Fla. Feb. 28, 2023) ("*Johnson & Johnson*"). There is no reason to take a different approach here. For the reasons explained below, the Court should grant final approval to the Settlement.

[1] Unless otherwise indicated, capitalized terms have the meaning ascribed to them by the Settlement Agreement. *See generally* Settlement Agreement, ECF No. 23-1.

BACKGROUND

A. P&G's Comprehensive Investigation into Benzene Contamination.

On November 4, 2021, Valisure LLC, an online laboratory, filed a citizen petition with the FDA. That petition stated that Valisure had tested 108 batches of body sprays from 30 brands made by various companies for the presence of benzene, and concluded that some but not all of these contained benzene. According to Valisure, 12 batches of P&G's products contained no detectable benzene or levels below 2 parts per million ("ppm"), but 10 batches contained benzene levels higher than 2 ppm.

Upon learning of Valisure's allegations, P&G immediately investigated the possible presence of benzene in its aerosol body spray products. The investigation revealed that a significant number of P&G's antiperspirant and deodorant aerosol products contained either no detectable benzene or benzene levels below 1 ppm. However, P&G's investigation also identified some products that did contain levels of benzene above 2 ppm. As a result, P&G proactively expanded its investigation and tested its entire portfolio of aerosol products. Most products did not have issues. However, P&G's testing revealed trace levels of benzene in certain aerosol dry shampoo and dry conditioner products.

From there, P&G moved quickly to address the issue. With safety as its top priority, P&G immediately conducted consumer safety assessments for these products, based on extremely conservative assumptions. These assessments concluded that even the products with the highest detected benzene levels were unlikely to cause adverse human health consequences for consumers.

(Benzene is ubiquitous in the environment, and it is among the 20 most widely used chemicals in the United States.[2])

Notwithstanding P&G's conclusion that the products were safe, it worked cooperatively with FDA to voluntarily recall all affected products out of an abundance of caution. On November 23, 2021, less than three weeks after Valisure's petition was filed, P&G announced the antiperspirant and deodorant recall. The dry shampoo and dry conditioner recall was announced on December 17, 2021. As part of these recalls, P&G made a widely publicized offer to reimburse consumers.

News of P&G's voluntary recall programs received widespread coverage. Significant numbers of consumers received reimbursement: P&G issued more than 482,000 vouchers redeemable for the full value of the suggested retail price for the product to an estimated 214,624 consumers with a retail value of $3,594,951. Decl. of Janos Josephson ("Josephson Decl.") ¶ 5, ECF No. 38-3. For consumers who requested cash refunds instead, P&G issued 995 cash payments to 959 U.S. consumers totaling $25,080.84. *Id*. ¶ 6.

B. The Parties' Settlement Negotiations.

Hours after Valisure's petition was filed, plaintiffs began filing consumer class actions against P&G. The suits sought to represent overlapping classes of consumers based on the same overarching theory: the alleged presence of benzene made the products worthless and entitled consumers to full reimbursement, even though the products otherwise worked as intended.

Over the following weeks, numerous plaintiffs' counsel contacted P&G to raise the prospect of nationwide settlement discussions. *See* Decl. of Andrew Soukup ("Soukup Decl.")

[2] *See* Benzene and Cancer Risk, American Cancer Society (last updated Jan. 5, 2016), https://www.cancer.org/cancer/cancer-causes/benzene.html.

¶ 3, ECF No. 38-2. P&G's response to each outreach was the same: P&G was willing to discuss nationwide resolution, but only if a sufficiently large group of plaintiffs emerged that expressed a similar interest in settlement. *Id*.

Eventually, a large group of plaintiffs and their counsel approached P&G to express interest in mediation. On February 18, 2022, Gary Klinger reported to P&G's counsel that lawyers representing 28 of the then-42 plaintiffs (in 12 out of the then-25 cases) were interested in exploring settlement. Soukup Decl. ¶ 8, Ex. D. Because this coalition represented a sizable majority of plaintiffs with claims, P&G agreed to mediate. *Id*.

A mediation occurred on March 28, 2022, but the parties were unable to reach an agreement at that time and remained far apart on many critical terms. *See* Meyer Decl. ¶¶ 4, 8, ECF No. 38-1. The parties continued to engage in settlement negotiations over the following weeks. *Id*. ¶ 9. In late April, the parties appeared to be at an impasse. In an effort to break the impasse, on April 29, 2022, the mediator made a mediator's proposal. *Id*. ¶ 10. Both parties accepted the mediator's proposal on May 2, 2022, *id*. ¶ 11, and the parties announced to the Court that they had reached an agreement in principle the next day, *see* ECF No. 13.

C. The Proposed Settlement.

Under the Settlement, Class Members may choose to receive either a product voucher (for values ranging from $5 to $10) or a cash payment of $3.50 per qualified purchase. *See* Prelim. Approval Order at 3; Settlement Agmt. §§ 1.32, 1.33, 3.2, ECF No. 23-1. There is no limit to the amount of cash or vouchers P&G will provide to Class Members who provide valid Proof of Purchase, and there is no limit to the number of claims a Class Member may submit with valid Proof of Purchase. Settlement Agmt. § 3.2(a). For Class Members who could not provide valid Proof of Purchase, P&G agreed to pay up to three cash payments/vouchers per household. *Id.*

§§ 1.16, 1.17, 3.2(b). Class Members who already recovered through P&G's voluntary recall program will have their claims offset by their prior recovery. *Id*. § 3.2(c).

P&G also agreed to injunctive relief that includes: specifying that sourced isobutane raw material may not contain more than 1 ppm benzene; requiring its raw material suppliers and contract manufacturers of isobutane raw material to test for the presence of benzene in its materials and withhold batches containing more than 1 ppm; and requiring P&G to test its finished product and withhold batches that contain more than 1 ppm. Settlement Agmt. § 3.5.

D. Non-Settling Plaintiffs Did Not Advance Any Legitimate Objections to Preliminary Approval, and No Other Objections Were Filed.

Plaintiffs moved for preliminary approval on July 1, 2022. *See* ECF No. 23. On July 22, 2022, two Non-Settling Plaintiffs—represented by the same lawyers—opposed the preliminary approval motion. *See* ECF No. 26. These Non-Settling Plaintiffs argued that the settlement negotiations were not conducted at arm's length and that the Settlement did not provide adequate relief for several reasons. *See id*. In a thorough opinion, the Court carefully addressed each argument, correctly determined that the arguments against settlement approval were meritless, and granted preliminary approval on October 28, 2022. *See* Prelim. Approval Order at 13–21.

Notice of the Settlement was provided to the Settlement Class beginning on November 28, 2022. The Settlement Class received notice via online display banner advertising; social media advertising through Facebook, Instagram, and YouTube; keyword search advertising; and a press release. *See* Declaration of Jeanne C. Finegan ("Finegan Decl."), ECF No. 54-2, ¶¶ 5-6. The press release resulted in 191 news mentions of the Settlement. *Id*. ¶ 16.

The reaction of the class has been overwhelmingly positive. Whereas the Non-Settling Plaintiffs told this Court at the preliminary approval stage that it was "highly likely that each of those [non-settling] plaintiffs' counsel are likely to opt out their claims," Tr. of Sept. 28, 2022

Prelim. Approval Hearing, ECF No. 44, at 7:23-25, none actually did so. Just two class members requested exclusion. *See* Decl. of Scott M. Fenwick ("Fenwick Decl."), ECF No. 54-1, ¶ 15. None objected. *Id*. ¶ 16. Roughly 280,000 validated claims were received, 263,193 of which requested a monetary payment and 16,700 of which requested a product voucher. *Id*. ¶ 13. The total combined value of the monetary and voucher relief that will be distributed to the class if the Settlement is approved is $3,094,751—$2,738,911 in monetary relief and $355,840 in the form of vouchers. *Id*.

PROCEDURAL STANDARD

When deciding whether to grant final approval to a proposed settlement, the Court must consider whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the Court considers the following factors: (1) the likelihood of success on the merits; (2) the complexity, expense and likely duration of the litigation; (3) the risk of fraud or collusion; (4) the amount of discovery engaged in by the parties; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *See Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021) (Watson, J.); *see also* Prelim. Approval Order at 22.

ARGUMENT

I. THE SETTLEMENT IS FAIR AND REASONABLE.

In addition to the reasons Plaintiffs provide, *see* Pls.' Unopposed Mot. for Final Approval of Class Action Settlement, ECF No. 55, there are other reasons why this Court should approve the Settlement as "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2).

A. Plaintiffs Were Unlikely to Succeed Through Further Litigation

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from

which the benefits of the settlement must be measured." *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011) (internal quotation marks and citation omitted). "The lower the likelihood of success on the merits, the more desirable a favorable settlement appears." *Kritzer v. Safelite Sols., LLC*, 2012 WL 1945144, at *6 (S.D. Ohio May 30, 2012) (granting final approval to a settlement). In this case, there were at least four "obstacles plaintiffs [w]ould [have] face[d] in attempting to certify a class for litigation purposes or to establish P&G's knowledge." Prelim. Approval Order at 12; *see also id.* at 15 n.5, 21.

First, not every aerosol product in these cases was contaminated with benzene. Because plaintiffs' alleged injury is purely economic—overpayment of some or all of the products' price—they must show that they actually bought products that contained benzene. According to Valisure's petition, some of P&G's products are among those that tested negative for benzene. P&G's internal testing confirms that many P&G products contained no benzene. A plaintiff's inability to prove "that she actually purchased . . . products which were adulterated with benzene" will be fatal to their claims. *Schloegel v. Edgewell Personal Care Co.*, 2022 WL 808694, at *2 (W.D. Mo. Mar. 16, 2022) (dismissing claims arising out of purchase of allegedly contaminated sunscreen); *Rooney v. Procter & Gamble Co.*, 2023 WL 1419870, at *2–4 (E.D. La. Jan. 31, 2023) (dismissing claims arising out of allegedly contaminated antiperspirant in part because plaintiff did not plausibly allege that the product she actually used was contaminated); Prelim. Approval Order at 3 (recognizing that purchasers of products that did not contain benzene "could not recover should the case proceed with litigation"). But even if individual plaintiffs could prove that they bought a benzene-contaminated product, they would be unable to do so on a classwide basis through classwide proof.

Second, plaintiffs cannot establish that any benzene in the products they purchased was at levels that were unsafe or violated any law. The FDA has advised manufacturers to recall drug products only if they contain benzene at levels above 2 ppm.[3] In other words, the FDA at present finds nothing harmful, much less unlawful, about selling products that contain trace amounts of benzene. That explains why, for the past two years, the FDA has explicitly permitted the sale of hand sanitizers with benzene levels between zero and 2 ppm,[4] and the FDA generally allows the use of ethanol containing up to 2 ppm of benzene in a range of over-the-counter products.[5] And as this Court observed, even where FDA recommends that manufacturers not release drugs containing benzene above 2 ppm, that guidance is not binding. Prelim. Approval Order at 17.

Third, most of plaintiffs' claims require proof that P&G *knew* that it sold products allegedly contaminated with benzene. Plaintiffs will not be able to make this showing. P&G had no knowledge of any benzene contamination until Valisure's petition was filed. Indeed, this Court already considered the sole piece of evidence that could even arguably be construed as suggesting knowledge—a short, vague form letter from October 2021 from P&G's contract manufacturer, dated 14 days before Valisure's petition was filed—and concluded it did not disclose that any of the products manufactured for P&G contained benzene or even that a supplier had been supplying

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[3] *FDA alerts drug manufacturers to the risk of benzene contamination in certain drugs*, U.S. Food & Drug Admin. (last updated June 9, 2022), https://www.fda.gov/drugs/pharmaceutical-quality-resources/fda-alerts-drug-manufacturers-risk-benzene-contamination-certain-drugs?utm_medium=email&utm_source=govdelivery; *Frequently Asked Questions on Benzene Contamination in Drugs*, U.S. Food & Drug Admin. (last updated June 9, 2022), https://www.fda.gov/drugs/drug-safety-and-availability/frequently-asked-questions-benzene-contamination-drugs ("Drug manufacturers . . . should test their drugs accordingly and should not release any drug product batch that contains benzene above 2 ppm.").

[4] *Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Product During the Public Health Emergency (COVID-19)*, U.S. Food & Drug Admin. (updated June 1, 2020), *available at* https://www.regulations.gov/document/FDA-2020-D-1106-0020.

[5] Monograph for Ethanol, U.S. Food & Drug Admin., https://www.uspnf.com/sites/default/files/usp_pdf/EN/USPNF/alcohol.pdf.

contaminated hydrocarbon propellant. Prelim. Approval Order at 15 (observing that "the October 2021 letter is hardly the damning evidence Nonsettling Plaintiffs claim it to be"). P&G's prompt efforts to immediately investigate and recall affected products following the filing of Valisure's petition further confirm that P&G lacked prior notice of benzene contamination.

Finally, P&G's widely publicized voluntary recall program, which hundreds of thousands of consumers took advantage of, promptly and efficiently provided the same economic relief that plaintiffs seek in these cases, potentially mooting Plaintiffs' damages claims altogether and at a minimum making the recall program superior to years of costly class-action litigation. *See, e.g.*, *Hadley v. Chrysler Grp., LLC*, 624 F. App'x 374, 379–80 (6th Cir. 2015) (affirming dismissal of claims as moot where vehicle manufacturer acknowledged defect and offered free repair); *Pacheco v. Ford Motor Co.*, 2023 WL 2603937, at *3–4 (E.D. Mich. Mar. 22, 2023) (dismissing claims as prudentially moot based on voluntary recall program overseen by National Highway Transportation Safety Administration); *Treviso v. Nat'l Football Museum, Inc.*, 2018 WL 4608197, at *8 (N.D. Ohio Sept. 25, 2018) (denying class certification and finding reimbursement program superior "when compared to the cost, time and vagaries of a class action"); *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012) ("[R]ational class members would not choose to litigate a multiyear class action just to procure refunds that are readily available."). Consumers who already received benefits under P&G's recall program would have nothing more to recover from these purported class action cases. *See In re Samsung Top-load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2020 WL 2616711, at *14 (W.D. Okla. May 22, 2020), *aff'd* 997 F.3d 1077 (10th Cir. 2021) (approving settlement when plaintiffs would "have to wrestle against the reality that a voluntary recall meant to address the very injuries complained of here was already in place before many of the claims were brought").

As the Court noted in granting preliminary approval, the Settlement is "particularly fair given the significant hurdles plaintiffs could face in attempting to litigate their claims on a class-wide basis." Prelim. Approval Order at 21. That is why the Settlement enjoys overwhelming support from the Class, as discussed below.

B. The Settlement is Procedurally Fair.

"In this Circuit, [c]ourts presume the absence of fraud or collusion in reaching a settlement unless there is evidence to the contrary." *Karpik*, 2021 WL 757123, at *4 (internal quotation marks omitted). This Court already examined this issue in detail in its Preliminary Approval Order and was "satisfied no collusion occurred here." Prelim. Approval Order at 13. As the Court explained, "[t]he Settlement was reached only after engaging in mediation with a neutral JAMS mediator who specializes in complex business litigation." *Id.* "Even then, the Parties reached an impasse after a full-day mediation." *Id.* "The mediator then assisted the Parties in 'engag[ing] in vigorous, arm's lengths negotiations' over the following weeks, but they *again* appeared to be at an impasse." *Id.* at 13-14 (quoting Meyer Decl. ¶ 9). "It was only after the mediator, '[i]n an effort to break the impasse,' made a mediator's proposal that the Parties reached agreement." *Id.* (quoting Meyer Decl. ¶ 10).

Even after an agreement in principle was reached, this Court issued two orders to ensure that parties who did not participate in the mediation had access to the Settlement and the same informal discovery that had been provided during settlement negotiations. *See* ECF Nos. 14, 21. As this Court explained, the purpose of its orders was to ensure that "Non-Settling Plaintiffs have had a meaningful opportunity to review the Settlement and engage in negotiations regarding the same, if necessary." ECF No. 21 at 2. No party, including Non-Settling Plaintiffs or their counsel, took this Court up on its invitation to propose changes to the Settlement. Soukup Decl. ¶¶ 16–17. To the contrary, after the agreement in principle was reached, seven additional plaintiffs in three

additional cases in this MDL affirmatively supported the settlement. *Id.* ¶ 15. And since this Court granted preliminary approval to the settlement, none of the Non-Settling Plaintiffs, nor any other Settlement Class Member, has filed any objections or made any new criticisms of the settlement or the process by which it was negotiated. *See* Fenwick Decl. ¶ 16.

C. The Settlement is Substantively Fair.

The compensation provided under the Settlement is also more than adequate, especially considering the "significant hurdles plaintiffs could face in attempting to litigate their claims on a class-wide basis." Prelim. Approval Order at 21; *see also supra* § I.A.

First, for each P&G Aerosol Product purchased, Class Members were permitted to request either a $3.50 monetary payment or a voucher equivalent to the current retail price of each Product purchased by Class Members. ECF No. 23-1, §§ 3.2(a), (b). As this Court observed, "[t]he cash payments represent approximately 70% of the manufacturer's suggested retail price, and the vouchers represent an even higher value relative to alleged loss of purchase price per product—which is the primary loss alleged" by plaintiffs. Prelim. Approval Order at 11-12.

Second, Class Members who provided Proof of Purchase faced no limit on the number of claims they could submit. Settlement Agmt. § 3.2(a). Given the obstacles plaintiffs faced in pursuing litigation, the compensation provided to Class Members under the Settlement is a "significant recovery given the low maximum recovery each plaintiff would win even after success at trial." Prelim. Approval Order at 12. Indeed, in another case involving benzene contamination, a court recently granted final approval of a settlement that primarily provided product vouchers, with a limit of only two per household. *Johnson & Johnson*, 2023 WL 2284684, at *3.

Third, the Settlement also secures meaningful non-monetary relief that will benefit all Class Members and the public. Specifically, P&G has agreed to adopt new specifications requiring isobutane raw material suppliers to ensure that such raw material used in the P&G Aerosol

Products does not contain more than 1 ppm of benzene, and has agreed to certain additional testing requirements for its raw materials and finished products. Settlement Agmt. § 3.5(b), (c). P&G has already complied with these provisions, which "provide[] for more restrictive procedures than even the current FDA guidance," on the permissible level of benzene in consumer aerosol products, and support the adequacy of the relief provided for under the Settlement. Prelim. Approval Order at 17; *see also Does 1-2 v. Déjà Vu Servs. Inc.*, 925 F.3d 886, 897 (6th Cir. 2019) (affirming approval of settlement that involved, among other things, "injunctive relief [that] mandates extensive changes to [defendant's] business practices"); *Pelzer v. Vassalle*, 655 F. App'x 352, 362 (6th Cir. 2016) (approving in part because the settlement's "purely prospective relief . . . will help prevent similar issues in the future" and will "serve the public going forward").

In *Johnson & Johnson*, the recently approved nationwide class action settlement similarly required the defendant to adopt new specifications and new testing protocols "requiring any supplier of isobutane raw material intended for use in Aerosol Products to test for the presence of benzene at no more than [1] parts per million (PPM) and refrain from shipping such raw material unless the shipment has passed such test."[6] *See Johnson & Johnson*, 2023 WL 2284684, at *4. The court found that that settlement, including these injunctive provisions, provided "immediate, real, substantial, and practical benefits to the Class Members." *Id.* at *11. The same is true here.

[6] The *Johnson & Johnson* opinion incorrectly states that the testing required under the settlement permitted no more than 0.1 ppm of benzene. The *Johnson & Johnson* settlement agreement itself, however, makes clear that, similar to this case, that settlement imposed a standard of no more than 1 ppm of benzene. Class Action Settlement Agreement at 12–13, *In re Johnson & Johnson Aerosol Sunscreen Mktg., Sales Pracs. and Prods. Liab. Litig.*, No. 0:21-md-3015 (S.D. Fla.), ECF No. 55-9.

D. The Reaction to the Settlement is Overwhelmingly Positive

In granting final approval to a class settlement, the Court also considers the reaction of absent class members to the settlement. *Poplar Creek Dev. Co.*, 636 F.3d at 244. Here, class members' reaction was overwhelmingly positive.

First, there have been no objections to the settlement, and only two requests for exclusion were made. *See* Fenwick Decl. ¶¶ 15-16; *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 997 (N.D. Ohio 2016) ("That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and demonstrates that the Settlement is 'fair, reasonable, and adequate.'" (citation omitted)); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 500 (E.D. Mich. 2008) ("If only a small number [of opt outs or objections] are received, that fact can be viewed as indicative of the adequacy of the settlement."). Although Non-Settling Plaintiffs previously objected to preliminary approval of the Settlement, they have not renewed their objections at final approval. Nor have any of the Non-Settling Plaintiffs requested to be excluded from the settlement, as they suggested they might do at the preliminary approval hearing. *See* Tr. at 7:20-25, ECF No. 44.

Second, approximately 280,000 claims are due to be paid to Settlement Class Members under the settlement, 263,193 of which are for monetary payments and 16,700 of which are for product vouchers. *See* Fenwick Decl. ¶ 13; *Rikos v. Proctor & Gamble Co.*, 2018 WL 2009681, at *8 (S.D. Ohio Apr. 30, 2018) (reaction of absent class members "strongly support[ed] approval" where claims administrator received 151,445 claim forms and five objections). Those 280,000 claims are *in addition to* the more than 200,000 consumers who collectively received cash and vouchers worth $3,620,031 under P&G's voluntary recall program. *See* Josephson Decl. ¶¶ 5, 6.

Consistent with the terms of the Settlement Agreement, Kroll reduced the number of vouchers or monetary payments that individuals who participated in the Recall Program will receive under the Settlement. Fenwick Decl. ¶ 9. As this Court previously observed, "[t]here is nothing wrong with requiring an offset or limiting additional non-proof-of-purchase recovery; settlement is not meant to be a windfall to plaintiffs, and if they have already been made whole via another mechanism, it is not unfair to prevent additional recovery through settlement." Prelim. Approval Order at 20. And "[t]here is no requirement that a defendant, who takes voluntary remedial measures to compensate purchasers for an alleged loss of purchase price, must then *exceed* that voluntary effort in order to settle a lawsuit." *Id*. at 18. Otherwise, "defendants would be loath to institute voluntary remedial measures for fear that they would establish a floor for future settlement negotiations." *Id*. Such a result would be bad for consumers, because prompt voluntary remedial measures—such as P&G's recall and reimbursement program here—are "superior when compared to the cost, time and vagaries of a class action." *Treviso*, 2018 WL 4608197, at *8; *see also Flores v. FCA US LLC*, 2020 WL 7024850, at *4 (E.D. Mich. Nov. 30, 2020) (plaintiffs were not injured where car manufacturer offered free repairs).

Kroll also denied claims that appeared to be the product of fraud. Where, as here, the identities of class members are unknown, efforts to "weed out fraudulent claims . . . take on heightened importance." *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *9 (N.D. Ohio Aug. 12, 2019). Kroll ultimately determined that approximately 362,000 claims were not valid, because (a) they were untimely, (b) the email domain associated with the claim was found to be fraudulent, (c) the electronic payment destination was found to be in a foreign country (and thus the claimant was not a Class Member), and/or (d) the address and/or payment account associated with the claim was duplicative of one or more other claims, indicating that

more than one claim had been submitted for a particular household. Fenwick Decl. ¶¶ 13–14. That an online claims process that offered monetary payments that could be distributed to digital payment accounts such as prepaid digital MasterCard, Venmo, PayPal, or Zelle without requiring proof of purchase was apparently the target of fraud is neither unexpected nor an impediment to final approval. *See Rawa v. Monsanto Co.*, 2018 WL 2389040 (E.D. Mo. May 25, 2018) (claims administrator explained propensity for fraud in online claims systems with no proof-of-purchase requirement and means of detecting fraud, including excluding certain geographic locations and sources that submitted high claim volumes), *aff'd*, 934 F.3d 862 (8th Cir. 2019); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 4102586, at *3 (E.D. Pa. Sept. 14, 2017) (confirming final approval after claims administrator belatedly invalidated nearly two-thirds of claims, including many received through an online portal).

Given that the overwhelming majority of Settlement Class Members appear to support the Settlement, "[t]his positive response from the Settlement Class weighs in favor of approving the settlement." *Wright v. Premier Courier, Inc.*, 2018 WL 3966253, at *5 (S.D. Ohio Aug. 17, 2018) (Watson, J.); *see also Johnson & Johnson*, 2023 WL 2284684, at *10 (granting final approval to class settlement where only one objection was received and only two exclusions were requested out of 209,000 claims filed).

II. 28 U.S.C. § 1712 PERMITS THIS COURT TO GRANT FINAL APPROVAL NOW.

This Court's preliminary approval order directed the parties to "address the supportability of any requested fees under 28 U.S.C. § 1712." Prelim. Approval Order at 12. P&G takes no position on what amount of attorney's fees or service awards should be awarded, other than that the total amount of attorney's fees and costs awarded should be consistent with the parties' Settlement Agreement (*i.e.*, no more than $2.4 million). *See* ECF No. 23-1 § 3.4(a). Instead, to assist the Court, P&G provides these observations about the impact of § 1712 on this Court's

analysis of Plaintiffs' pending motions.

First, § 1712 only applies if a settlement "provides for a recovery of coupons to a class member," but the vouchers to be distributed here are not "coupons" within the meaning of § 1712. For purposes of § 1712, a "coupon" "require[s] an individual to buy a product or service before receiving the promised benefits" *and* "require[s] class members to 'hand over more of their own money' to be eligible to redeem the benefits of the Settlement Agreement in this case." *Does 1-2*, 925 F.3d at 897. Here, however, the vouchers cover the full purchase price of a P&G Aerosol Product. Because Settlement Class Members need not spend more money to enjoy the benefits of the Settlement, this settlement is distinguishable from other settlements that have involved "coupons." *See Linneman v. Vita-Mix Corp.*, 394 F. Supp. 3d 771, 780 (S.D. Ohio 2019), *vacated and remanded on other grounds*, 970 F.3d 621 (6th Cir. 2020) (coupon settlement where "[i]t [was] undisputed that Class Members will have to spend money to utilize their Gift Card," Gift Cards were "good for one-time use and unused funds are forfeited," and other restrictions applied); *Chapman v. Tristar Prod., Inc.*, 2018 WL 3752228, at *2, *4 (N.D. Ohio Aug. 3, 2018) (coupon settlement where class members could receive a credit off of one of three products, but because the price of each product exceeded the value of the credit, "class members must pay the difference between the product's retail cost and the value of the credit, plus any shipping and handling fees").

Second, even assuming that the vouchers are "coupons" for purposes of § 1712, such a conclusion has no material impact on this Court's decision to grant final approval. Section 1712(e) simply provides that "[i]n a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). In other words, even when a settlement calls for the distribution

of coupons, § 1712(e) has prescribed that a court's process for approving such a settlement is the same inquiry the court would employ under Fed. R. Civ. P. 23(e)(2). *See id.* As explained elsewhere, the proposed settlement here easily meets that standard.

Third, in this case, a conclusion that the vouchers are "coupons" for purposes of § 1712 only affects this Court's analysis into how an attorney's fee should be awarded. The value of the vouchers to be distributed under the Settlement represents 11.5% of the total monetary relief that will be distributed to Settlement Class Members. *See* Fenwick Decl. ¶ 13. But here, Plaintiffs have disclaimed any reliance on the value of the vouchers in assessing the amount of any attorney's fee award. ECF No. 47 at 10. Accordingly, the Court need not wait to see how many vouchers are redeemed before determining the appropriate amount of attorney's fees to award, as the Court would otherwise have to do. *See* 28 U.S.C. § 1712(a) ("If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.").

Instead, if this Court concludes that the Settlement involves "coupons," this Court should follow the process set forth in § 1712(b) for calculating the amount of any attorney's fee, which applies when "a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel." 28 U.S.C. § 1712(b)(1). That section provides that "any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action." *Id.* It further provides that any attorney's fee "shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable." *Id.* § 1712(b)(2). And it states that "[n]othing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method in determining

attorney's fees." *Id.*

CONCLUSION

This Court should enter the proposed Final Judgment and Order Granting Final Approval of Class Settlement.

DATED: April 11, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 11, 2023, I caused to be electronically filed the foregoing Memorandum in Support of Motion for Final Approval of Class Action Settlement. Notice of this filing will be sent by electronic mail to all parties who filed a notice of appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

s/ *Henry Liu*
Henry Liu