

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)**

SARA HAWES, et al.,

Plaintiffs,

v.

MACY'S WEST STORES, INC.,

Defendant.

Civil Action: 1:17-CV-00754

Judge Douglas R. Cole

CHIARALUCE, et al.,

Plaintiffs,

v.

MACY'S, INC.,

Defendant.

Civil Action: 2:20-CV-0081

Judge Douglas R. Cole

**PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF
PROPOSED SETTLEMENT AND OTHER RELATED RELIEF**

Plaintiffs, by and through Class Counsel, hereby move for an order pursuant to Fed. R. Civ. P. 23 granting final approval of the settlement between Plaintiffs and Defendants Macy's West Stores, Inc. and Macy's, Inc. The requested related relief is set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Final Approval.

For the reasons set forth in the accompanying memorandum of law, Plaintiffs respectfully request that the Court grant this motion and enter the proposed Order and Final Judgment filed herewith. Defendants do not oppose this motion.

Dated: September 27, 2023

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CERTIFICATE OF SERVICE

I certify that on September 27, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

/s/ David Black

David Black

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**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
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I. INTRODUCTION

Pursuant to the Court’s Order of June 21, 2023, Dkt. No. 146, Plaintiffs Sara Hawes, Cassandra Chiaraluce, and Jonathan Fontaine (“Plaintiffs” or “Class Representatives”), by and through counsel, hereby submit this Memorandum of Law in Support of Plaintiffs’ Motion for Final Approval. A proposed Order Granting Final Approval is attached hereto as Exhibit 1.

On May 1, 2023, the Court granted Plaintiffs’ motion for preliminary approval and provisionally certified the following class: “All persons who purchased one or more CVC Sheets supplied by AQ Textiles, LLC from a Macy’s store in the United States or Guam or on www.macys.com between November 8, 2013, and March 24, 2023.” Dkt. No. 144. The parties complied with the final approval order and directed that notice be given to the Settlement Class and on August 4, 2023, filed a motion for fees, expenses, and service awards. Dkt. No. 147.

The Settlement remains fair, adequate, and reasonable and represents a substantial recovery for Class Members. After five years of hard-fought litigation, Class Counsel¹ has negotiated and presented a common fund settlement totaling \$10,500,000. The Settlement provides eligible Class Members with significant cash benefits and injunctive relief in the form of modified label packaging. Defendants will ensure that CVC sheets supplied by AQ Textiles, LLC, on or after September 1, 2023, will state: “Thread count determined from a sample of a representative sheet by counting cotton yarns and by separating and counting adjacent parallel polyester yarns.” Settlement Agreement at 5.3.²

¹ “Class Counsel” includes Cuneo Gilbert & LaDuca, LLP, Audet & Partners, LLP, and Levin Sedran & Berman, LLP, as well as other firms representing the Plaintiffs with the prosecution of this litigation.

² The Settlement Agreement was filed with Plaintiffs’ motion for preliminary approval. Dkt. Nos. 143, 143-2.

Class Representatives and Class Counsel have zealously pursued this litigation and Defendants mounted a spirited defense.

The Court has seen first-hand much of the work done by Class Counsel as reflected in Plaintiffs' granted motion for class certification and its opposition to Defendants' motion for summary judgment, which this Court denied in part. In those filings, Plaintiffs included numerous deposition excerpts (depositions were taken of Defendants' representatives and employees, fact witnesses, third-party witnesses, the Representative Plaintiff, and numerous experts) and document admissions which Class Counsel ascertained because of aggressive discovery efforts.

The Settlement was carefully negotiated at arm's length with the assistance of an experienced mediator, the Honorable Diane Welsh (Ret.), but only after the Parties completed discovery, the Court granted class certification, the Sixth Circuit denied interlocutory review, the Court denied Macy's summary judgment motion, and the Parties and their counsel began trial preparations. Any compensation to Class Counsel and the Representative Plaintiffs' service awards were only discussed after the Parties reached agreement on the material terms of the Settlement.

The Notice plan has been effectuated as per the Court's preliminary approval order. In its Order, Dkt No. 144 at page 4, the Court found "that the Notice Plan is the best practicable method to provide notice to potential class members under the circumstances and constitutes valid and sufficient notice to the Settlement Class." Notice was provided using direct mail and/or email notice as well as employing programmatic notice tools including, *inter alia*, advertising on websites and internet ad platforms similar to Google and Facebook. *See* Declaration of Steven Weisbrot, Esq. of Angeion Group LLC Re: Settlement Administration ("Weisbrot Decl."), attached as Exhibit 2.

As explained in the previously filed motion for awards of attorneys' fees, litigation expenses, and service awards to the Class Representatives, Dkt No. 147, the requested amounts are appropriate under the Settlement Agreement and reasonable in comparison to awards in similar cases. Specifically, Plaintiffs seek (1) \$3,500,000 for attorney's fees (one-third (1/3) of the \$10,500,000 common fund); (2) \$216,561.44 for reimbursement of litigation expenses already incurred; and (3) service awards totaling \$6,500 for the three Class Representatives. *Id.* As the Court noted in its order granting preliminary approval, "Agreement set forth in the parties' Settlement is within the range of reasonableness and possible final approval in that it appears fair, reasonable, and adequate." Dkt. No 144 at page 2.

In exchange for the monetary and prospective relief, Defendants will receive a release as set forth in the Settlement. *See generally* Settlement.

The reaction of the Settlement Class has been overwhelmingly positive. As of the filing of this motion, in response to notice, approximately 300,000 Class Members have submitted claim forms. The number of claims is already substantial. The deadline for claim submissions is six months after the settlement is final and effective. *See generally* Settlement. As discussed herein and in the declaration of the court appointed notice provider, supplemental notice tools will be employed by the notice provider to continue to notify and remind class members about the Settlement and claim filing.

The deadline to object or opt out of the Settlement was September 6, 2023. Only 59 requests for exclusion were received. There were not any objections to the Settlement by class members. The fact that not a single Class Member objected to any aspect of the terms of the Settlement, the proposed fee award, or to the Service Awards is a testament to the quality of the work done, and results achieved, by Class Counsel.

As set forth herein, the Class Representatives respectfully request the Court enter an order that finally: (1) approves the Settlement Agreement and Release as fair, reasonable, and adequate under Federal Civil Rule 23; (2) certifies the Settlement Class; (3) appoints Sara Hawes, Cassandra Chiaraluce, and Jonathan Fontaine as Class Representatives; (4) appoints Charles J. LaDuca, Michael McShane and Charles Schaffer as Class Counsel; (5) finds the Notice plan as implemented satisfies Rule 23 and due process; (6) appoints Angeion Group as the Settlement Administrator; (7) awards \$3,500,000 for attorney's fees; (8) awards \$216,561.44 for reimbursement of litigation expenses; (9) awards service awards totaling \$6,500 for the three Class Representatives; and (9) grants further relief as the Court deems just and proper.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Plaintiffs' Claims.

Plaintiff Sara Hawes filed this class action lawsuit on November 8, 2017, alleging that CVC Sheets she purchased from Macy's were falsely and deceptively labeled in that the thread count listed on the packaging was incorrect (higher than it actually was), and that as a result she paid more for the CVC Sheets than they were worth. Dkt. Nos. 1, 44, and 64. After the filing of a third-amended complaint, Dkt. No. 64, the following six claims moved forward: (1) claims under the unlawful, unfair, and fraudulent prongs of the California Business and Professions Code § 17200; (2) claims for deceptive advertising under the same code § 17500; (3) a consumer protection claim under the California Consumer Legal Remedies Act § 1750; (4) a breach of express warranty claim; (5) a fraud claim; and (6) an unjust enrichment claim.

On February 12, 2020, as explained in the Plaintiffs' motion for preliminary approval, Plaintiffs' counsel herein also filed the action styled as *Chiaraluce v. Macy's Inc.*, No. 2:20-CV-

081 (S.D. Ohio). *Chiaraluce* was then related to *Hawes* by Order of the Court. *Chiaraluce* Dkt. No. 4.

B. The Court Denies Macy's Motion to Dismiss.

Macy's filed a motion to dismiss on January 2, 2018. Dkt. No. 17. On September 28, 2018, the Court denied Macy's motion and granted, in part, and denied, in part, the motion to dismiss. Dkt. No. 39. On the same date, the Court granted a motion to dismiss filed by AQ Textiles on jurisdictional grounds, removing them from the case. Dkt. No. 38.

C. Plaintiffs Engage in Extensive Discovery and Expert Analysis.

Prior to filing this matter, Plaintiffs' Counsel undertook an extensive investigation of the alleged issues and prepared for protracted litigation. *See* Joint Fee Declaration ¶¶ 25-26.³

Among other things, during this litigation, Plaintiffs' Counsel have:

- Deposed and defended depositions (corporate, fact, third-party, and experts);
- Collected information from a variety of sources, including third parties (including AQ and marketing companies), the Federal Trade Commission, the Texas Attorney General's Office, and evidence that Defendants produced;
- Collected and analyzed information and discovery;
- Conducted extensive research on the various aspects of the law, and drafted, edited, and filed complaints, a motion for class certification, and oppositions to Defendants' motion dismiss, motion for summary judgment, and a Rule 23(f) petition;
- Consulted with liability and damages experts, who proffered reports and were deposed;
- Analyzed test results of sheets and engaged with experts;
- Researched and analyzed American Society for Testing and Materials (ASTM) and other industry standards;
- Researched and analyzed federal and state enforcement materials;

³ The Joint Fee Declaration was filed on August 4, 2023 as an exhibit to Plaintiffs' motion for fees, expenses, and service awards. Dkt. No. 147-2.

- Drafted and negotiated key case management documents and stipulations;
- Reviewed thousands of pages of documents produced by Defendants;
- Drafted, prepared for, and argued aspects of case before the Court (including Class Certification (granted) and Summary Judgment);
- Negotiated discovery and scheduling issues with defense counsel including numerous meet and confer sessions, each of which required substantial preparation;
- Prepared correspondence with respect to timing, stipulations, and case planning issues;
- Corresponded and attended calls regarding client discovery and expert issues;
- Responded to Defendants' discovery requests;
- Performed all the tasks necessary to reach a Settlement, including formulating demands, negotiating, mediation, meetings, and exchange of drafts; and
- Drafted the Settlement Agreement, preliminary approval materials, and worked on notice materials, claim forms, the settlement website, and other settlement materials with the notice provider. *Id.*

Plaintiffs' Counsel has substantial experience in prosecuting class actions, particularly those involving consumer claims as alleged here. *Id.* ¶¶ 7-21. As part of their investigation, Plaintiffs' Counsel assembled a uniquely qualified team of experts to assist in this litigation. *Id.* ¶ 27.

D. The Court Grants Class Certification.

On February 1, 2021, Plaintiffs filed a motion for class certification. Dkt. No. 84. Extensive briefing followed the Plaintiffs' certification motion. In May 2021, Macy's opposed Plaintiffs' motion for class certification and moved to strike Plaintiffs' experts' testimony under *Daubert*. Dkt. No. 87. On July 21, 2021, Plaintiffs filed a reply. Dkt. No. 112. On January 22, 2022, the Court granted Plaintiffs' motion for class certification and certified the following California class: Each person in California who purchased from Macy's a CVC (cotton-polyester blend) sheet

supplied by AQ between November 8, 2013, and the present. The Court determined, Dkt. No. 137 at page 36, in-part:

The overwhelmingly important question that looms over this litigation is a common one. It is either true or false that the thread-counting method used by Macy's deceptively overinflates thread-count by tallying each parallel strand in a bundle. Stated in the negative, it seems very unlikely that Macy's thread-count labelling would afford a claim to only some members of the proposed class. In large part, it is an all-or-nothing proposition.

E. Macy's Motion for Summary Judgment is Denied In-Part.

On July 30, 2021, Macy's filed a motion for summary judgment. Dkt. No. 117. On August 23, 2021, Plaintiffs responded. Dkt. No. 124. On September 9, 2021, Macy' filed its reply. Dkt. No. 131. On March 16, 2022, the Court denied in-part Macy's motion. Dkt. No. 139.

F. The Sixth Circuit Denies Macy's Rule 23(f) Petition.

After Plaintiffs' motion for class certification was granted and Macy's summary judgment motion was denied, Macy's requested an interlocutory appeal under Rule 23(f). On June 22, 2022, the Sixth Circuit denied Macy's 23(f) petition for interlocutory appeal.

G. The Parties Negotiate the Settlement.

After a California class of purchasers of CVC sheets was certified, and Macy's motion for summary judgment was denied in-part, the Parties engaged in two separate all-day mediation sessions before Judge Welsh. Joint Fee Decl. ¶ 34. The mediation sessions were conducted in a hybrid fashion, the mediator and some representatives of all Parties attended in person while other representatives of the Parties participated remotely. *Id.* As part of mediation, the Parties prepared and exchanged detailed mediation statements addressing the facts, posture, liability, and damages of the case. *Id.* The Parties also negotiated between the two mediation sessions, including by exchanging important information about the claims and defenses present in the litigation. *Id.* At the second mediation session with Judge Welsh in November 2022, the parties reached a settlement

in principle in this matter. *Id.* Thereafter, the Parties continued to negotiate and finalize the details of the Settlement resulting in the Agreement. *Id.*

H. Settlement Terms.

The Settlement Class is defined as follows: All persons who purchased one or more CVC Sheets supplied by AQ Textiles, LLC, from a Macy's store in the United States or Guam or on www.macys.com between November 8, 2013, and March 24, 2023. Preliminary Approval Order at 2-3.

A settlement fund of \$10,500,000 will be created for the benefit of the class. Joint Fee Decl. ¶ 36. The funds will be paid for by Macy's after the settlement is finalized. The funds will be used to pay class members' claims, notice and administrative costs, attorney fees, and incentive awards.

All members of the Settlement Class in one of the categories below who submit an Eligible Claim are eligible to receive monetary benefits as set forth below.

- Members of the Settlement Class verified from Defendants' records as actual purchasers of CVC sheets will receive \$7.50 per unit of CVC Sheets purchased. *See* Settlement Agreement ¶¶ 6.1, 6.1.1, 6.1.2, 6.1.3.
- Members of the Settlement Class who provide proof of purchase through a receipt will receive \$7.50 per unit of CVC Sheets. *Id.*
- Members of the Settlement Class who attest under penalty of perjury that they purchased a unit of CVC Sheets and who do not fall within bullets one and two above will receive \$2.50. That amount is capped at \$2.50 per Household. These members are not eligible to participate in any possible second distribution as described below. *Id.*
- Eligible Claims will be paid in full or reduced pro-rata, depending on the number of claims paid and after the fund is reduced for administrative expenses, fees, costs, and incentive awards. *Id.*

I. Class Counsel's Efforts to Maximize Notice.

Class Counsel worked extensively with Defendants' counsel and the notice provider, Angeion Group, LLC ("Angeion"), a nationally recognized class notice firm, to develop and

implement a customized plan for distribution of the Settlement. *Id.* The motion for preliminary approval and Settlement describes the notice plan in detail and attests to it meeting the requirements of Fed. R. Civ. P. 23 and due process. The Court approved Angeion Group to carry out and implement the Notice Plan. As discussed herein, Angeion has successfully implemented the notice plan and will continue to administer the Settlement and receive claims.

The Notice Plan provided individual direct notice to over 1.5 million class members via email and mail, combined with a robust media campaign utilizing a variety of methods including state-of-the-art target Internet notice, social media notice, and a paid search campaign. In addition, it included a press release, publication notice, and the implementation of a dedicated settlement website and a call – free telephone line where settlement class members can learn more about the rights and options pursuant to the terms of the settlement. *See* Notice plan (ECF 143-2); *generally*, (Weisbrot Decl.). The consumer media campaign component of the notice plan delivered approximately 75.19% reach with an average frequency of 3.38 times. *Id.* What this means is that 75.19% of the target audience saw a digital advertisement concerning the settlement an average of 3.38 times each. The 75.19% reach is independent from the direct-mail and email notice efforts and does not include the press release, publication notice, nor dedicated settlement website for toll – free telephone line. *Id.* To date, the claims activity has been robust with approximately 300,000 claims being filed. *Id.*

The comprehensive Notice Plan was determined by the Court to meet the requirements of due process. (ECF No. 144). As Angeion’s Declaration demonstrates, it has taken the steps necessary to implement and complete the Notice Plan and it satisfies the requirements of Rule 23 and due process and should be approved by the Court. The claims period will not commence until the settlement becomes effective and it will run for six months and the amount of claims

being submitted will be significant. Furthermore, the Parties, in conjunction with Angeion, designed a supplemental notice plan to stimulate claims consisting of: (1) disseminating reminder email notices; (2) additional programmatic display advertising; (3) targeted social media notice; (4) sponsored listings on two leading class action settlement websites; and (5) a paid search campaign via Google. The Claims Stimulation Package will utilize a mix of digital advertising tactics and simplified messaging specifically designed to drive Settlement Class Members to the Settlement Website and ultimately submit a claim. Real-time optimization techniques will be rolled out towards optimizing the best performing tactics. (Weisbrot Decl.). This technique of providing ongoing awareness of the Settlement and the Settlement benefits is especially effective at reaching and motivating claimants who are deadline-oriented individuals. Angeion has already started deploying the supplemental notice program. Angeion will continue to monitor the notice program, claims activity, and employ additional notice tools throughout the claims period to reach and notify class members about the settlement in an effort to increase the number of claims filed by class members. *Id.*

Prior to the commencement of the Claims Stimulation efforts on September 22, 2023, Angeion received over 275,000 claim form submissions, which is an average of approximately 3,575 claim form submissions per day. In the immediate three-day period after the commencement of the Claim Stimulation efforts, the average number of claim submissions per day rose to over 14,400. Angeion anticipates that an elevated rate of claim form submissions will continue throughout the duration of the Claim Stimulation efforts, as the multi-faceted Claim Stimulation techniques act as a reminder to submit a claim form by furthering awareness of the Settlement through a variety of means. *Id.*

J. Court Enters Preliminary Approval Order.

On March 24, 2023, Plaintiffs filed a motion for preliminary approval of the Settlement. Dkt. No. 143. On May 1, 2023, the Court granted Plaintiffs' motion for preliminary approval of Settlement (Dkt. No. 144). On June 21, 2023, the Court entered a revised scheduling order (Dkt No. 146) providing for the following deadlines:

- July 8, 2023, notice to the class by the claims administrator.
- August 6, 2023, Plaintiffs' motion for fees, costs, and service awards due.
- September 6, 2023, exclusion deadline.
- September 6, 2023, objection deadline.
- September 27, 2023, Plaintiffs' motion for final approval due.
- October 6, 2023, certification due to Court concerning notice requirements and opt-outs.
- October 20, 2023, hearing on final approval set to take place.

III. ARGUMENT

A. The Settlement Meets Rule 23 and Sixth Circuit Standards for Final Approval

Pursuant to Rule 23(e), the Court should finally approve the Settlement here because it is “fair, reasonable, and adequate.” Amendments to Rule 23(e) include factors used for considering whether a class action settlement is fair, reasonable, and adequate, which include:

- Whether the class representatives and class counsel have adequately represented the class;
- Whether the proposal was negotiated at arm's length;
- Whether the relief provided for the class is adequate, while taking into account:
 - the costs, risk, and delay of trial and appeal;

- the effectiveness of any proposed method of distributing relief to the class including the method of processing class members claims;
 - the terms of any proposed award of attorney’s fees, including timing of payment; and
 - any agreement required to be identified under Rule 23(e)(3); and
- Whether the proposal treats class members equitably. *See* Fed. R. Civ. P. 23(e)(2); Advisory Committee’s Note to 2018 amendment.

Sixth Circuit courts determining whether final approval is warranted additionally review: “(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.” *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 754 (6th Cir. 2013); *Todd S. Elwert, Inc., DC v. All. Healthcare Servs., Inc.*, No. 3:15-CV-2673, 2018 WL 4539287, at *2 (N.D. Ohio Sept. 21, 2018).

Indeed, “[f]ollowing preliminary approval, the class action is presumed to be reasonable...” *Id.* Therefore, “a district court’s role in evaluating a private consensual agreement ‘must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.’” *Todd S. Elwert, Inc., DC*, 2018 WL 4539287, at *2 (quoting *Clark Equip. Co. v. Int’l Union, Allied Indus. Workers of Am., AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986) (per curiam)). It is not appropriate to “withhold approval simply because the benefits accrued from the [agreement] are not what a successful plaintiff would have received in a fully litigated case.” *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 550 (S.D. Ohio 2000). “In general, a reviewing court’s task ‘is not to decide whether one side is right or even

whether one side has the better of these arguments. . . . The question is rather whether the parties are using settlement to resolve a legitimate legal and factual disagreement.” *Brent v. Midland Funding, LLC*, No. 3:11 CV 1332, 2011 WL 3862363, at *12 (N.D. Ohio Sept. 1, 2011) (internal quotations omitted).

The Settlement here meets the factors, many of which overlap and are treated below together, set forth in Rule 23 and *Vassalle*.

1. The Settlement was the Product of Arm’s Length Negotiations and No Collusion Exists.

Settlements resulting from arm’s length negotiations are presumptively reasonable. See 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.41 at 90 (4th Ed. 2002); *Roland v. Convergys Customer Mgmt. Grp. Inc.*, No. 1:15-CV-00325, 2017 WL 977589, at *1 (S.D. Ohio Mar. 10, 2017) “In assessing settlement agreements, ‘[c]ourts presume the absence of fraud or collusion unless there is evidence to the contrary.” *Todd S. Elwert, Inc., DC*, 2018 WL 4539287, at *2.

As this Court noted in its order preliminary approving the Settlement, the “parties’ Agreement was reached as a result of extensive arm’s length negotiations between the parties and their counsel, taking into consideration the relative strength and weaknesses of their case.” Dkt. No 144 at page 2.

After a California class of purchasers of CVC sheets was certified and Macy’s motion for summary judgment was denied in part, the Parties engaged in two separate all-day mediation sessions with Judge Welsh as the mediator. *See generally* Plaintiffs’ Motion for Preliminary Approval, Dkt. No. 143. The mediation sessions were conducted in a hybrid fashion, the mediator and some representatives of all Parties attended in person while other representatives of the Parties participated remotely. *Id.* As part of mediation, the Parties prepared and exchanged detailed

mediation statements addressing the case's facts, posture, liability, and damages. *Id.* The Parties also negotiated between the two mediation sessions, including by exchanging important information about the claims and defenses present in the litigation. *Id.* At the second mediation session with Judge Welsh in November 2022, the parties reached a settlement in principle in this matter. *Id.* Thereafter, the Parties continued to negotiate and finalize the details of the Settlement resulting in the Agreement. *Id.*

As here, because there is “no evidence – or even a suggestion – that the Settlement was a product of fraud or collusion, ... this factor favors approval of the Settlement.” *Karpik v. Huntington Bancshares, Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021).

2. The Complexity, Expense, Likely Duration of the Litigation, and Substantial Risk for Plaintiffs, Warrant Final Approval of the Settlement.

“Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.” *Id.* (quoting *Ganci v. MBF Inspection Servcs., Inc.*, No. 2:15-cv-2959, 2019 WL 6485159, at *3 (S.D. Ohio Dec. 3, 2019)). “[A]voiding the delay, risks, and costs of continued litigation against a defendant is a valid reason for counsel to recommend and for the court to approve a settlement.” *In re Big Lots, Inc. S'holder Litig.*, No. 2:12-CV-445, 2018 WL 11356561, at *3 (S.D. Ohio Aug. 28, 2018) (quoting *In re Nationwide Fin. Servs. Litig.*, No. 2:08-cv-00249, 2009 WL 8747486, at *10 (S.D. Ohio Aug. 18, 2009)).

“In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.50 (4th ed. 2002). Similarly, the complexity, expense, and likely duration of litigation here favor final approval of the Settlement. Continued litigation would certainly be an involved and expensive process.

The Settlement here provides the Plaintiffs with real benefits now without having to endure the risks, duration, and expense that would surely follow if this litigation were to continue and/ or go to trial. *See Bert v. AK Steel Corp.*, No. 1:02-cv-467, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008) (“The Court has no doubt that ... a complete resolution of the case would not be reached for several more years. This factor clearly weighs in favor of the proposed settlement.”).

The Plaintiffs have undertaken significant expense through motion practice (certified a class and defended against summary judgement) and discovery and would continue to incur significant expense if the case were to proceed to trial with the possibility of an appeal. Trial preparation would be lengthy, likely involve extended pre-trial motion practice, and would culminate in a multi-week, complex trial, which will undoubtedly be a battle of experts regarding the thread counting method and damages.

While Plaintiffs are confident in the strength of their claims, they are also pragmatic and aware of the various defenses available to Defendants, as well as the risks inherent to continued litigation. The Settlement offers immediate, significant, and substantial relief to all Class Members who submit a claim. The Settlement delivers real value to Class Members. Under any analysis, the relief afforded by this Settlement is fair and reasonable, especially when weighed against the anticipated cost, prolonged nature, and uncertain outcome of continued litigation.

Thus, this factor weighs in favor of granting final approval.

3. Class Counsels’ Experience and Work Here Strongly Indicates That the Settlement is Fair, Reasonable, and Adequate Sufficient Discovery Was Conducted in this Case.

Class Counsel more than adequately represented the Class and the Court already found that Class Counsel were “adequate representatives of the class.” Order, Dkt. No. 144, at page 3.

Class Counsel specializes in class actions and have national practices. *See McHugh v. Olympia Entm't, Inc.*, 37 F. App'x. 730, 740 (6th Cir. 2002). Class Counsel has vast experience litigating similar types of consumer cases (many of which have been MDL's) with similar law, causes of action, and legal theories. *See In re: CertainTeed Fiber Cement Siding Litig.*, MDL No. 2270 (E.D. Pa. 2014); *In re: CertainTeed Roofing Shingle Products Liability Litig.*, No. 07-MDL-1817 (E.D. Pa. 2010); *In Re IKO Roofing Shingle Products Liability Litigation*, MDL No. 2104 (C.D. Ill. 2009); *Morrison v. Ross Stores, Inc.*, No. 4:18-CV-2671-YGR, 2021 WL 3852726 (N.D. Cal. Aug. 27, 2021); *In re: Kitec Plumbing System Products Liability Litig.*, MDL No. 2098 (N.D. Tex. 2011); *Gold v. Lumber Liquidators*, No. 14-cv-5373 (N.D. Cal. 2017); *In re Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La. 2011); *In re Propulsid Products Liability Litigation*, MDL No. 135 (E.D. La. 2002); *Eliason v. Gentek Building Products, Inc.*, No. 10-2093 (N.D. OH. 2013); *In re: JP Morgan Chase Mortgage Modification Litigation*, No. 11-md-2290 (D. Mass. 2014); *United Desert Charities v. Sloan Valve Company*, No. 12-6878 (C.D. Cal. 2014); *Gulbankian v. MW Manufacturers, Inc.*, No. 10-10392 (D. Mass. 2014); *Pollard v. Remington Arms Company, LLC*, No. 4:13-cv-00086-ODS (W.D. M.O. 2017); *Leach v. Honeywell International, Inc.*, No. 1:14-cv-12245-LTS (D. Mass. 2014); *Newman v. Metropolitan Life Insurance Company*, No. 1:11-cv-03530 (N.D. Ill. 2019); *In re Apple Inc. Device Performance Litigation*, MDL 2827 (N.D. Cal. 2020); *Hill v. Canidae Corporation*, No. 20-1374 (C.D. Cal. 2021); *Herrera v. Wells Fargo Bank, N.A.*, No. 8:18-cv-00332 (C.D. Cal. 2021); *In re Zurn Pex Plumbing Litig.*, MDL No. 1958 (D. Minn. 2007); *In re Uponor, Inc. F1807 Plumbing Prods. Liab. Litig.*, MDL No. 2247 (D. Minn. 2011).

Since the start of this litigation, Class Counsel has ensured that they have “had access to sufficient information to evaluate their case and to assess the adequacy of the proposed

Settlement.” *Karpik*, 2021 WL 757123, at *5 (quoting *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 374 (S.D. Ohio 2006)).

For instance, among other things (including much third-party discovery), during this litigation, Plaintiffs’ Counsel have (*see* Joint Fee Declaration ¶¶ 25-26):

- Deposed and defended depositions (including experts);
- Collected information from a variety of sources, including third parties (including AQ and marketing companies), the Federal Trade Commission, the Texas Attorney General’s Office, and evidence that Defendants produced;
- Collected and analyzed information and discovery;
- Conducted extensive research on the various aspects of the law, and drafted, edited, and filed complaints, a motion for class certification, and oppositions to Defendants’ motion to dismiss, motion for summary judgment, and a Rule 23(f) petition;
- Consulted with liability and damages experts, who proffered reports and were deposed;
- Analyzed test results of sheets and engaged with experts;
- Researched and analyzed American Society for Testing and Materials (ASTM) and other industry standards;
- Researched and analyzed federal and state enforcement materials;
- Drafted and negotiated key case management documents and stipulations;
- Reviewed thousands of pages of documents produced by Defendants;
- Drafted, prepared for, and argued aspects of the case before the Court (including Class Certification (granted) and summary judgment);
- Negotiated discovery and scheduling issues with defense counsel including numerous meet and confer sessions, each of which required substantial preparation;
- Prepared correspondence with respect to timing, stipulations, and case planning issues;
- Corresponded and attended calls regarding client discovery and expert issues;
- Responded to Defendants’ discovery requests;

- Performed all the tasks necessary to reach a Settlement, including formulating demands, negotiating, mediation, meeting, and exchanging of drafts; and
- Drafted the Settlement Agreement, preliminary approval materials, and worked on notice materials, claim forms, the settlement website, and other settlement materials with the notice provider. *Id.*

“In light of the discovery that took place prior to settlement taking place, the Court deems it appropriate to ‘defer to the judgment of experienced trial counsel’ with regard to the evaluation of the strength of the case and the desirability of settlement at this stage of the proceeding.”) *See Kritzer v. Safelite Solutions, LLC*, No. 2:10-cv-729, 2012 WL 1945144, at *7 (S.D. Ohio May 30, 2012) (internal citation omitted). Among other things, Class Counsel’s discovery work here helped certify the class and defend against summary judgment. A “court should defer to the judgment of experienced counsel who has competently evaluated the strength of [their] proofs.” *Karpik*, 2021 WL 757123, at *6 (quoting *Williams v. Vuokovich*, 720 F.2d 909, 922 (6th Cir. 1983)). “Class Counsel have concluded that the Settlement is not only fair and reasonable, but that it confers substantial benefits to the Class,” and “their recommendation that the Court should approve the Settlement is entitled to some deference.” *Id.*

Thus, this factor weighs in favor of granting final approval.

4. The Reaction to the Settlement

The reaction to the Settlement was favorable. *See Olden v. Gardner*, 294 Fed. Appx. 210, 217 (6th Cir. 2008) (79 objections in class of nearly 11,000 members "tends to support a finding that the settlement is fair"); *see also Hainey v. Parrott*, 617 F. Supp. 2d 668, 675 (S.D. Ohio Sept. 20, 2007) (“Generally, however, a small number of objections, particularly in a class of this size, indicates that the settlement is fair, reasonable and adequate.”). As of the filing of this motion, in response to notice, approximately 300,000 Class Members submitted claim forms to date, with additional timely claim forms expected to be received over the next several months. *Id.* The

deadline to object or opt out of the Settlement was September 6, 2023. Only 59 requests for exclusion were received. *Mars Steel Corp. v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 834 F.2d 677, 680 (7th Cir. 1987) (“Only 1.5 percent of the class members had opted out, a surprisingly small fraction of the settlement...”). Not a single class member objected to the settlement.⁴

The lack of any class member objections to the settlement, especially when considered in light of the almost 300,000 pre-claims period claims submitted by class members, speaks volumes about the strength and quality of the settlement.

Class Members who submitted claims thus far are looking forward to the offered benefits. *See Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509, at *22 (S.D. Ohio Apr. 4, 2014), report and recommendation adopted, No. 2:11-CV-00436, 2014 WL 3543819 (S.D. Ohio July 16, 2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016) (quotation omitted) (“Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs’ class.”).

The near “unanimous approval of the proposed settlements by the class members is entitled to nearly dispositive weight in the court’s evaluation of the proposed settlements.” *In re Art Materials Antitrust Litg.*, MDL No. 436, 100 F.R.D. 367, 372 (N.D. Ohio 1983). The fact that the settlement has received 59 opt outs and no objections is very strong evidence that the Settlement merits final approval. Thus, this factor weighs in favor of granting final approval.

5. The Public Interest

“[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.” *Brent*, 2011 WL

⁴ A law firm filed a request to file an *amicus brief* with this Court, which will be addressed separately.

3862363, at *12 (quoting 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 11.41 (4th ed. 2002)); accord *Int'l Union, UAW, et al. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (“*UAW*”) (noting “the federal policy favoring settlement of class actions”). According to Sixth Circuit jurisprudence, “settlement agreements should ... be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.” *Stotts v. Memphis Fire Dep’t*, 679 F.2d 541, 555 (6th Cir. 1982), rev’d on other grounds, 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483 (1984); see also *In re Nationwide Fin. Servs. Litig.*, 2009 WL 8747486, at *8 (“[T]here is certainly a public interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve.”); *Hainey v. Parrott*, 617 P. Supp. 2d at 679 (“noting that “[p]ublic policy generally favors settlement of class action lawsuits.”); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 248 (S.D. Ohio 1991) (noting that the settlement of a class action lawsuit served the public interest because it “avoid[ed] a time-consuming and expensive trial” and “eliminate[d] the possibility of any time-consuming and expensive appeals.”).

The Settlement offers real monetary benefits and eliminates further expensive litigation (especially in a case that is approximately five years old). Importantly, it ensures that Defendants’ sheets will now state: “Thread count determined from a sample of a representative sheet by counting cotton yarns and by separating and counting adjacent parallel polyester yarns.” Settlement Agreement at 5.3.

Thus, the public interest has been served.

6. All Remaining Factors Favor Final Approval

All remaining factors contained in Rule 23 and *Vassalle* support the Settlement. The method of distributing relief was chosen to make the claims process as easy as possible. Rule 23(e)(2)(C)(ii). The attorneys' fees of one-third of the common fund are well within the range of fees for a case of this nature. Rule 23(e)(2)(C)(iii). There is no undisclosed agreements made in connection with the Settlement. Rule 23(e)(2)(C)(iv). All Class Members are treated equitably relative to each other. Rule 23(e)(2)(D). The Settlement offers cash benefits and strong injunctive relief for packaging. In total, all of the factors to be considered when determining whether to grant final approval weigh in favor of a finding that the Settlement is fair, reasonable, and adequate.

B. *Cy Pres* is Appropriate and Common in This Circuit

Generally, if unclaimed funds “are not directed to one party or another, they are distributed *cy pres* – *i.e.* to whatever would be the next best use of the money to carry out the intent of the fund.” *Rosser v. A & S Contracting, Inc.*, No. 2:15-cv-00711, 2017 U.S. Dist. LEXIS 23377, at *4 (S.D. Ohio Feb. 17, 2017). This type of distribution is normally preferred over escheat to the government. *Id.* (citing Am. L. Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. b (“A *cy pres* award to a recipient whose interests closely approximate those of the class is preferable to either [escheat to the state or reversion to the defendant].”)); *see also Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783 (E.D. Mich. 2007) (“Courts have generally looked favorably on distributions to charities that offer services that are related to the plaintiffs of a class action.”) However, “while use of funds for purposes closely related to their origin is still the best *cy pres* application, the doctrine of *cy pres* and courts’ broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations...” *Rosser*, 2017 U.S. Dist. LEXIS 23377, at *6 (citing *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993)). Numerous courts in this circuit have

approved the use of *cy pres* for unclaimed funds in class actions. *Shanahan v. KeyBank, NA*, No. 1:19-cv-2477, 2021 U.S. Dist. LEXIS 50516, at *13 (N.D. Ohio Mar. 16, 2021); *Swigart v. Fifth Third Bank*, No. 1:11-cv-88, 2014 U.S. Dist. LEXIS 94450, at *22 (S.D. Ohio July 11, 2014); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1006 (N.D. Ohio 2016); *Kritzer*, 2012 WL 1945144, at *31-32. Here, in this consumer fraud related class action, the selected *cy pres* recipient of the Public Interest Research Group (“PIRG”) is exactly in line with the goals of the class. One of PIRG’s stated areas of work is specifically consumer protection, and it even operates a PIRG Consumer Watchdog team to “make sure consumers are informed and empowered to protect themselves in today’s rapidly changing marketplace” where they work to “get rid of unsafe products and expose unfair business practices.”⁵ These interests align with the class almost exactly, and thus PIRG is an appropriate *cy pres* recipient.

C. The Best Practicable Notice was Provided

In its Order approving preliminary approval, the Court approved “the proposed methods for giving notice of the Settlement to the Members of the Settlement Class, as reflected in the Notice Plan” and found “that the Notice Plan provides due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement, and informs Settlement Class Members as to how they may exclude themselves from the class.” Order, Dkt No. 144 at page 4.

As discussed herein, Angeion Group⁶ sent the Court-approved Settlement Notices to Class Members via U.S. Mail and email. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In addition, Angeion established a website and

⁵ <https://pirg.org/our-work/consumer-protection/>

⁶ As the Court noted, Angeion Group is “a well-qualified and experienced claims administrator.” Dkt. No. 144 at page 5.

toll-free number for members of the Settlement Class and utilized other forms of notice as discussed above. No member of the Settlement Class has claimed that the Notices were deficient, and to the extent they had questions, they could review the settlement website, call the toll-free telephone line, or contact the Settlement Administrator or Class Counsel. *Graybill v. Petta Enterprises, LLC*, No. 2:17-cv-418, 2018 WL 4573289, at *3 (S.D. Ohio Sept. 25, 2018) (quoting *UAW*, 497 F.3d at 630) (notice shall apprise settlement class members as to the terms of the settlement which allows them to draw their own conclusions).

The notice program meets the structures of Rule 23 and due process and should be approved by the Court.

D. Final Certification of the Settlement Class is Appropriate

In the Preliminary Approval Order, the Court provisionally certified the Settlement Class.

The Court rules as follows:

The requirements for certification of the Settlement Class under Fed. R. Civ. P. 23(a), (b)(2), and (b)(3) have been satisfied for settlement purposes. The Court finds, for settlement purposes, pursuant to Rule 23(a): (i) the numerosity requirement is satisfied; (ii) there are questions of law and fact that are common to the Settlement Class; (iii) the claims of the Plaintiffs are typical of the claims of the Settlement Class she seeks to represent for purposes of settlement; and (iv) Plaintiffs and Class Counsel are adequate representatives of the class. The Court further finds, pursuant to Rule 23(b)(2): Defendants have acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole. The Court further finds, pursuant to Rule 23(b)(3): (i) questions of law and fact common to the Settlement Class predominate over any questions affecting any individual Settlement Class Member; and (ii) a class settlement is superior to other available means of adjudicating this dispute.

Order, Dkt No. 144 at page 3.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant this final approval of the presented Settlement.

Dated: September 27, 2023

/s/ David Black

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CERTIFICATE OF SERVICE

I certify that on September 27, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

/s/ David Black

David Black