IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: KEURIG GREEN MOUNTAIN SINGLE-SERVE COFFEE ANTITRUST LITIGATION *This Document relates to the Indirect-Purchaser Actions*	No. 1:14-md-02542 (VSB) No. 1:14-cv-04391 (VSB)

OBJECTIONS, AND MEMORANDUM IN SUPPORT OF THE OBJECTIONS, BY THE FLORIDA AND ILLINOIS ATTORNEYS GENERAL TO THE PLAN OF ALLOCATION FOR THE PROPOSED SETTLEMENT OF THE INDIRECT-PURCHASER ACTIONS

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INTRODUCTION

The Florida and Illinois Attorneys General (hereinafter "Attorneys General") object to the settlement and urge the Court to modify the proposed Plan of Allocation as it is currently structured because: (i) it does not treat class members from Florida and Illinois equitably relative to other class members from states with similar laws; (ii) and the interests of class members residing in Florida and Illinois were not adequately represented in the settlement process, which created the Plan of Allocation. In the alternative, the Attorneys General request that the Court deny final approval of the proposed settlement of this matter.

The settlement is objectionable because it arbitrarily and unfairly restricts the dollar amount paid to indirect purchasers in Florida and Illinois who submit the same documentation of their purchases of Keurig K-Cup Portion Packs ("K-Cups") as class members from other states. In fact, based on the same information submitted, indirect purchasers in Florida and Illinois would receive only a third of the recovery provided to similarly situated Indirect Purchaser Plaintiffs ("IPPs") who purchased K-Cups in states that IPPs' Class Counsel have identified as "Repealer States."[1]

While the settlement documents contain absolutely no justification for the disparate treatment of Florida and Illinois indirect purchasers, the IPPs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation

[1] In other settlements involving indirect purchasers who recover damages from antitrust injuries, the term "Repealer States" generally refers to those states that recognize an indirect purchasers' right to recover damages for violations of antitrust law notwithstanding the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (hereinafter *"Illinois Brick*"). See, *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *5 (N.D. Cal. Dec. 10, 2020) In *Illinois Brick*, the U.S. Supreme Court held that indirect purchasers cannot recover any monetary damages under the §4 of the Clayton Act, 15 U.S.C. §15. The IPPs' Class Counsel have identified the following as Repealer States or Territories ("Repealer States") in the settlement documents: Arizona, Arkansas, California, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Guam. [ECF No. 1115-7, at 5].

("Memorandum of Law") provides a brief rationale, which does not justify disparate treatment. [ECF No. 1320, at 20] This treatment is further confounding because both Florida and Illinois law permit indirect purchasers to recover damages claimants have suffered as a result of antitrust violations. Therefore, the laws or court decision in their states are similar to those states that the IPPs' Class Counsel have identified as Repealer States. Under Fed. R. Civ. P. Rule 23(e)(2)(D) this Court must consider whether the proposed settlement treats class members equitably relative to each other. Here, indirect purchasers of K-Cups in Florida and Illinois are disadvantaged without any meaningful justification.

Additionally, the settlement should be rejected because indirect purchasers in Florida and Illinois were not adequately represented in the settlement negotiations or the development or review of the Plan of Allocation. The interests of indirect purchasers in Florida and Illinois are antagonistic to those of indirect purchasers in the settlement's "Repealer States" because both subgroups compete for the same common fund. However, indirect purchasers in Florida and Illinois are unfairly and adversely disadvantaged by the arbitrary limit on their ability to recover. Adversity between subgroups of class members "requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). This settlement does not create separate subclasses for Florida and Illinois indirect purchasers.

Alternatively, courts have recognized that informal procedures, such as designating independent counsel to protect the interests of subgroups within a class, can eliminate the need for subclasses. In this instance, however, no counsel independent or otherwise represented the interests of indirect purchasers in Florida or Illinois, and the allocation counsel ("Allocation Counsel")

failed to advance any arguments in favor of treating indirect purchasers in specifically Florida and Illinois as "Repealer States." Although Allocation Counsel reviewed the Plan of Distribution, he represented claimants from non-repealer jurisdiction, rather than Florida and Illinois. Given the absence of structural or informal safeguards to protect indirect purchasers in Florida and Illinois, the Court should modify or reject the Plan of Allocation because the representative parties did not fairly and adequately protect the interests of the entire class of indirect purchasers as required by Fed. R. Civ. P. Rule 23(a)(4) and Rule 23(e)(2)(A).

BACKGROUND

The Attorneys General are their respective States' chief law enforcement or chief legal officers. Their objections to the Plan of Allocation arise from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers in their roles as chief law enforcement or legal officers. *Second*, they have a responsibility to protect consumer class members under the Class Action Fairness Act ("CAFA"), which provides an explicit role for State Attorneys General in the class action settlement approval process. *See* 28 U.S.C. §1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *Id.* at 35 ("notifying appropriate state and federal officials . . . will provide a check against inequitable settlements"). The Attorneys General raise these objections to further these interests, speaking on behalf of consumers in Florida and Illinois who will be treated unfairly and unreasonably under the proposed Plan of Allocation, in contravention of Fed. R. Civ. P. Rule 23(a)(4) and Rule 23 (e)(2)(A).

STATEMENT OF FACTS

Plaintiffs' Current Complaint

In the Third Amended Complaint ("TAC"), the IPPs allege a nationwide claim for damages under Vermont law as well as damages claims based on various state statutes.[2] The IPPs' federal law claims pled in the Second Amended Complaint were dismissed by the Court on the basis that the IPPs lacked standing. [ECF No. 581, at 30]. The Court also determined that the IPPs lacked standing to bring several of their state law claims. The Court dismissed the IPPs' claims under the antitrust laws of Michigan, Mississippi, Nevada, New Hampshire, New Mexico, New York, and South Dakota, *id.* at 81, and the IPPs' unjust enrichment claims under New York and Michigan law. *Id.* at 111. Additionally, the Court rejected the IPPs' Motion for Reconsideration of the dismissal of their antitrust claims under the laws of New York, Michigan, and New Hampshire. [ECF No. 634, at 7]. The Plaintiffs' TAC realleges all the previously dismissed claims and adds new claims under the laws of Rhode Island, Maine, and Missouri. [ECF No. 631].

The Plan of Allocation provides for three tiers of recovery based on the state in which IPPs purchased K-Cups. [ECF No. 1115-7, at p. 5-6]. The first tier of recovery consists of IPPs who purchased K-Cups in IPPs' Class Counsel's own selected list of "Repealer States." IPPs who purchased K-Cups in these states or territories are eligible to receive up to the full value of their qualifying K-Cup purchases. *Id.* The second tier of recovery consists of IPPs who purchased K-Cups in IPPs' Class Counsel's "Non-Repealer States or Territories" ("Non-Repealer States")[3] and

[2] The TAC pleads state law claims for the following jurisdictions: Arizona, Arkansas, California, District of Columbia, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, West Virginia, and Wisconsin. [ECF No. 631]

[3] IPPs' Class Counsel have designated the following as Non-Repealer States: Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Montana, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, Washington, Wyoming, American Samoa, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands. [ECF No. 1115-7, at 5]

they are eligible to recover only up to 7.5% of the value of their qualifying K-Cup purchases. *Id.* Finally, the third tier of recovery consists of IPPs who purchased K-Cups in Florida and Illinois. These Class Members are eligible to receive up to only one-third of the value of their qualifying K-Cup Purchases compared to the IPPs who purchased K-Cups in the Repealer States. *Id.*[4]

The settlement further reduces IPPs' recoveries based on the form of proof the Class Members submit with their claims. *Id.* at p. 5-6. The three tiers of recovery based on the state or territory of purchase and the three tiers based on proof of purchases supplied establish nine distinct categories of recovery under the Plan of Allocation, which is part of the settlement. According to the Memorandum of Law, IPPs' Class Counsel developed a Distribution Matrix to implement the Plan of Allocation and determine the value of Settlement Class Member claims. [ECF No. 1320, at 21]. IPPs' Class Counsel refers to these categories as either the Plan of Allocation or the "Distribution Matrix." [ECF No. 1320, at 21].

Based on the Declaration of Robert N. Kaplan, the Distribution Matrix was reviewed by Allocation Counsel representing claimants from non-repealer jurisdictions. [ECF No. 1323, ¶ 79] The Memorandum of Law stated that the IPPs' Class Counsel and Allocation Counsel disputed the appropriateness of the Plan of Allocation and reached an impasse, apparently on the treatment of purchasers in the states that IPPs' Class Counsel designated as Repealer States and Non-Repealer States. [ECF No. 1320, at 21]. Therefore, they enlisted the aid of the mediator, Judge Farnan, to resolve this specific dispute. *Id.* According to the Memorandum of Law, after a mediation session and argument, which are not included in the Court record, Judge Farnan ultimately determined that the proposed "Plan of Allocation and Distribution Matrix appropriately

[4] The form of proof of purchases that are submitted to receive a claim will also affect the amount a claimant received. But, again purchasers in Florida and Illinois who file any particular type of proof will receive only a third of the amount received by purchasers in a "Repealer States" who file the same type of proof. [ECF No. 1115-7, at p. 5-6]

treated Settlement Class Member claims differently based on the rights provided by state laws and that the matrix values were fair and reasonable and provided an adequate allocation." *Id.* The affidavit that was submitted by Judge Farnan stated as follows:

> 10. In August 2020, Interim Co-Lead Counsel for the Indirect Purchaser Plaintiffs contacted me and asked whether I was available to act as a neutral in matters concerning the Plan of Allocation for the settlement. Interim Co-Lead Counsel advised me that an attorney had been designated to serve as Allocation Counsel for Plaintiffs with respect to jurisdictions whose laws did not afford them a right to indirect purchaser damages in antitrust cases, but who might have a potential claim under Vermont law. I was familiar with the distinctions between so-called Illinois Brick repealer and non-repealer jurisdictions generally, and as it applied more specifically to this case as a result of the mediation. Upon the request of both Interim Co-Lead Counsel and Allocation Counsel, I agreed to act as a neutral regarding the disputed allocation issues and to review and provide guidance on Interim Co-Lead Counsel's proposed Plan of Allocation
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> 11. I conducted a telephonic mediation session regarding Plan of Allocation issues on August 28, 2020, with a working group delegated by Interim Co-Lead Counsel and with Marcus Bozeman, Esq., of the Bozeman Law Firm, serving as Allocation Counsel. The mediation did not result in a consensus on allocation issues, and I advised counsel to continue negotiating and I set a deadline of August 31 for submissions concerning any unresolved issues. On August 31, I received submissions from Allocation Counsel and Interim Co-Lead Counsel requesting me to resolve an issue that had not been resolved by negotiation among the attorneys. The issue presented to me was whether the Plan of Allocation should allocate differentially to Class members based on the rights offered by their state laws or on a pro rata distribution. The submissions advised me that, if this threshold issue was resolved in favor of differential allocation, Allocation Counsel and Interim Co-Lead Counsel had agreed to a matrix quantifying the treatment of claims.
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> 12. After discussing the matter with the working group and allocation counsel, reviewing the submissions provided to me and based on my familiarity with the issues and circumstances in this case from the mediation between Indirect Purchaser Plaintiffs and Keurig, I concluded that the Plan of Allocation may and should treat Class Member claims differently based on the rights provided by state laws. I also concluded that the proposed allocation matrix was fair and reasonable and provided an adequate allocation. [ECF No. 1116, at 3-4].

During the mediation process, indirect purchasers in Florida and Illinois, did not received adequate representation, even though they were later singled out for disparate treatment. As IPPs'

Class Counsel acknowledged, there was no separate counsel appointed to represent only Florida and Illinois indirect purchaser class members. Moreover, while the disparate treatment afforded to Florida and Illinois indirect purchaser class members was based on IPPs' Class Counsels' erroneous belief that the laws of these states justified treating them differently, IPPs' Class Counsel acknowledged that during the mediation no counsel put forth any arguments specific to the laws of either state.

ARGUMENT

I. TO APPROVE THE PLAN OF ALLOCATION OF THE PROPOSED SETTLEMENT, WHICH WILL BIND IPPs, THE COURT IS REQUIRED TO FIND THAT IT IS "FAIR, REASONABLE AND ADEQUATE," AFTER CONSIDERING VARIOUS FACTORS RELATED TO THE NEGOTIATIONS AND SETTLEMENT AGREEMENT.

To approve a class-action settlement, this Court is required to find that all aspects of the settlement are "fair, reasonable and adequate." Fed. R. Civ. P. Rule 23(e)(2). A settlement involving a class can only be approved if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. Rule 23(a)(4). Courts are required to examine both the negotiating process leading to the settlement and the settlement's substantive terms. *In re Signet Jewelers Limited Securities Litigation*, *slip op.*, 2020 WL 4196468, at *1 (S.D.N.Y. July 21, 2020). Pursuant to Fed. R. Civ. P. Rule 23(e)(2), Courts are required to consider:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.[5]

[5] Historically, courts in the Second Circuit have also considered the factors detailed in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974) to evaluate whether to approve a settlement in a class-action, however, none of those factors are relevant to the objections by the Attorneys General, so those need not be considered in considering these objections.

Here, the proposed Plan of Allocation treats Florida and Illinois class members inequitably relative to class member who purchased K-Cups in the states that the IPPs' Class Counsel designated as "Repealer States." This result is due to the IPPs' Class Counsel having inadequately represented Florida and Illinois class members by failing to have separate counsel represent the interests of Florida and Illinois indirect purchasers, and to raise arguments on their behalf.

II. THE PROPOSED PLAN OF ALLOCATION CONTAINED IN THE SETTLEMENT DOES NOT TREAT CLASS MEMBERS EQUITABLY RELATIVE TO EACH OTHER

A. Indirect Purchasers in Florida and Illinois Are Permitted to Recover Antitrust Injuries, Thus These Indirect Purchasers Should Be Treated as Purchasing in "Repealer States"

As noted above, the Court must consider whether the proposed settlement treats class members equitably relative to each other. Fed. R. Civ. P. Rule 23(e)(2)(D). "Consideration of this factor could include whether the apportionment of relief among class members takes appropriate account of differences among their claims." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 698 (S.D.N.Y. 2019) (internal quotation omitted) (*citing* 2018 Advisory Note). "Put simply, the court's goal is to ensure that similarly situated class members are treated similarly." 4 Newberg on Class Actions § 13:56 (5th ed.). Unfortunately, the proposed Plan of Allocation treats indirect purchasers in Florida and Illinois less favorably than similarly situated class members in states which the IPPs' Class Counsel considers "Repealer States." Therefore, approval of the settlement is inappropriate unless the Plan of Allocation is amended to correct this inequity.

Based on the law, indirect purchasers can bring suit and recover damages under Florida and Illinois law, just like indirect purchasers in the IPPs' Class Counsel's designated "Repealer States." Florida court law authorizes indirect purchasers to recover under Florida's consumer protection laws. *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 110 (Fla. Dist. Ct. App. 1996) (permitting indirect purchaser claims under the Florida Deceptive and Unfair Trade Practices Act,

Ch. 501, Part II, Florida Statutes); *In re Aggrenox Antitrust Litig.*, 2016 WL 4204478, at *8 (D. Conn. Aug. 9, 2016); *In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp. 3d 352, 377 (D.R.I. 2019); *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 538 (E.D. Pa. 2010). Similarly, the Illinois Antitrust Act ("IAA"), 740 ILCS 10/7(2), clearly states that "no provision in [the IAA] shall deny any person who is an indirect purchaser the right to sue for damages." It is also striking that other Courts that have distinguished between *Illinois Brick* repealer and non-repealer states,[6] have recognized that both Florida and Illinois should be considered repealer States. *See e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 2014 WL 6461355, at *72-73 (N.D. Ohio Nov. 17, 2014) (certifying indirect purchaser class including purchasers in Florida and Illinois and finding "any differences that might exist among the various state statutes are minimal."); *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at *12 (N.D. Cal. Dec. 10, 2020);[7] *In re Liquid Aluminum Sulfate Antitrust Litig.*, 2019 WL 7375288, at *2 (D.N.J. Nov. 7, 2019). In fact, Counsel for the Attorneys General have not located a court decision holding that indirect purchasers from Florida and Illinois were unable to bring a lawsuit for antitrust injuries because of the U.S. Supreme Court's decision in *Illinois Brick*. Therefore, indirect purchasers in Florida and Illinois should be treated in the same manner as indirect purchasers in other states that the IPPs' Class Counsel have designated as "Repealer States."

[6] Courts have found that there is no requirement that indirect purchaser class settlements differentiate between *Illinois Brick* repealer and non-repealer states. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011) ("We can find no support in our case law for differentiating within a class based on the strength or weakness of the theories of recovery. Accordingly, we decline to require such an analysis.")

[7] Although the cited decision does not list the repealer and non-repealer states, the publicly available long-form class notice makes it clear that Florida and Illinois are considered repealer states, available at http://www.reversethecharge.com/pdf/ION%20Long%20Form%20Notice%209.22.20.pdf. The Attorneys General have not located an approved antitrust class action settlement that has adopted a plan of allocation, which treats Florida and Illinois class members as proposed by IPPs' Class Counsel in this matter.

B. The Plan of Allocation Arbitrarily and Unfairly Limits the Recovery of Indirect Purchasers in Florida and Illinois

Courts have recognized that pursuant to Fed. R. Civ. P. Rule 23(e)(2)(C)(ii), while a plan of allocation need not be perfect, it must be "fair and adequate," and have a reasonable and rational basis. *In re GSE Bonds,* 414 F. Supp. 3d, at 694. The unique treatment of indirect purchasers located in Florida and Illinois under the Plan of Allocation is neither fair nor has a reasonable and rational basis.

Initially, it should be noted before IPPs' Class Counsel filed the Memorandum of Law, there were no public documents regarding the proposed settlement, including the settlement agreement and the long and short form class notice, which explained why indirect purchasers in Florida and Illinois are being treated differently from indirect purchasers in states that the IPPs' Class Counsel identifies as "Repealer States." However, in discussions with the Attorneys General, the IPPs' Class Counsel stated that Florida and Illinois were not treated as Repealer States because Florida law does not provide for treble damages for antitrust injury, and the IAA does not allow private class actions brought on behalf of indirect purchasers. Additionally, in the Memorandum of Law, IPPs' Class Counsel admits that Florida and Illinois are repealer states, but then concludes that "Illinois does not permit state antitrust class actions and Florida's repealer statute does not provide for treble damages." [ECF No. 1320, at 20]. These explanations are fatally flawed, and thus do not satisfy the requirement in Fed. R. Civ. P. Rule 23(e)(2)(D) that a proposed settlement treat class members equitably relative to each other, and that the differences contained in the Plan of Allocation have a fair, reasonable and rational basis.

The unreasonable disparate treatment is illustrated by examining a state which the IPPs' Class Counsel identify as a "Repealer State" under the settlement but is similarly prevented from seeking treble damages. For example, Missouri was designated by the IPPs' Class Counsel as a

"Repealer State," and thus indirect purchasers in that state are entitled to full recovery under the proposed Plan of Allocation. [ECF No. 1115-7, at 5] However, indirect purchasers in Missouri are unable to bring an action for treble damages relief under Missouri's antitrust law. *Duvall v. Silvers, Asher, Sher & McLaren, M.D.'s*, 998 S.W.2d 821, 825-826 (Mo.Ct.App. 1999). The Second Circuit and other courts have recognized that indirect purchasers in Missouri are permitted to bring an antitrust action under its Merchandising Practices Act ("MPA"), which only provides actual damages, not treble damages. Mo. Rev. Stat. §407.025; *Sergeants Benevolent Association Health and Welfare Fund v. Actavis, plc*, 2018 WL 7197233, at *45-46 (S.D.N.Y. 2018); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 355 F. Supp. 3d 145, 157 (E.D.N.Y. 2018); *Sheet Metal Workers Local 441 Health and Welfare Plan v. Glaxosmithkline, PLC*, 737 F.Supp.2d 380, 416-417 (E.D. PA 2010); and *In re Pool Products Distribution Market Antitrust Litigation*, 946 F.Supp.2d 554, 570 (E.D.La. 2013). Therefore, indirect purchasers located in both Florida and Missouri cannot recover treble damages for antitrust injury, but based on the proposed Plan of Allocation, indirect purchasers in Florida can recover, at best, only a third of what Missouri indirect purchasers can recover when they submit similar documentation.

Similarly, Michigan, Nevada, New Hampshire, New Mexico, New York, and South Dakota are all placed by the IPPs' Class Counsel in the "Repealer State" group under the Plan of Allocation even though the state law claims for these states were previously dismissed.[8] Again, the proposed Plan of Allocation is inequitable because Florida and Illinois purchasers, who have express rights of recovery under their states' laws, receive only one-third as much as residents of these six states

[8] In particular, the Court dismissed both the antitrust claims and unjust enrichment claims brought under Michigan and New York law. Id. at 102, 111. Then the Court again rejected claims under New York, Michigan, and New Hampshire's antitrust laws on the IPPs' Class Counsels' request for reconsideration. [ECF No. 634, at 7].

who, absent a successful appeal, have no state law claims other than the Vermont law claim plead on behalf of a nationwide class (which would include Florida and Illinois purchasers).

Further, as to Illinois purchasers, Section 7(2) of the IAA, 740 ILCS 10/7(2), clearly permits Illinois indirect purchasers to recover treble damages for antitrust injuries, the maximum amount allowed indirect purchasers by the laws of IPPs' Class Counsel's designated "Repealer States." Despite this provision, IPPs' Class Counsel has offered the oral explanation to the Illinois Attorney General that the IAA does not permit private class actions to represent Illinois residents and stated that "Illinois does not permit state antitrust class actions" in the Memorandum of Law. [ECF No. 1320, at 20] Moreover, IPPs' Class Counsel has not offered any explanation justifying how they arrived at the one-third recovery compared to their designated "Repealer States," when Illinois purchasers are similarly entitled to treble damages. However, IPPs' Class Counsels' beliefs that they cannot represent Illinois residents is not a basis for allowing them to represent those same purchasers by settling and releasing those purchasers' claims on inequitable terms. Rather, such unauthorized representation requires that the Plan of Allocation be modified or rejected by the Court. But, if this representation issue is the basis for the disparate treatment of Illinois purchasers, the problem can now be easily remedied. The Illinois Attorney General has been granted the right to intervene in this matter and has the undisputed right to seek treble damages on behalf of Illinois indirect purchasers. 740 ILCS 10/7(2). The Plan of Allocation can be amended by allowing equal treatment of Illinois residents, under the representation of the Illinois Attorney General. In any case, there is no defensible basis for continuing the inequitable treatment of Illinois indirect purchasers.

For the above stated reasons, it is inequitable for indirect purchasers of K-Cups in Florida and Illinois to receive only a third of the potential recovery that similarly situated class members

can receive.[9] Treating Florida and Illinois purchasers equally to the states that the IPPs' Class Counsel designated as "Repealer States" is the appropriate, equitable, fair and reasonable way of allocating the common fund and would comport with the requirements of Fed. R. Civ. P. Rule 23(e)(2)(D) to treat class members equitably relative to each other.

III. THE IPPs' CLASS COUNSEL HAVE FAILED TO ADEQUATELY REPRESENT INDIRECT PURCHASERS BOTH IN FLORIDA AND ILLINOIS

A determination of adequacy under Fed. R. Civ. P. Rule 23(a)(4) and Rule 23(e)(2)(A) typically entails inquiry as to whether plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. *In re GSE Bonds,* 414 F. Supp. 3d, at 692 (*citing Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)). It has also been recognized that adequacy of counsel requires that the proposed class representative have an interest in vigorously pursuing the claims of the class in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223, 231 (2d Cir. 2016). The adequacy "must be determined independently of the general fairness review of the settlement; that the settlement may have overall benefits for all class members is not the 'focus' in 'the determination whether proposed classes are

[9] The authority cited by IPPs' Class Counsel in the Memorandum of Law to support the disparate treatment for purchasers in Florida and Illinois does not apply to the facts of this case. [ECF No. 1320, at 20-21] For example, *Beltran, et al., v. InterExchange, Inc., et. al.*, 2019 WL 3496692 (D. Colo. Aug. 1, 2019), involved claims that au pairs were underpaid and there was a settlement which calculated recovery in part based on claims by states' limitation period. However, there was no objection in that matter that individuals working in similarly situated states were treated differently, as in this case. See, Id., Plan of Allocation, available at: https://www.aupairclassaction.com/courtdocs. IPPs' Class Counsels' reliance on *Townsend v. G2 Secure Staff, L.L.C., et al.,* Case No. 18STCV04429 (unpublished order) (Cal. Super, Ct. L.A. Cnty., July 7, 2020) is also misplaced, as it involves a California state court class action that included potential class members that did not reside in California and who received background checks by defendants who were outside of California. Plaintiff's Notice of Motion and Motion for Final Approval Class Action Settlement and for an Award of Attorneys' Feed and Costs, at 12, available at https://www.townsendvg2securestaff.com/docments. This matter has no jurisdictional issues and the laws of Florida and Illinois are similar to other states that were classified as "Repealer States" by IPPs' Class Counsel, therefore they should be treated in the same manner under the Plan of Allocation. Similarly, *In re Facebook, Inc.*, 343 F. Supp. 3d 394 (S.D.N.Y. 2018), was a securities class action, and had a Plan of Allocation which created a distinction in the recovery of losses based on the date of the sales of shares of Facebook and other investors who earned a profit on the transactions. See *In re Facebook, Inc. IPO Securities and Derivative Litigation*, MDL No. 12-2389 (RWS), Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, at 21-23, available at http://www.facebooksecuritieslitigation.com/. Again, that case has no relevance to this matter where purchasers in similar states are not treated similarly.

sufficiently cohesive to warrant adjudication.'" *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). The Second Circuit has also recognized that to avoid antagonistic interests, any fundamental conflict must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs. *In re Payment Card Interchange Fee*, 827 F.3d, at 231, *quoting Amchem Prod., Inc.*, 521 U.S., at 627. The Supreme Court has also recognized that one common structural protection is division of the classes into "homogenous subclasses under Rule 23(c)(4)(B) [n/k/a Rule 23(c)(5)] with separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 856 (1999).

Here, while the IPPs' Class Counsel are no doubt qualified, experienced, and able, there was no counsel, qualified or unqualified, that advocated solely on behalf of the subgroup of indirect purchasers from Florida and Illinois. In contrast, IPPs' Class Counsel stated that an independent counsel argued on behalf of class members from states that they considered "Non-Repealer" jurisdictions, which do not include Florida and Illinois. [ECF No. 1113, at 30]. However, as IPPs' Class Counsel acknowledged, no counsel addressed the laws of Florida and Illinois. The recent filings by IPPs' Class Counsel also show that the Allocation Counsel represented "claimants aside from the repealer jurisdictions," meaning claimants from non-repealer jurisdictions. [ECF No. 1320, at 21 and ECF 1323, at ¶ 79]. As Florida and Illinois are repealer states, the subgroup of indirect purchasers in Florida and Illinois were inadequately represented.

All IPPs who make up the class involved in this settlement have an interest in maximizing their share of the $31 million common fund created by the proposed settlement. Based on the Plan of Allocation indirect purchasers in Florida and Illinois would receive significantly inequitable recoveries from this fund relative to indirect purchasers that purchased K-Cups in states that the IPPs' Class Counsel designated as "Repealer States." Therefore, there is adversity between these

subgroups. *See Sullivan*, 667 F.3d, at 326 (recognizing that increasing the recovery of one subclass at the expense of another's diminished recovery can create adversity which must be balanced against the potential drawbacks of subclassing). The creation of a separately represented subclass of indirect purchasers in Florida and Illinois could have provided a structural safeguard to ensure that their interests were protected by an advocate who had been properly instructed to evaluate the settlement specifically on behalf of this subgroup. *See Amchem Prod., Inc.*, 521 U.S., at 627. No such individual subclasses were created in the consideration of the Plan of Allocation in this matter.

Moreover, the IPPs' Class Counsel failed to take proper steps to ensure that the interests of the purchasers in Illinois and Florida were protected in the negotiation of the Plan of Allocation. The Second Circuit has recognized that inadequate representation of separate subclasses cannot be remedied by the assistance of judges and mediators in the bargaining process. *In re Payment Card Interchange Fee,* 827 F.3d, at 235. The Court has recognized that "even an intense, protracted, adversarial mediation, involving multiple parties, including highly respected and capable mediators and associational plaintiff, does not compensate for the absence of independent representation." *Id*. (*citing In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252-253 (2d Cir. 2011). The Court noted that it was the mission of mediators to bring together the parties and interests rather than advancing the strongest arguments in favor of each subset of class members entitled to separate representation or to voice the interests of a subclass for which no one was speaking. *Id*. It has been recognized that, adequate representation was assured by the appointment of an independent attorney for parties with conflicting interests to provide appropriate structural protections for differently situated plaintiffs negotiated with their own unique interests. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 (3d Cir. 2004).

As part of the negotiations regarding the Plan of Allocation, an independent counsel was apparently appointed to present arguments on behalf of IPPs who purchased K-Cups in states that

the IPPs' Class Counsel designated as "Non-Repealer" States before the mediator, Judge Farnan. However, no separate counsel was appointed to represent the specific interests or positions of indirect purchasers from Florida and Illinois. Although Judge Farnan himself reviewed the fairness of the Plan of Allocation, no arguments specific to Florida or Illinois law were advanced by allocation counsel. Moreover, as noted above the Second Circuit has recognized that the assistance of a mediator is no substitute for adequate representation of the subset of class members. *In re Payment Card Interchange Fee*, 827 F.3d, at 234–35. Without either establishing a subclass or designating independent counsel to represent the interests of only indirect purchasers in Florida and Illinois, this subset of class members was not adequately represented and the proposed settlement should not be approved unless the Plan of Allocation is modified to add Florida and Illinois to the list of the states that the IPPs' Class Counsel designated "Repealer States."

CONCLUSION

WHEREFORE, for the foregoing reasons the Attorneys General respectfully request that the Court modify the Plan of Allocation to treat Florida and Illinois as the other states which the IPPs' Class Counsel designated as "Repealer States." The Attorneys General further request that if the Plan of Allocation is changed to include Florida and Illinois as Repealer States, then the website announcing the proposed settlement of indirect purchasers be amended to reflect these changes. In the alternative the Attorneys General request that the Court deny final approval of the proposed settlement in this matter and grant such other and further relief as is just and proper.

May 14, 2021,

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I caused a copy of the foregoing document to be served via ECF on all counsel of record.

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