No. 14-13882-FF
Multi-Appeal Nos. 14-14165-FF, 14-14170-FF, 14-14221-FF and 14-14272-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTOPHER BATMAN, *et al.*,

Appellants,

v.

THE GILLETTE CO. *et al.*,

Appellees.

On Appeal from the United States District Court
For the Middle District of Florida, No. 6:12-cv-00803

Brief of Appellants Theodore H. Frank, Robert Falkner, and Christopher Batman

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Certificate of Interested Persons and Corporate Disclosures

Pursuant to Cir. R. 28-1(b) and Fed. R. App. P. 26.1(b), Theodore H. Frank, Robert Falkner, and Christopher Batman make the following disclosures, reaffirming those in the official forms already filed:

1. Neither Frank, Falkner, nor Batman is a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.
3. The list of interested persons filed by Frank on September 26, 2014, should be supplemented to include the following additional two persons: Helen Heindel and John Pentz, Esq.

Statement in Support of Oral Argument

Pursuant to Cir. R. 28-1(c), Appellants[1] respectfully requests that the Court hear oral argument in this case because it presents significant issues concerning settlements in class actions. These issues, regarding the requirements of Rule 23 and the scope of existing Eleventh Circuit precedent, are meritorious, and pit the district court decision against those of this and other Circuits.

This appeal raises complex but recurring questions of civil procedure; their exploration at oral argument would aid this Court's decisional process and benefit the judicial system. CCAF has previously argued and won landmark appellate rulings improving the fairness of class-action settlement procedure. *E.g.*, *Pearson v. NBTY, Inc.*, __F.3d__, 2014 U.S. App. LEXIS 21874, 2014 WL 6466128 (7th Cir. Nov. 19, 2014); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Prods.*"); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) ("*Pampers*"); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"); *see also* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013 (calling Frank "[t]he leading critic of abusive class action settlements"). A favorable resolution in this case would improve the class action process by deterring other class-action settlements designed to benefit attorneys at the expense of their putative clients.

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[1] Throughout this brief, Appellants Theodore H. Frank, Christopher Batman, and Robert Falkner refer to themselves collectively as "Objectors" or "Frank."

Table of Contents

Certificate of Interested Persons and Corporate Disclosures i

Statement in Support of Oral Argument ii

Table of Contents iii

Table of Authorities vi

Statement of Subject Matter and Appellate Jurisdiction xix

Statement of the Issues 1

Statement of the Case 2

A. The lawsuit. 2

B. The settlement agreement. 3

C. Frank objects. 4

D. The district court approves the settlement. 6

E. Standard of review. 8

Summary of the Argument 9

Argument 13

I. A settlement structured to provide preferential treatment to class counsel by paying attorneys $5,680,000 and the class $344,000 is unfair as a matter of law, and the district court erred in holding otherwise. 13

A. The attorney award is disproportionate to actual class benefit. 14

1. The district court committed clear error in holding that a proportionate settlement was not "practical." 24

2. The lower court erred as a matter of law in attributing class benefit to P&G's pre-settlement actions or the settlement's injunction on an already-discontinued product. 31

B. The district court erred by failing to subject the clear-sailing agreement to any scrutiny. 35

C. The district court erred by failing to consider the "questionable provision" of a "kicker." 37

D. All settlements have a low number of objectors and the recommendation of class counsel; it should be an error of law to rely on these factors to determine settlement fairness. 41

II. The settlement misuses *cy pres*. 43

A. The settlement resorts to *cy pres* prematurely. 45

B. Failure to identify specific charitable designees deprives class members of notice and objection rights. 50

Conclusion 52

Certificate of Compliance with 11th Cir. R. 28-1(m) 54

Proof of Service 55

Table of Authorities

Cases

In re Agent Orange Prods. Liab. Litig.,

818 F.2d 179 (2d Cir. 1987) 51

In re Airline Ticket Commission Antitrust Litig.,

268 F.3d 619 (8th Cir. 2001) 51

In re Aqua Dots Prods. Liab. Litig.,

654 F.3d 748 (7th Cir. 2011) 24

In re Baby Prods. Antitrust Litig.,

708 F.3d 163 (3d Cir. 2013) .... *passim*

Bankers Trust Co. v. Mallis,

435 U.S. 381, 98 S. Ct. 1117 (1978) xx

In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.,

No. 09-md-2023, 2012 U.S. Dist. LEXIS 143955

(E.D.N.Y. Oct. 2, 2012) 25-26

Beecher v. Able,

575 F.2d 1010 (2d Cir. 1978) 48

Bennett v. Behring Corp.,

737 F.2d 982 (11th Cir. 1984) 7, 12, 23-24

In re Bluetooth Headset Prods. Liab. Litig.,

654 F.3d 935 (9th Cir. 2011) .... *passim*

Boeing v. Van Gemert,

444 U.S. 472 (1980) 17-19, 21

Broussard v. Meineke Disc. Muffler Shops,

151 F.3d 331 (4th Cir. 1998) 47

Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.,

532 U.S. 598 (2001) 33

Camden I Condominium Ass'n v. Dunkle,

946 F.2d 768 (11th Cir. 1991) 15, 22

Carrera v. Bayer Corp.,

727 F.3d 300 (3d Cir. 2013) 24

Citizens for Police Accountability Political Comm. v. Browning,

572 F.3d 1213 (11th Cir. 2009) 8

In re Corrugated Container Antitrust Litig,

643 F.2d 195 (5th Cir. Apr. 1981) 41

In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.,

418 F.3d 277 (3d Cir. 2005) 41

Cotton v. Hinton,

559 F.2d 1326 (5th Cir. 1977) 48

Day v. Persels & Assocs., LLC,

729 F.3d 1309 (11th Cir. 2013) 8, 9, 25, 42, 51

**Dennis v. Kellogg*,

697 F.3d 858 (9th Cir. 2012) 9, 15, 16, 50, 51, 52

Devlin v. Scardelletti,

536 U.S. 1 (2002) xx

Dikeman v. Progressive Express Ins. Co.,

312 Fed Appx. 168 (11th Cir. 2008) 18

**In re Dry Max Pampers Litig.*,

724 F.3d 713 (6th Cir. 2013) .... *passim*

Eubank v. Pella Corp.,

753 F.3d 718 (7th Cir. 2014) 15, 16, 38

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,

55 F.3d 768 (3d Cir. 1995) 9, 37-38, 41, 46

Giles v. California,

554 U.S. 353 (2008) 15

Hensley v. Eckerhart,

461 U.S. 424 (1983)... 36

Holmes v. Cont'l Can Co.

706 F.2d 1144 (11th Cir. 1983).. 9, 10, 11, 39, 42

In re Hotel Tel. Charges.,

500 F.2d 86 (9th Cir. 1974)... 24

In re HP Inkjet Printer Litig.,

716 F.3d 1173 (9th Cir. 2013).. 37

Int'l Precious Metals Corp. v. Waters,

530 U.S. 1223, 120 S. Ct. 1237 (2000) 20, 35

Ira Holtzman, C.P.A., & Assocs. v. Turza,

728 F.3d 682 (7th Cir. 2013)... 45

In re Katrina Canal Breaches Litig.,

628 F.3d 185 (5th Cir. 2010)...23-24

Klier v. Elf Atochem N. Am., *Inc.*,

658 F.3d 468 (5th Cir. 2011)... 2, 10, 43-44, 46, 48, 49

Koon v. United States,

518 U.S. 81, 116 S. Ct. 2035 (1996) 8

Leverso v. Southtrust Bank,

18 F.3d 1527 (11th Cir. 1994) 23

Luevano v. Wal-Mart Stores, Inc.,

722 F.3d 1014 (7th Cir. 2013) xx

In re Lupron Mktg. and Sales Practices Litig.,

677 F.3d 21 (1st Cir. 2012) 45-46

Marek v. Lane,

134 S. Ct. 8 (2013) 43

Masters v. Wilhemina Model Agency, Inc.,

473 F.3d 423 (2d Cir. 2007) 46

McDonough v. Toys "R" Us, Inc.,

No. 06-cv-00242 (E.D. Pa.) 28

Nachshin v. AOL, LLC.,

663 F.3d 1034 (9th Cir. 2011) 44, 46

Nelson v. Mead Johnson & Johnson Co.,

484 Fed. Appx. 429 (11th Cir. 2012) 18, 50

In re Nissan Motor Corp. Antitrust Litig.,

552 F.2d 1088 (5th Cir. 1977) 25

Norman v. Housing Auth of Montgomery,

836 F.2d 1292 (11th Cir. 1988) 36

Pearson v. NBTY, Inc.,

No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357

(N.D. Ill. Jan. 3, 2014) 26

**Pearson v. NBTY, Inc.*,

No. 14-1418, __F.3d __,

2014 U.S. App. LEXIS 21874, 2014 WL 6466128

(7th Cir. Nov. 19, 2014) .... *passim*

Pecover v. Electronic Arts,

No. C 08-02820 CW (N.D. Cal. Apr. 2, 2013) 29, 30

Perdue v. Kenny A.,

559 U.S. 542, 130 S. Ct. 1662 (2010) 36-37

In re Pet Food Prods. Liab. Litig.,

629 F.3d 333 (3d Cir. 2010) 49-50

Pettway v. Am. Cast Iron Pipe Co.,

576 F.2d 1157 (5th Cir. 1978 10

*_Piambino v. Bailey_,

757 F.2d 1112 (11th Cir. 1985) .... _passim_

Pickett v. Iowa Beef Processors,

209 F.3d 1276 (11th Cir. 2000) 9, 33

Public Health Trust of Dade Cty., Fla v. Lake Aircraft, Inc.,

992 F.2d 291 (11th Cir. 1993) 16

Redman v. RadioShack Corp.,

768 F.3d 622 (7th Cir. 2014) .... _passim_

Reynolds v. Beneficial Nat'l Bank,

288 F.3d 277 (7th Cir. 2002) 1, 33

Richardson v. L'Oreal USA, Inc.,

991 F. Supp. 2d 181 (D.D.C. 2013) 41, 42

SEC v. Bear, Stearns & Co.,

626 F. Supp. 2d 402 (S.D.N.Y. 2009) 30

Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.,

559 U.S. 393, 130 S. Ct. 1431 (2010) 45

Sobel v. Hertz, No. 3:06-cv-00545-LRH-RAM

2011 WL 2559565, 2011 U.S. Dist. LEXIS 68984 (D. Nev. Jun. 27, 2011) 37

Staton v. Boeing Co.,

327 F.3d 938 (9th Cir. 2003) 33, 40

Strong v. Bellsouth Tel. Inc.,

137 F.3d 844 (5th Cir. 1998) 19-20

In re Thornburg Mortg., Inc. Secs. Litig.,

885 F. Supp. 2d 1097 (D.N.M. 2012) 50

True v. Am. Honda Motor Co.,

749 F. Supp. 2d 1052 (C.D. Cal. 2010) 34

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153 F.3d 1222 (11th Cir. 1998) 51

United States v. Irey,

612 F.3d 1160 (11th Cir. 2010) (*en banc*) 8

Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,

350 F.3d 1181 (11th Cir. 2003) 32-33

Vought v. Bank of Am.,

901 F. Supp. 2d 1071 (C.D Ill. 2012) 33, 35, 41

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,

396 F.3d 96 (2d Cir. 2005) 22

Waters v. Int'l Precious Metals Corp.,

190 F.3d 1291 (11th Cir. 1999) 17-19, 21, 23, 35

Weinberger v. Great Northern Nekoosa Corp.,

925 F.2d 518 (1st Cir. 1991) 35

Wooley v. Maynard,

430 U.S. 705, 97 S. Ct. 1428 (1977) 52

Rules and Statutes

28 U.S.C. § 1291 xix

28 U.S.C. § 1292(a)(1) xx

28 U.S.C. § 1332(d)(2) xix

28 U.S.C. § 1711 *et seq.* 18

Fed. R. App. P. 4(a)(1)(A) xx

Fed. R. Civ. P. 23(a) 11

Fed. R. Civ. P. 23(b)(2) 34

Fed. R. Civ. P. 23(b)(3) 24

Fed. R. Civ. P. 23(e) .... *passim*

Fed. R. Civ. P. 23(e)(2) 12

Fed. R. Civ. P. 23(h) 36, 37, 46

Fed. R. Civ. P. 58(a) xix

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28 ALASKA L. REV. 295 (2011) 49

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88 S. CAL. L. REV.__ (forthcoming 2014), *available at*
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413951 49

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Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. §1332(d)(2) because this is a class action where the amount in controversy exceeds $5,000,000 exclusive of costs; many of the millions of class members in the nationwide class are citizens of states other than a defendant's state of citizenship; and no exception to the Class Action Fairness Act applies. For example named plaintiff Joshua Poertner is a citizen of Florida, and defendant Gillette is a Delaware corporation with its principal place of business in Boston, Massachusetts. Dkt. 117 at 3.[2] Gillette is a wholly-owned subsidiary of defendant Procter and Gamble ("P&G"), an Ohio corporation with its principal place of business in Cincinnati, Ohio. *Id.* We refer to defendants collectively as "P&G."

This court has appellate jurisdiction under 28 U.S.C. § 1291 because this is a timely-filed appeal from a final decision. Class member and objector Theodore H. Frank filed a timely objection to a proposed class action settlement and a reply in support of that objection. Dkts. 126, 162. Several other class members, including Christopher Batman and Robert Falkner, also filed objections. Dkts. 131, 132. The district court overruled all objections, approved the settlement, and ordered the court to close the case file in a written approval order ("Order") dated August 21, 2014. Dkt. 168. Although the district court did not enter final judgment on a separate document as required by Fed. R. Civ. P. 58(a), this Court can treat the appeal as one

[2] "Dkt." refers to docket entries in Case No. 6:12-cv-00803 (M.D. Fla.) below. "App. Dkt." refers to docket entries in this appeal, No. 14-13882 (11th Cir.).

from a proper final judgment because there are "clear signal[s] from the district court" that it intended to issue a final order. *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1020 (7th Cir. 2013); *see also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S. Ct. 1117 (1978). In the alternative, there is appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the Order enjoins appellants from commencing any suit relating to the Settlement Agreement. Dkt. 168 at 11.

Frank filed a notice of appeal from the Order on September 15, 2014. Dkt. 172. Batman and Falkner also filed notices of appeal on August 27 and September 15, 2014, respectively. Dkts. 169, 171. These notices are timely under Fed. R. App. P. 4(a)(1)(A).

Objectors have standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti,* 536 U.S. 1, 122 S. Ct. 2005 (2002).

Statement of the Issues

1. Class action settlements may not afford "preferential treatment" to class counsel at the expense of absent class members. *Pampers*, 724 F.3d at 718; *accord Pearson*, 2014 WL 6466128; *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985). Is it an error of law to approve a settlement structured to pay $344,850 to over 7,000,000 class members while allowing class counsel to seek an unopposed award of $5,680,000 from a segregated fund?

2. There was undisputed evidence that numerous class-action settlements and courts have used obtained data from third-party "loyalty programs" to ascertain class membership and provide individualized notice and/or direct payment. *E.g., Pearson*. Did the district court commit clear error or err as a matter of law in concluding that this oft-used procedure was not a "practical alternative" and that the settlement's procedure that failed to compensate over 99% of the class was the "best practical means of providing relief to the Class"?

3. Settlement fairness "must be evaluated primarily on how it *compensates class members*—not on whether it provides relief to other people, much less on whether interferes with defendant's marketing plans." *Pampers*, 724 F.3d at 720; *see also Pearson*, at *8. Moreover, when valuing a settlement, it is only the "*incremental* benefits" that matter, not benefits that the defendant was already providing before settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (emphasis in original). Was it error for the district court to conclude that injunctive relief relating to the labeling of a product P&G stopped selling before the settlement was signed (and

P&G's unilateral decision to cease selling that product before settling) were each a benefit to the class justifying approval of a settlement that paid class counsel several times what it paid the class?

4. *Cy pres* is a vehicle for distributing settlement funds to non-class third parties that should only be utilized as a last resort. *Pearson*, at *6; *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011). This settlement provides $6 million retail value worth of Duracell batteries to third-party charities, while capping class members' claims at $6 (without proof of purchase) or $12 (with proof of purchase). As a result, the class is set to receive $344,850, less than a tenth of what undetermined third parties will receive. Did the district err as a matter of law in approving a settlement that favors *cy pres* over class members?

Statement of the Case

A. The lawsuit.

Gillette is the owner of the Duracell battery brand. Dkt. 117 at 3. In 2009, Duracell announced a new line of "Ultra Advanced" batteries and marketed them as lasting longer than other Duracell-branded batteries. *Id.* at 5-9. In January 2012, Duracell began to phase out their "Ultra Advanced" line and replace them with batteries branded as "Ultra Power" that made similar representations of superlative performance. *Id.* We refer to both as "Ultra batteries." During the summer of 2013, P&G voluntarily stopped manufacturing, packaging, or marketing Ultra batteries. Dkt. 153 at 1-2. There is no record evidence that Duracell ever plans to reintroduce the product to the market.

In May 2012, Defendants removed to the Middle District of Florida under the Class Action Fairness Act a class action Joshua Poertner brought in Florida state court. Dkt. 1. That suit, and a similar one in the Northern District of California,[3] allege that defendants engaged in a variety of deceptive marketing practices relating to the quality of Ultra batteries. The initial complaint sought actual damages, restitution, declaratory and injunctive relief, and costs and attorneys' fees on behalf of a class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Dkt. 2.

A week after a class certification motion hearing, but before the court ruled, the parties settled. Class Action Settlement Agreement, Dkt. 113-1 at 4-5.

B. The settlement agreement.

Under the settlement, Poertner filed a Third Amended Complaint (Dkt. 117) of nationwide scope "under the FDUTPA, and similar laws of other states" to enable a global release. Dkt. 117. The expansion covered a class consisting of approximately 7,260,000 persons in the United States who, with certain exclusions, "purchased size AA or AAA Duracell brand Ultra Advanced and/or Ultra Power batteries at Retail from or after June 2009." Dkt. 113-1 at 16; Deborah McComb Decl. (Dkt. 156 at 2).

Class members who filed timely valid claims would receive a refund of $3 per pack of batteries, up to four packs ($12) with proof of purchase, or two ($6) without proof of purchase. Dkt. 113-1 at 25-26. Class members who did not file claims would receive nothing.

[3] *Heindel v. The Gillette Co., et. al.*, No. 12-cv-01778 EDL (N.D. Cal.).

Meanwhile, class counsel was permitted to apply for $5,680,000 in fees and costs without opposition from P&G, to be shared by counsel in the Florida and California actions. Dkt. 113-1 at 27-28. If the court awarded less than $5,680,000, the excess would revert to P&G. *Id.* Class representative Poertner was permitted to seek an unopposed incentive award of $1,500. Dkt. 113-1 at 29.

P&G further agreed to make a *cy pres* donation of $6 million worth of batteries to "first responder charitable organizations, the Toys for Tots charity, or 501(c)(3) organizations that regularly use consumer batteries" calculated at retail value. Dkt. 113-1 at 26. Defendants also agreed to cease packaging the Ultra brand batteries in their current chemical formulations with the "longest lasting" labeling. Dkt. 113-1 at 25.

Class members released their non-personal injury claims against P&G and its subsidiaries relating to the consumer allegations in the complaints about Ultra batteries in the United States. Dkt. 113-1 at 13, 32.

The district court preliminarily approved the settlement on November 5, 2013. Dkt. 118. There was no individualized notice, only publication notice through periodicals and internet outlets. Dkt. 114-4. The parties' settlement administration agent's internal data showed that publication-notice-only settlements will "almost always have a claims rate of less than one percent (1%)." Dkt. 156 at 2.

C. Frank objects.

In February 2014, class member Theodore H. Frank objected through counsel. Frank Objection, Dkt. 126; Frank Declaration, Dkt. 126-1. Frank is an attorney who

has previously successfully challenged similar settlements that have favored class attorneys over their clients from his position as head of the non-profit Center for Class Action Fairness.[4] Dkt. 126-1 at 3-6.

Frank's objection's gist was that the settlement's allocation was structured to primarily benefit class counsel at the expense of the class. Dkt. 126 at 1. Because of the rigidly-capped claims-made structure, Frank observed that the attorneys, allotted $5,680,000, would disproportionately receive more than twelve times as much as the class, making the settlement *per se* unfair. Dkt. 126 at 10-16. Frank objected that class counsel had insulated their own award through negotiating self-dealing "clear-sailing" and "kicker" provisions. Dkt. 126 at 16-20. Nor were the injunctive labeling alterations a benefit. Dkt. 126 at 14-16. He challenged the settlement's use of a *cy pres* mechanism, and its failure to identify specific beneficiaries. Dkt. 126 at 22-29. In the alternative, Frank urged that any fee award should be limited to a reasonable percentage of actual payments to the class, rather than hypothetical maximum payments. Dkt. 126 at 30-36.

Frank noted, citing cases, that settlements that actually wish to disburse money to class members ascertain class members using subpoenaed or otherwise-obtained data from loyalty programs and retailers' other tracking methods, thus permitting individualized notice or even direct payments to class members. Dkt. 162 at 14-17; Dkt. 126-1 at ¶7.

[4] *E.g., Pearson*, 2014 WL 6466128; *Baby Prods.*, 708 F.3d 163; *Bluetooth*, 654 F.3d 935.

Class members Batman and Falkner objected on similar grounds. Dkts. 131, 132.

In response, the settling parties argued that the gross size of the settlement was adequate (a position Frank did not dispute), and that low claims rates are commonplace and irrelevant to settlement fairness. They argued that a 100% claims rate made available more than $40 million for class members. Dkts. 150, 158. A P&G analyst averred that P&G did not possess information identifying class members nor have access to retailers' customer information. Dkt. 154 at ¶5. Frank defended his objection in a reply. Dkt. 162.

D. The district court approves the settlement.

The district court continued the fairness hearing to May 22, 2014, to obtain claims data and additional briefing. Dkts. 141, 146, 162; Transcript, Dkt. 181.

In response, the claims administrator calculated that 55,346 class members made claims for a total of $344,850. Dkt. 156 at 2-3. Thus, over seven million non-claiming class members, over 99% of the class, would receive no compensation.

On August 21, 2014, the court issued its order approving the settlement and Rule 23(h) request in full. Dkt. 168. Although the court found that "the $50 million [settlement valuation] calculation [was] somewhat illusory," it concluded that the settlement was fair and the fee sought was reasonable. Dkt. 168 at 9. In approving the agreement, it cited the "small number of objections relative to the size of the

settlement," its analysis of the *Bennett*[5] factors, and its belief that "there is no practical alternative by which to deliver greater value to Class Members." Dkt. 168 at 5-8.

With respect to Frank's objection to the preferential treatment toward class counsel, the opinion said nothing beyond remarking that no practical alternatives existed for conferring greater benefit upon class members, and its conclusion that "In determining a reasonable fee…the Court is not limited by the actual amount of claims to be paid." Dkt. 168 at 9. The court did not mention the "clear-sailing" and "kicker" provisions insulating class counsel's fee award.

Assessing the nonmonetary relief, the court found that "the class received a substantial equitable benefit by reason of Gillette's agreement to stop selling Ultra batteries." *Id.* It also found that "[t]he charitable donation's direct benefit will not flow to the class members, however, it is appropriate to consider the donation in evaluating the settlement overall and it will have an indirect benefit to the Class." Dkt. 168 at 9. The court's opinion did not specifically address Frank's objections to crediting either the *cy pres* or the injunctive relief as class value. It made a conclusory finding that Frank's proposed alternative of gaining class members' contact information from third-party retailers "would be difficult, expensive, and essentially fruitless," and thus the claims process used in the settlement was "the best practical means of providing relief to the Class." Dkt. 168 at 6. It did not cite any basis in the record for this conclusion. The court did not remark upon other alternatives such as amending the caps built into the claims process.

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[5] *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

The court held that the $5,680,000 fee was reasonable under either the percentage method that was requested by class counsel, or the lodestar method with a 1.56 multiplier. Dkt. 168 at 9. Finally, the court reaffirmed its earlier finding that the notice plan provided the best practicable notice and that the named representative was adequate. Dkt. 168 at 10.

Frank, Batman, and Falkner filed timely notices of appeal from the court's order. Dkts. 169, 171, 172. This Court's case opening letter channeled these and two other objectors' appeals into No. 14-13882, Batman's first-filed appeal.

E. Standard of review.

As Cir. R. 28-1(*i*)(iii) requires, Frank states:

A district court decision to approve a class action settlement is reviewed for abuse of discretion. *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1316 (11th Cir. 2013). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996). It also abuses its discretion if it "applies the law in an unreasonable or incorrect manner." *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1216 (11th Cir. 2009). Abuse of discretion is found where the district court "fails to afford consideration to relevant factors that were due significant weight" or where "it considers the proper factors but balances them unreasonably." *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*) (citing cases).

Frank's appellate issues here—such as whether allocating 95% of settlement cash to class counsel renders a settlement unfair; whether prospective labeling changes

on a product no longer being sold benefit a class of past purchasers; and when *cy pres* is appropriate—implicate standards of Rule 23(e). "[T]o the extent that the issue[s] involve[] interpretation of the Federal Rules of Civil Procedure, we review *de novo*." *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000).

Factual determinations are reviewed for clear error. "[A] court commits a clear error when it makes a factual finding that has no support in the record." *Day*, 729 F.3d at 1327.

"[J]udges must be both vigilant and realistic in [their] review" of proposed settlements. *Pearson*, 2014 WL 6466128, at *9. Review is subject to more searching scrutiny yet where the settlement is negotiated before class certification. *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 786-800 (3d Cir. 1995) ("*GM Trucks*"). Likewise, the Court should always keep foremost in mind that "the class settlement process is more susceptible than adversarial adjudications to certain types of abuse." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (internal quotation omitted).

Summary of the Argument

The district court approved a settlement that paid class counsel $5,680,000, to-be-determined charities $6 million retail value of batteries, and the less-than-1% of the class who submitted claims only $344,850, leaving the other 99% of the class with nothing. This is wrong. While Rule 23(e) does not require a perfect settlement, it does forbid a "selfish deal" like this that affords "preferential treatment" to class counsel

and non-class member charities at the expense of the class itself. *Pearson*, at *9; *Pampers*, 724 F.3d at 718.

Pearson, which reversed approval of a structurally-indistinguishable settlement, is consistent with this Circuit's precedents, which have repeatedly warned against such self-dealing. "Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members." *Holmes,* 706 F.2d at 1147 (internal quotation omitted); *accord Piambino*, 757 F.2d at 1139 ("The district court should have rejected the settlement as unfair because it was accomplished at the expense of the minority members of the plaintiff-class, primarily to provide Lead Counsel an attorney's fee."); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1215-16 (5th Cir. 1978) (commanding district courts to "always consider the possibility that that an agreement reached by the class attorney is not in the best interest of the class" and to beware of settlements which enrich class counsel to a greater degree than they do the absent class). Careful scrutiny means looking at actual recovery not theoretical recovery; it means ensuring injunctive relief is not illusory; it means refusing to credit self-serving formalisms and fictions conjured up by the settling parties. *Pearson*; *Pampers*.

Similarly, the district court committed reversible error in permitting a settlement that emphasized *cy pres*, rather than using it as a last resort. Again, *Pearson* is directly on point. *Id.* at *6; *see also Klier*, 658 F.3d at 475.

The court below disregarded these allocational concerns premised on its unsupported finding that "there is no practical alternative by which to deliver greater

value to Class Members." Dkt. 168 at 5. This was clear error. "The burden of proving the fairness of the settlement is on the proponents,"[6] and still Frank outlined several available alternatives used by other settlements for reaching a fairer equilibrium. The settling parties left these alternatives unrebutted with any record evidence, and the district court's erred in deferring to appellees' *ipse dixit* and in crediting value to an injunction that had literally no effect on the marketplace.

Note what this appeal is not arguing. Frank is not arguing that the settling parties colluded. Although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient*. "While the Rule 23(a) adequacy of representation inquiry is designed to foreclose class certification in the face of 'actual fraud, overreaching or collusion,' the Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948 (internal quotation omitted). The Court's oversight role does not end at making sure that the settling parties engaged in properly adversarial arm's-length settlement negotiations. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014); *Pampers*, 724 F.3d at 717-18. Because "[t]he defendant, and therefore its counsel, is uninterested in what portion of the total payment will go to the class and what percentage will go to the class attorney"[7] it is

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[6] *Pampers*, 724 F.3d at 718 (compiling cases and authorities); *accord Holmes*, 706 F.2d at 1147.

[7] *Piambino*, 757 F.2d at 1143 (quoting *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 686 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978)).

enough that the settlement evinces "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations."[8] As this Circuit has observed, "the defense operates as no brake against the invidious effects of a such a conflict of interest." *Piambino*, 757 F.2d at 1143.

Nor does Frank claim that P&G should have settled this case for $50,000,000 or $24,000,000 instead of $12,000,000. Under Rule 23(e)(2), it is not enough that the size of the settlement is adequate; the *allocation* of the settlement must also be fair. *Pampers*, 724 F.3d at 718; *Pearson*.

Thus, if appellees respond that the *Bennett* factors show that $12 million (or even $0.3 million) is adequate, or that there was no collusion, as they did below, they dodge Frank's issue on appeal. When parties settle a case for a total of $6 million in cash and $6 million in product, it is inherently unfair for the class attorneys to sequester 95% of the cash for themselves, 100% of the product for third party charities, and leave a mere pittance—an average of less than five cents a class member—for the putative class. The 1650% ratio of attorney to class recovery in this settlement is *per se* unacceptable if Rule 23(e) means anything. *See Pearson*, at *3-*4.

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[8] *Pampers*, 724 F.3d at 718 (internal quotation omitted).

Argument

I. A settlement structured to provide preferential treatment to class counsel by paying attorneys $5,680,000 and the class $344,000 is unfair as a matter of law, and the district court erred in holding otherwise.

A class action settlement may not confer preferential treatment upon class counsel to the detriment of class members. "Such inequities in treatment make a settlement unfair" for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718-21 (reversing settlement where class counsel received $2.73 million and absent class members were offered a money-back refund program with a likely small claims rate, prospective labeling changes, and a *cy pres* donation)).

A recent Seventh Circuit decision explains what constitutes undue preferential treatment. *Pearson,* 2014 WL 6466128. Like this case*, Pearson* settled consumer fraud and misrepresentation claims. And the *Pearson* settlement mirrors the settlement here: a multi-million dollar payday to class counsel sheltered by clear-sailing and "kicker" clauses, significant sums to non-class charities, meaningless labeling changes, and little actual recompense to class members. Without mincing words, *Pearson* nixed the "selfish deal" that "disserve[d] the class." *Id.* at *9.

Similarly, the Ninth Circuit in *Bluetooth* identified three warning signs of a class action settlement that is inequitable between class counsel and the class. 654 F.3d at 947 (listing the indications: **(1)** a disproportionate distribution of fees to counsel; **(2)** a "clear sailing agreement" (the defendant's agreement not to oppose a certain sum in

attorneys' fees); and **(3)** a "kicker" (a segregated fund for attorneys' fees that reverts any excess fees to the defendant)). As in *Pearson*, each warning sign is present here.

A. The attorney award is disproportionate to actual class benefit.

The first signal is "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F.3d at 947; *Pearson*, 2014 WL 6466128, at *3 (describing attorney award of 69% as "outlandish"); American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.05, *comment b* at 208 (2010) ("*ALI Principles*") ("a proposed settlement in which the class receives an insubstantial payment while the fees requested by counsel are substantial could raise fairness concerns").

Here, the class stands to recover only $344,850, while class counsel sought unopposed, and was awarded, fees and costs of $5,680,000. The disproportionate allocation in this case was not happenstance. This ratio was inevitable, as Frank predicted (Dkt. 126 at 13), because of the way the parties structured the settlement payment process to minimize direct recovery by the class: the $3 per product cap, the unit caps, the lack of direct notice, the lack of direct payment. And the settling parties admitted that they anticipated such a low claims rate, too. Dkt. 156 at 15 (acknowledging empirical evidence that "class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%))); Dkt. 157 at 7 (lauding the 0.76% claims-filing rate as "above-average"). This admission demonstrates that class counsel here "has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class." *Baby Prods.*, 708 F.3d at

178. *Cf. also Giles v. California*, 554 U.S. 353, 385, 128 S. Ct. 2678 (2008) (Those "who perform[] an act which it is known will produce a particular result [are] from our common experience presumed to have anticipated that result and to have intended it.").

The Eleventh Circuit has a "benchmark" of attorney recovery in the "20 to 30% range." *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) (finding abuse of discretion in using lodestar rather than percentage-of-recovery method of awarding fees in common fund case). A settlement allocation to attorneys that is designed to exceed that range is not what *Pampers* called "commensurate." 724 F.3d at 720. *Dennis*, 697 F.3d at 868 (38.9% "clearly excessive"); *Redman*, 768 F.3d at 630-32 (55%-67% allocation unfair); *Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014) (56% allocation unfair).

Pearson is most salient of all. There the settlement allocated to class member claimants less than $900,000, to a *cy pres* recipient $1.13 million, and to class counsel $4.5 million. *Pearson*, 2014 WL 6466128, at *1. When the district court reduced the fee award to $2 million based on low class member participation, the excess reverted to the defendant. *Id.* The Seventh Circuit found this arrangement untenably tilted toward class counsel. *Id.* at *3.

"The ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Id.* (quoting *Redman*, 768 F.3d at 630). Using that ratio, class counsel's allocation here was over 93% of the constructive common fund—substantially higher than the figures rejected as inappropriate in *Pearson*, *Dennis*,

Redman, and *Eubank*. Even if one counted the supposed $6,000,000 of *cy pres* as $6,000,000 of class benefit—a methodology specifically rejected by *Pearson* at *6 (*see* § II below)—the ratio is still a "clearly excessive" 48%. "When the class attorneys succeed in reaping a golden harvest of fees in a case involving a relatively small recovery, the judicial system and the legal profession are disparaged." *Piambino*, 757 F.2d at 1144 (internal quotation omitted). Given *Pearson*, this settlement collapses *a fortiori*. The class recovery here is $500,000 less than in *Pearson* yet the clear-sailing fees are $1.2 million more. To approve this settlement would be to create a inter-circuit split, something this Court does not do "lightly." *Public Health Trust of Dade Cty., Fla. v. Lake Aircraft, Inc.,* 992 F.2d 291, 295 n.4 (11th Cir. 1993).

When confronted with this objection below, the settling parties' primary response was that the amount actually claimed by class members is irrelevant to the fairness of the settlement. Dkt. 158 at 9-11; Dkt. 150 at 12-13. Instead, they insisted that the pertinent ratio was the attorneys' fees to the maximum amount that class members could hypothetically claim under the settlement. *See, e.g.*, Dkt. 114-1 at 8. To the extent the district court agreed, this is reversible error. *Pearson*, at *3.

Class counsel claimed that the settlement created $43 million of class benefit—a $6 claim for each of the estimated 7.26 million class members. But speculative, maximized estimates like this are not the appropriate measure of benefit. *Pearson*, at *2 (eschewing such "fiction"); *Dennis*, 697 F.3d at 868 (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class."); Federal Judicial Center, *Manual for Complex Litigation* §

21.71 (4th ed. 2004) ("In cases involving a claims procedure…, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather the fee should be based only on the benefits actually delivered."). "Cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted) (rejecting settling parties' *ipse dixit* that refund program unlikely to ever pay anything was class benefit).

Recognizing realities of settlement value rather than settling parties' illusion of benefit is especially important in the class-action context. Unlike one-on-one litigation, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* at 715; *accord Pearson*, at *8-*9. Because of "the built-in conflict of interest" the "law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action." *Redman*, 768 F.3d at 629.

In arguing that they should be credited with the entire hypothetical $50 million fund, class counsel distend two cases: *Boeing v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745 (1980) and *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999), *cert. denied* 530 U.S. 1223, 120 S. Ct. 1237 (2000). But *Boeing* and *Waters* are inapplicable for at least three reasons.

First, neither case has any relevance to adjudicating a Rule 23(e) objection that a settlement is unfairly slanted toward class counsel. *Boeing* involved a litigated judgment where *Boeing* was ordered to deposit a sum total in escrow at a commercial bank. After an extensive notice and search program, 47% of the class's potential claims had been accounted for. 444 U.S. at 476 n.4, 100 S. Ct. at 748 n.4. No settlement was involved. *See also Pearson*, at *3 (distinguishing *Boeing* as a case where the "harvest created by class counsel was an actual, existing judgment fund").

While *Waters* did involve a settlement, it did not address the Rule 23(e) fairness inquiry because appellants did not challenge settlement approval, only the fee award. 190 F.3d at 1292. Further, as in *Boeing*, the defendant advanced the challenge, and even did so in a manner inconsistent with attestations made at the district court. *Id.* at 1296 n.9.[9] *Pearson*, *Pampers*, and *Redman*, none of which were considered by the decisions class counsel rely upon, are compelling: direct benefit matters to settlement fairness.

Second, *Boeing* and *Waters* were superseded by the 2003 amendments to Federal Rule of Civil Procedure 23, which created Rule 23(h), and the subsequent passage of the Class Action Fairness Act in 2005 (28 U.S.C. §1711 *et seq.*). *See* Samuel

[9] Class counsel also relied upon unpublished cases that are non-precedential under 11th Cir. R. 36-2. These fare no better. *Dikeman v. Progressive Express Ins. Co.* addressed only an argument that the size of the fund was inadequate. 312 Fed. Appx. 168, 171 (11th Cir. 2008). *Nelson v. Mead Johnson & Johnson Co.* affirmed the overruling of a "conclusory" objection "to the inadequacy of the settlement consideration and the allocation of the settlement proceeds" without addressing the subsequent appellate decisions Frank relies upon here. 484 Fed. Appx. 429, 434 (11th Cir. 2012).

Isaacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3171-72 (2013) (describing *Boeing* as marking an "older line of cases" that eventually "prompted legislative rejection of compensating lawyers on the face value of the settlement, regardless of the take-up rate of the benefits by class members"). The new rules reflect common-sense intuitions. Attorneys' fees should be tied directly to what clients receive, and permitting a class member to fill out a claim form in order to receive a check simply is not equivalent to getting money to that class member directly. *See* Notes of Advisory Committee on 2003 Amendments to Rule 23 (directing courts "to scrutinize the manner and operation of any applicable claims procedure" when awarding fees).

<u>Third</u>, to whatever extent they remain valid, *Boeing* and *Waters* apply only to cases with actual common funds, not constructive common fund settlements like this one. *Pearson* is directly on point, reversing a district court that premised its calculation of settlement value on the fiction that $3/class member was "made available" to 4.7 million class members who received direct notice. *Pearson* at *3. There was no actual fund, no litigated judgment and no "reasonable expectation…that more members of the class would submit claims than did," and thus *Boeing* was inapplicable. *Id. Accord Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844, 852 (5th Cir. 1998) (*Boeing* only applies to "traditional common fund" from which class members had "undisputed and mathematically ascertainable claim to part"). *Waters* and *Boeing* themselves recognize this distinction. *Waters*, 190 F.3d at 1296 ("*Strong* never established a 'common fund' from which money would be drawn"); *Boeing*, 444 U.S. at 479 n.5, 100

S. Ct. at 750 n.5 (expressly reserving decision on whether its common-fund analysis applies to claims-made settlements). Thus, the *Strong* class counsel's fee award was properly based on actual class-member participation—the real value of the settlement—rather than the "phantom" value assigned by class counsel. 137 F.3d at 852.

Public policy demands that settlement allocation should be attuned to the result actually achieved for the class. *See Int'l Precious Metals Corp. v. Waters,* 530 U.S. 1223, 120 S. Ct. 1237 (2000) (O'Connor, J) (respecting denial of certiorari) (total benefit rule could "undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" and "could encourage the filing of needless lawsuits"). If this Court creates a circuit split with *Pearson* and endorses appellees' proposed rule that equates a settlement that awards cash directly to class members with a settlement employing a restrictive claims process, settling parties will always agree to the more burdensome claims process that ensures class counsel extracts the maximum amount of fees and defendants pay the minimum amount of money to settle the case. Unnamed class members will be inadequately represented.

A hypothetical demonstrates the absurd incentives class counsel's interpretation creates: imagine two possible settlements of the hypothetical class action *Coyote v. Acme Products*:

***Acme* Settlement One** ***Acme* Settlement Two**

***Acme* Settlement One**	***Acme* Settlement Two**
Acme Products mails a $50 check to each of one million class members who purchased their mail-order rocket roller skates. A second *pro rata* distribution is made of the amount from any uncashed checks.	One million class members have the right to fill out a twelve-page claim form requesting detailed proof of purchase, with a notarized signature attesting to its accuracy under penalty of perjury. The claim form must be hand-delivered in person between the hours of 8:30 a.m. and 9:30 a.m., on December 24, 2014, at Acme's offices in Walla Walla, Washington or Keokuk, Iowa. Class members with valid claim forms receive $200.

It would be malpractice for a class attorney to refuse Settlement One and insist on Settlement Two. Virtually all class members would prefer Settlement One to Settlement Two. A defendant would prefer Settlement Two to Settlement One as substantially cheaper. But under class counsel's proposed interpretation of *Boeing* and *Waters*, Settlement Two is worth four times as much as Settlement One, and entitles the class attorneys to four times as much in attorneys' fees. Instead, this Court should prefer the rule that "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class." *Pearson*, at *3.

The appellees might attempt to distinguish this case from the hypothetical Acme "Settlement Two"; after all, the settlement permitted claimants to file claims electronically rather than hand-deliver them, and did not require receipts to make a claim for two units. But making that argument concedes Frank's point that valuing "potential" benefits is improper without taking into account the likelihood that a class member will *actually* obtain the benefit. If it is improper to fully value Acme

"Settlement Two" because only 0.01% of the class will make claims, why is it appropriate to value this settlement by its "potential" benefits when it has a claims process where less than 1% of the class will *actually* make claims? There is no principled dividing line: the way to judge the validity of a claims process—and to incentivize class counsel to maximize the result actually obtained by the class—is to rely solely on the amount that the claims process will *actually* pay the class.

Attorneys' fee awards should "directly align[] the interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (quotation omitted); *accord Camden I,* 946 F.2d at 774; Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent percentage approach minimizes conflicts more efficiently than the lodestar…."). If settlement fairness is calculated identically, and class counsel is entitled to the same payment whether the claims period is thirty days long or ninety days long, whether the claims process requires nothing more than a name or address or whether it demands burdensome documentation, or whether notice actually communicates class members' rights, class counsel has little incentive to push back for the class when a defendant attempts to minimize its liability.

To its credit, the district court did not blindly accept the idea that the claims data was irrelevant to fairness. Instead, it postponed the fairness hearing pending an accounting of class claims, and briefing thereon. Dkt. 141. Also to the lower court's credit, it declined the plaintiffs' invitation to base its assessment on the fiction of a

$50 million fund. In fact, it found that such a valuation would be "somewhat illusory, because the parties never expected that Gillette would actually pay anything close to that amount." (Dkt. 168 at 9); *compare Waters*, 190 F.3d at 1296 ("the district court here never made a determination that [the purported settlement] amount was illusory."). At the fairness hearing, the Court offered several additional reasons for being skeptical of the plaintiffs' insistence that *Waters* controlled this case. Dkt. 181 at 11. But having avoided reversible error by determining the actual amount of class recovery, the district court committed reversible error by approving the settlement notwithstanding the misallocation of the settlement funds.

The district court erred because it relied solely on the six-factor test of *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Dkt. 168 at 7-8. But *Bennett*'s six-factor test simply does not provide an exclusive list of reasons to reject a settlement. *E.g.*, *Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530-31 (11th Cir. 1994) (concluding that the district court abused its discretion despite "thoroughly address[ing]" all six factors and concluding that each weighed in favor of approval). Other circuits with multi-factor tests agree. *Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *Baby Prods.*, 708 F.3d at 174 (failure to consider "the degree of direct benefit provided to the class" reversible error, though not in Third Circuit's nine-factor test); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone is not enough to survive appellate review"); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185,

195 (5th Cir. 2010) (multi-factor test not sole reasons a settlement should be rejected under Rule 23(e)).

Five of the six *Bennett* factors revolve around the issue of whether the gross fund is adequate. *See* 737 F.2d at 986. But Frank is not arguing the settlement should be *larger*; if the parties believe roughly $12 million is a fair assessment of the merits of the case against P&G, so be it. Frank's objection is to the *allocation*. While the *Bennett* factors provide a framework for evaluating a settlement's total amount's adequacy, they say nothing about potential unfair apportionment of an otherwise sufficient settlement. For this, one needs to use the *Pearson* ratio, which dictates reversal here.

1. The district court committed clear error in holding that a proportionate settlement was not "practical."

In response to Frank's objection, the lower court concluded that "there is no practical alternative by which to deliver greater value to Class Members." Dkt. 168 at 5; *accord id.* at 6 ("attempting to gain [class member contact] information from retailers would be difficult, expensive and essentially fruitless").[10] This is clear error because it

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[10] Such reasoning is predicated on the premise that impracticality, or even "fruitless" impossibility of paying class members, can justify a lopsided settlement allocation. This is wrong: even a settlement class cannot be certified if a class action is not a "superior" means of resolving class members' claims. Fed. R. Civ. P. 23(b)(3). A class action is not a superior means of adjudication where the class device is unable to compensate class members. *In re Hotel Tel. Charges,* 500 F.2d 86, 91-92 (9th Cir. 1974); *cf. also In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (reaching same conclusion on class certification when no marginal benefit to class possible, but on (a)(4) grounds, rather than (b)(3) grounds); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (reaching same conclusion but on basis of ascertainability prerequisite).

is unsupported by the record below. *Day*, 729 F.3d at 1326-27. In line with "simple and obvious" suggestion "to increase the share of the settlement received by the class, at the expense of counsel,"[11] Frank offered several alternatives available to the parties, and successfully used by other settlements, for resolving the disproportionality. There was no record evidence rebutting this evidence or precedent; there was not even evidence that it would be "expensive" to ascertain class members.[12] Even if there had been such evidence, it should have been rejected as a matter of Rule 23 precepts.

First, Frank explained that direct notice or payments to the class were feasible, and had been done in other settlements, by obtaining from third-party retailers the contact information of class members. For example, Frank below pointed to *In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.*, No. 09-md-2023 (E.D.N.Y.), which provided a precise roadmap. As here, *Bayer* was a consumer-fraud suit alleging deceptive practices relating to household products sold by middleman retailers—aspirin, rather than batteries. In late 2012, the parties settled and entered

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[11] *Pearson*, at *8.

[12] "Expensive" is a relative term; the parties will pay the settlement administrator at least $632,000 to distribute $344,000 to the class. Dkt. 151 at 4. While ascertaining class members is not free, there was no evidence of what it would cost, much less that a more comprehensive distribution plan would be more inefficient than the $1.83 extra spent for every $1 distributed to the class. "[C]lass representatives must be prepared to accept the concomitant responsibility of identifying absentee class members…." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103 (5th Cir. 1977).

into a low value claims-made settlement similar to this one. *Bayer*, Dkt. 181 (granting preliminary approval). Similar to here, Frank objected that class benefit would amount to a small fraction of class counsel's $5,100,000 fee request while two *cy pres* recipients would share the remaining $8 million from the net settlement fund. *Bayer*, Dkt. 206. After Frank filed his objection and notice of the *Baby Products* decision, the parties immediately amended the settlement to issue direct payments to known class members, culminating in a direct class benefit of $5.8 million. *Bayer*, Dkt. 218-3.

This happened though Bayer, like P&G, did not directly possess the contact information of class members who purchased its products. But the parties reached out to "numerous … major retailers [who] agreed to produce [class member] information to plaintiffs." 2012 U.S. Dist. LEXIS 143955, at *17 (E.D.N.Y. Oct. 2, 2012). When non-consenting retailer Safeway, Inc. challenged the subpoena for the class information, the court ordered production of the "contact information for individuals known by Safeway to have purchased the Combination Aspirins in order to provide direct notice to these purchasers of their right to collect under the preliminarily approved settlement." *Id.* at *15. "[I]t is rather standard practice for plaintiffs to subpoena third parties, in contexts similar to this one, in order to obtain information for the purpose of providing [individualized] notice." *Id.* at *14 (citing cases); *cf. also Pearson v. NBTY, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *8 (N.D. Ill. Jan. 3, 2014) (millions of consumer class members directly notified using retailers' records), *rev'd on other grounds* __F.3d__, 2014 WL 6466128 (7th Cir. Nov. 19, 2014).

The only record material supporting the finding that such endeavors would be "difficult," "expensive" and "essentially fruitless" was attorney argument that consumer actions would be "entirely impossible" if class members had to be paid and attorney argument that "the economic benefit" of "canvassing the country" "just isn't there." Dkt. 181 at 29-30, 31, 33-34. But the unrefuted record evidence that several vendors use loyalty or recordkeeping systems that track who has purchased Duracell Ultras and the fact that other consumer class actions had successfully used data to provide either individualized notice or individualized payment shows that what appellees assert to be "impossible" is very much possible. Frank Decl., Dkt. 126-1 at 2. *Cf., e.g.,* Charles Duhigg, "How Companies Learn Your Secrets," N.Y. TIMES MAG., Feb. 16, 2012 (documenting degree to which retailers collect and use customer purchase data). The uncontroversial proposition that P&G does not currently have access to or control over said information (the only claim P&G made below, Dkt. 154 at 2) says nothing of how fruitful it would be to seek out such information. After all, neither the *Bayer* nor *Pearson* defendants had control of third-party retailer information before they requested it. It is clear error to hold this common methodology "fruitless" or impractical, especially in the face of undisputed record evidence and the experience of other courts.

When courts demand more of settling parties on behalf of class members, they get more. *Baby Products* provides yet another model. The parties there initially sought approval of an arrangement that would pay class counsel $14 million, charities $18 million and class members under $3 million. 708 F.3d 163 (3d Cir. 2013). Noting that

class members prefer actual recovery to *cy pres*, the Third Circuit reversed approval and remanded for further proceedings, suggesting that a reduction of attorneys' fees might be appropriate if the class attorneys failed to prioritize direct recovery. *Id.* Thus appropriately incentivized, on remand the parties restructured the settlement to eliminate the superfluous *cy pres* in favor of direct class distributions, constituting a class improvement of $15 million, rather than risk the district court rejecting the settlement under the Third Circuit's standard. *See McDonough v. Toys "R" Us, Inc.,* No. 06-cv-00242 (E.D. Pa.), Dkt. 157-1 ¶18 (May 13, 2014).

Class counsel claim they devoted over $3 million of lodestar to obtain benefit for less than 1% of the class. Their refusal to invest a tiny fraction of that lodestar more to ascertain class members was a breach of their fiduciary duty to the class.

Perhaps P&G will argue that such individualized notice and direct payments would have materially changed the deal they agreed to, and that they would not have agreed to a settlement that required them to *actually* pay millions of class members. But such an argument merely proves Frank's point: this is really a $6 million settlement where the attorneys got 95% of the benefit, not a $50 million settlement. The parties can't have it both ways.

The district court's conclusion that this settlement used the "best practical" means of compensating class members is clear error for a second, independent reason. Frank argued below, again citing other class action settlement precedents, that relaxing the rigid caps on the number of units class members could claim, the dollar value of each unit, and/or the proof of purchase requirements would augment direct

class benefit. Dkt. 162 at 14; Dkt. 181 at 25; *see Pearson*, at *5 (impugning "burdensome" claims processes); *see also Baby Prods.*, 708 F.3d at 176 (finding it "more likely that many class members did not submit claims because they lacked the documentary proof necessary to receive the higher awards contemplated, and the $5 award they could receive left them apathetic.") (suggesting "rais[ing] the $5 cap or alter[ing] the documentary proof requirement on remand."); *Pecover v. Electronic Arts*, No. C 08-02820 CW (N.D. Cal. Apr. 2, 2013) (Dkt. 449) (approving a revised plan of allocation that would triple per claim amounts, include an automatic distribution of $2.2 million, and prevent a cy pres award of seven times the class's recovery).

Unsurprisingly, the vast majority of class members did not maintain proof of purchase and thus, those submitted claims did so for an average of 2.07 units/$6.23 per claimant. Dkt. 156 at 2-3. *See generally Pampers*, 724 F.3d at 718 (expressing mystification at the possibility of maintaining diaper receipts for years); *Baby Prods.*, 708 F.3d at 176 (decrying restrictive proof of purchase requirements and correlative claims caps); Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* ("*FJC Guide*"), at 6 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf. (cautioning judges to "[w]atch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained. A low claims rate resulting from such unreasonable requirements may mean your eventual fairness decision will overstate the value of the settlement to the class and give plaintiff attorneys credit for a greater class benefit than actually achieved.").

The problem is blatant; a $6 return is so feeble as to dissuade an average class member from taking the time to make a claim at all. Tiffaney Janowicz et al., *Settlement Administration: Impacting Claims Filing Rates* (Feb. 18, 2014) at 24, *available at* http://media.straffordpub.com/products/crafting-class-settlement-notice-programs-due-process-reach-claims-rates-and-more-2014-02-18/presentation.pdf (last visited Nov. 30, 2014) (describing how claims rates vary with the amount available); *Pearson*, at *4 (.25% claims rate where similarly "very modest monetary award" available). Even if a mind-boggling seven percent of the class had submitted claims for $6, the benefit would have barely exceeded half of the proposed attorneys' fees.

Adjusting the per-claim recovery could be accompanied with supplemental notice and a reopening of the claims process. As Frank noted below (Dkt. 162 at 14-15), in *Pecover*, the combination of adjustments to payout amounts and supplemental outreach resulted in an increase in class recovery of $11.5 million: from $2.2 million to $13.7 million. *See also SEC v. Bear, Stearns & Co.,* 626 F. Supp. 2d 402, 417 (S.D.N.Y. 2009) (yield increased by approximately 33% with secondary distribution). Where the monetary and unit caps are relaxed or eliminated, class member claims yields will increase significantly. *Cf.* Tiffaney Allen, *Anticipating Claims Filing Rates in Class Action Settlements* 2-3 (Nov. 2008) ("A class member must feel the benefits being offered are worth the time and effort required to file a claim.").[13]

[13]Available at http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf. (last visited Nov. 6, 2014).

Any of these alternatives could have cured the disproportion *ex ante* or *ex post*, but the court below failed to mention any of these possibilities in reaching its conclusion that $344,000 was the "best practical" result. This is clear error given other class action settlements and judicial opinions on public record.

So while the lower court wisely renounced the fiction of a $50 million fund, its rationale to approve the misallocation remains fatally flawed and reversible error. There was no record evidence that it was "difficult" or "expensive" to ascertain class members relative to the lodestar expended on bringing the litigation or even defending the excessive fees here. And even if it were inconvenient or even "difficult" to require the parties to prioritize direct benefit before approving the settlement, "difficult" does not mean "fruitless," impossible, or even impracticable—and, moreover, impracticable or impossible itself would not justify approval of a lopsided settlement.

2. The lower court erred as a matter of law in attributing class benefit to P&G's pre-settlement actions or the settlement's injunction on an already-discontinued product.

Perhaps part of the reason that the district court overlooked the allocation problem was that the court credited the plaintiffs with achieving valuable injunctive relief for the class. *See* Dkt. 168 at 9; Dkt. 181 at 14 ("I do weigh pretty heavily the injunctive aspect of this…"). In so crediting, the court committed errors of law (possibly misconstruing the settlement itself) because, as in *Pearson*, the injunction provides class members no marginal benefit or consideration for the release of their claims.

Paragraph 58 of the settlement details the injunctive relief. Dkt. 113-1 at 25. Under that provision defendants prospectively agree not to package Ultra batteries in their current formulation with certain statements that imply superiority over ordinary CopperTop batteries (*e.g.*, "Our Longest Lasting"). This "relief" is illusion; it is undisputed that "Gillette stopped selling Ultra batteries in July, 2013." Dkt. 168 at 3 n.4 (citing Dkt. 153 ¶3). There is no indication, in the record or otherwise, that defendants will ever sell them with the same formulation again. Simply put, class counsel is not entitled to credit for obtaining labeling alterations on a product that is no longer sold. Agreeing to changes on non-existent packages is even more "substantively empty" than the semantic alterations made in *Pearson*. *Pearson*, at *7.

Possibly sensing the strength of this objection, the district court seized instead upon the fact that "Class counsel's efforts have played a large part in ending the Defendants' practice of selling the Ultra batteries, which is a direct benefit to the class members." Dkt. 168 at 5. Here, the Court makes multiple errors of law including perhaps misinterpreting the settlement agreement. The court's belief that the cessation of Ultra batteries was "formalized through the Settlement Agreement" (Dkt. 168 at 6) is factually incorrect. Paragraph 58 does not enjoin the sale of batteries, it only prohibits certain packaging in the event Ultra batteries are sold in the same formulation.[14]

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[14] Moreover, if the settlement *had* contained such an injunction, then there would have been a Rule 23(a)(4) intra-class conflict between those class members who wish to have the product available in the future, and those that do not. *Valley Drug Co.*

More importantly, as a matter of law, voluntary pre-settlement changes do not count as a compensable class benefit that can justify either settlement approval or a fee award. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1090 (C.D. Ill. 2012) (voluntary remedial measures independent of the settlement "should not be considered part of the benefit for forfeiting the right to sue"); *cf. also Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835 (2001) (repudiating theory that obtaining voluntary concessions makes plaintiff "prevailing party"). This is true even if those changes (unlike here) had been duplicated and formalized in the terms of a settlement. *E.g., Pampers*, 724 F.3d at 719; *Staton v. Boeing Co.*, 327 F.3d 938, 961 (9th Cir. 2003); *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (It is "the *incremental* benefits" that matter, "not the total benefits." (emphasis in original)). Any benefit to class members from P&G's voluntary pre-settlement actions accrues to the class whether or not the class releases their claims; such benefit therefore cannot be consideration justifying either a settlement or a misallocation of settlement benefits to class counsel at the class's expense.

Beyond the particulars of Ultra batteries, there is a more fundamental problem with counting prospective labeling relief as class relief. "The fairness of the settlement must be evaluated primarily on how it *compensates class members*—not on whether it provides relief to other people, much less on whether interferes with defendant's

v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189-92 (11th Cir. 2003); *Pickett*, 209 F.3d at 1280.

marketing plans." *Pampers*, 724 F.3d at 720 (internal quotation omitted). Simply, "[n]o changes to future advertising by [defendants] will benefit those who already were misled." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010). "Future purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, at *7.

These cases recognize that a class composed of people who have done discrete business with defendants *in the past* is not served by prospective injunctive relief that can at most only benefit those who do business with defendants *in the future*. Even in the unlikely event that the injunction imposes significant costs on P&G, that is not the measure of compensable value. *Bluetooth*, 654 F.3d at 944 ("[T]he standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class.") (quoting *TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)). As in the case of diapers, it may be true that "every square centimeter" of a package of batteries is "extremely valuable" to the defendants, but it is "egocentrism" to presume that that the same space is equally valuable to class members. *Pampers*, 724 F.3d at 720.[15]

[15] Frank is not arguing that a class settlement may never have injunctive relief. For example, a 23(b)(2) civil-rights claim may seek to change the future behavior of a governmental body or an employer with respect to the class. A settlement might provide retrospective injunctive relief that repairs or replaces a defective product. Or one could settle a class action on behalf of a class of consumers who plan to purchase batteries in the future without waiving their damages claims. But that is not what happened here.

B. The district court erred by failing to subject the clear-sailing agreement to any scrutiny.

In addition to the discrepancy between fees and class benefit, the settlement contains a second warning sign of an unfair deal: a "clear sailing" agreement. *Redman*, 768 F.3d at 637 ("at least in a case…involving a non-cash settlement award to the class, such a clause should be subjected to intense critical scrutiny…."); *see also Pearson*, at *1; *Bluetooth* 654 F.3d at 947. A clear sailing clause stipulates that the defendant will not contest plaintiffs' fee motion. Dkt. 113-1 at 27 ("P&G will not oppose …"). "Such a clause by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524-25 (1st Cir. 1991) (clause lays groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees"); *see also Waters*, 190 F.3d at 1293 n.4 (taking note of controversy but not reaching issue where appellants did not challenge settlement approval itself).

"Provisions for clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought*, 901 F. Supp. 2d at 1100 (quoting *Int'l Precious Metals Corp.*, 530 U.S. at 1224); *accord* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear sailing provisions."). "[T]he defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the

settlement that goes to the class members, as that is the only reduction class counsel are likely to consider." *Redman*, 768 F.3d at 637.

As another consequence of clear-sailing here, class counsel felt so secure in their fee request that they submitted only the barest of lodestar billing records. At a minimum, "counsel should identify the general subject matter of [their] time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12, 103 S. Ct. 1933 (1983). Yet below, the submissions only provided the sum number of hours for each attorney and the claimed lodestar rate. *See* Dkt. 157-1 ¶21; Dkt. 157-2 ¶4; Dkt. 157-3 ¶6. "Generalized statements that the time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much weight… [T]he district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary…" *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988) (abrogated on other grounds by *Perdue v. Kenny A.*, 559 U.S. 542, 130 S. Ct. 1662 (2010)). Would class counsel have submitted such deficient records had the defendants the opportunity to challenge the fees? Doubtful. Where there is clear-sailing however, plaintiffs have a tendency to "handicap[]" objectors by not submitting "the details of class counsel's hours and expenses." *Redman*, 768 F.3d at 638 (holding that such a procedure violated Rule 23(h)).

Nevertheless, the district court approved in the alternative an award based on lodestar and a 1.56 risk multiplier. Dkt. 168 at 9. A 1.56 multiplier is no longer a routine enhancement. *Contrast Kenny A.*, 559 U.S. at 552 *and Redman*, 768 F.3d at 633 ("attorneys' fees don't ride an escalator called risk into the financial stratosphere"),

with Dkt. 158 at 40-41 (citing pre-*Kenny A* case law). But even if that were a reasonable multiplier in isolation, even a request below lodestar cannot justify a settlement in which class counsel obtains a disproportionate sum of the proceeds. *See Redman*, 768 F.3d at 635 ("hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel."); *Baby Prods.*, 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (same with multiplier of 0.32). In a consumer action, a lodestar award amounting to a majority of the settlement proceeds does not make a "fair" settlement under Rule 23(e) nor a "reasonable" award under Rule 23(h). *Pearson*, at *4. It is inequitable for the class to make pecuniary sacrifices while its counsel does not. In effect class counsel is asking the class to settle, and then to "appl[y] for fees as if it had won the case outright." *Sobel v. Hertz*, 2011 WL 2559565, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011).

The court below approved the settlement without considering the clear-sailing provision or its effects on the proceedings. That is independent reversible error.

C. The district court erred by failing to consider the "questionable provision" of a "kicker."

Unlike with an all-inclusive pure common fund, each of the benefits here is formally segregated and compartmentalized. This segregation forms what is known as a "constructive common fund," colloquially known as a "kicker." *See, e.g.*, *Pearson,* at *8; *GM Trucks*, 55 F.3d at 820-21 (A severable fee structure "is, for practical purposes, a constructive common fund…[P]rivate agreements to structure artificially separate

fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case”).

A constructive common fund structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, at *8; *Bluetooth*, 654 F.3d at 949. The settlement effectuates this segregation by stipulating that fees will be considered separate and apart from class relief. Dkt. 113-1 at 28. This constitutes the third red flag of a lawyer-driven settlement and begets a “strong presumption of…invalidity.” *Pearson*, at *8; *accord Redman*, 768 F.3d at 637 (kicker is a “defect”); *Eubank*, 753 F.3d at 723 (kicker is a “questionable provision”).

In a typical common fund settlement, the district court can reduce the fees requested by plaintiffs’ counsel—and when it does so, the class will benefit from the surplus. Had this settlement been arranged as a common fund, a simple reduction of fees would have been a seamless “practical alternative by which to deliver greater value to Class Members.” Dkt. 168 at 5; *see also Pearson*, at *8 (calling this the “simple and obvious way”). It cannot be correct that the settling parties’ decision to structure a settlement in an inflexible way can be the extenuating circumstances excusing an unbalanced settlement.

Because of the structure, if the district court had awarded less than the $5,680,000 fee that P&G had already agreed to pay to class counsel, P&G would have

been the only beneficiary.[16] Because the "economic reality" is that the defendant only cares about its total payment, this settlement is therefore worse for the class than a traditional common fund. *Pampers*, 724 F.3d at 717 (internal quotation omitted). The parties hamstrung the district court, preventing it from returning the constructive common fund to natural equilibrium.

Fee segregation thus has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See id.* (calling it a "gimmick for defeating objectors"). A court has less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Silver, *Due Process and the Lodestar Method*, 74 TUL. L. REV. at 1839 (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (same; further arguing that reversionary kicker is *per se* unethical). Because "the adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is *allocated* between the class representatives, class counsel, and unnamed class members," *Pampers*, 724 F.3d at 717 (emphasis in original), it is no surprise that the most common settlement defects are ones of allocation. *See Holmes*, 706 F.2d at 1147 (noting importance of review of fairness of allocation and not just adequacy of settlement sum). Thus, a segregated-fee structure

[16] *See Bluetooth*, 654 F.3d at 949 ("The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees.").

prevents the Court from exercising its discretion, in furtherance of its fiduciary duty, to cure the most endemic settlement ailment.

Despite the parties' assertions below (*e.g.,* Dkt. 114-1 at 7), formally segregating the fee award exacerbates the problem; it does not remedy the inherent conflict. *See Pearson*, at *8; *Bluetooth*, 654 F.3d at 943; *Piambino*, 757 F.2d at 1122.[17] "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

Nor are issues of allocation resolved by sequentially negotiating fees after substantive settlement terms. As Judge Posner notes,

> Class counsel claim that often they negotiate for the benefits to the members of the class first, selflessly leaving for later any consideration of or negotiation for their award of attorneys' fees. That claim is not realistic. For we know that an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel. Caring only about his total liability, the defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant.

[17] The interrelation of fees and class relief cannot be undone just by following the advice of a professional mediator. James Richard Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN ST. Y.B. ARB. & MEDIATION 162, 163 (2013) (deference to mediators "is an abdication of judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members").

Pearson, at *8; *see also In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 204 (D.D.C. 2013). The district court erred as a matter of law by failing to apply a "strong presumption of its invalidity" to the kicker. *Pearson*, at *8.

D. All settlements have a low number of objectors and the recommendation of class counsel; it should be an error of law to rely on these factors to determine settlement fairness.

The lower court found the small number of objections and opt-outs suggested that the settlement was fair. Dkt. 168 at 7. This is wrong—even "naïve." *Redman*, 768 F.3d at 628; *accord In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. Apr. 1981) ("[A] low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases."). Just as it is uneconomic to bring class-action litigation as individual litigation, it is even more uneconomic to object to an unfair class-action settlement. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007); *see also GM Trucks*, 55 F.3d at 812-13; Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense dictates that apathy, not decision, is the basis for inaction."). There will never be a large number of objectors in a class-action settlement, so the absence of thousands of objectors indicates nothing. *See Vought*, 901 F. Supp. 2d at

1093 (citing, *inter alia*, a 1996 Federal Judicial Center survey that found between 42% and 64% of settlements engendered no filings by objectors).

Objections should be judged on quality not quantity. *E.g.*, *Pampers*, 724 F.3d at 716 (reversing settlement binding multi-million-member class though only three objectors and a single appellant); *Baby Prods.*, 708 F.3d 163 (reversing settlement binding multi-million member class though only few objectors and three appellants). Allowing the lack of objections to control is tantamount to relieving the settling parties of their "burden of developing a record demonstrating that the settlement distribution is fair, reasonable, and adequate." *Holmes,* 706 F.2d at 1147.

It was likewise error to allow the recommendation of class counsel to enter the equation as a reason to approve the settlement. Dkt. 168 at 8 n.8. Of course class counsel supports a settlement; if they didn't, there wouldn't be a settlement. (And why would class counsel oppose a settlement that benefits them at the expense of the class?) Because this factor will never weigh against settlement, it "proves very little." *Richardson*, 991 F. Supp. 2d at 204 (citing *ALI Principles* § 3.05 *comment a* at 206 (2010)). This Circuit should, as a matter of public policy, jettison consideration of class counsel's settlement endorsement from the analysis. Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J.L. REFORM 80 (2013). Until then, problems are likely to recur. *E.g.*, *Day*, 729 F.3d at 1315 (vacating settlement approval where magistrate had relied on its "complete confidence in the ability and integrity of counsel").

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Though it was possible for the parties to ascertain and directly pay class members, class counsel structured a settlement so that the bulk of the benefit would go to itself, and to shield its fee request from scrutiny. As in *Redman*, *Pearson*, and *Pampers*, defendants acquiesced because they cared only about the total cost of settlement, not the allocation. The reason class counsel did not want to ascertain class members was because every dollar going to class members was a dollar that P&G would not have been willing to pay for attorneys' fees. The disproportionate misallocation is *per se* unfair and requires reversal of settlement approval and rejection of the settlement.

II. The settlement misuses *cy pres.*

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Pearson*, 2014 WL 6466128, at *5. Imported to the class action context, it has become a increasingly popular method of distributing settlement funds to non-class third parties—a "growing feature" that raises "fundamental concerns." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari).

Cy pres distributions are non-compensatory, disfavored among both courts and commentators alike, and remain an inferior avenue of last resort. *See, e.g., Pearson*, at *5 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to…the class members"); *Klier*, 658 F.3d at 475 ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members

directly."); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[A] growing number of scholars and courts have observed, the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process"); *Baby Prods.,* 708 F.3d at 173 ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory"); Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

One variety of class action *cy pres* is *ex ante cy pres*. It can be defined as an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class." Redish et al., *Cy Pres Relief and Pathologies,* 62 FLA. L. REV. 617, 657 n.171. Settlement §61 is an archetype of (1). It provides that defendants will donate $6 million worth of products to non-class member charities over a five year period. Dkt. 113-1 at 26-27.

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on shakier footing. "This form of cy pres stands on the weakest ground [is] because *cy pres* is no longer a last-resort solution for a residual problem of claims administration. The

concern for compensating victims is ignored…." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 1, 4 (2013).

Preferring non-compensatory *cy pres* might be acceptable if the class were a free-floating entity, existing only as a figment of class counsel's imagination. But that is not how Rule 23 functions; Rule 23 is a complex joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S. Ct. 1431, 1443 (2010) (class action is a "species" of joinder). Thus, "[t]he plaintiff-class, as an entity, [is] not Lead Counsel's client in this case. Rather, Lead Counsel continue[s] to have responsibilities to each individual member of the class even when negotiating." *Piambino*, 757 F.2d at 1144 (internal quotation omitted).

A. The settlement resorts to *cy pres* prematurely.

Cy pres is improper when it is feasible to make further distributions to class members, at least where there is no compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. *See Pearson*, at *6 (*cy pres* only permissible "if it's infeasible to provide that compensation to the victims). §3.07(a) of the *ALI Principles* succinctly states the limitation: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[18] The last-resort

[18] Numerous courts have endorsed §3.07 to a greater or lesser degree. *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 689-690 (7th Cir. 2013); *Baby Prods.*, 708 F.3d at 173; *In re Lupron Mktg. and Sales Practices Litig.*, 677 F.3d 21, 32-33

rule follows from the precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* §3.07 cmt. (b)).

As the following chart demonstrates, the allocational problems of this *cy pres* settlement are even more debilitating than those of the now-discredited *Pearson* agreement.

	Pearson	*Poertner*
Gross settlement fund	$6.5 million	$12.02 million[19]
Direct class benefit	$865,284	$344,850
Rule 23(h) request	$4,500,000	$5,680,000
Rule 23(h) award	~$1.93 million	$5,680,000
Ratio of attorney request to class recovery	5.2	16.47
Ratio of attorney recovery to class recovery	2.23	16.47
Approximate *cy pres*	$1.13 million	$6 million[20]
Ratio of *cy pres* to class recovery	1.3	17.39
Class's percentage	about 13.3%	less than 3%

(1st Cir. 2012); *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Nachshin*, 663 F.3d at 1039 n.2; *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version).

[19] $6 million of this is in-kind product relief, not monetary relief. "[N]on-cash relief… is recognized as a prime indicator of suspect settlements" *GM Trucks*, 55 F.3d at 803.

[20] *See supra* n.20.

	Pearson	*Poertner*
Attorneys' fee request percentage using *Pearson* methodology	69%	**94%**
Attorneys' fee request percentage counting *cy pres* as benefit (*contra Pearson*)	49%	48%
Cy pres percentage	17.3%	about 50%

Although it was feasible to distribute the value of the $6 million in-kind relief to class members instead of *cy pres*, class counsel did not negotiate for using that fund to compensate class members, either through higher monetary per-claim payouts, or through less rigorous unit claims caps, or through additional in-kind product relief whenever a class member makes a claim. Rather, class counsel gave that value away to non-class entities in dereliction of their fiduciary obligations.[21] *See also Turza*, 728 F.3d at 689-90 (rejecting *cy pres* where district court had failed to take steps to ensure direct recovery).

The district court said little regarding this objection beyond a finding that the *cy pres* constituted an "indirect benefit" that supported the fairness of the settlement. Dkt. 168 at 5. Regardless, indirect benefit cannot be permitted to trump direct benefit.

[21] If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts doubt on the adequacy of class representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("[B]asic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

Below, the settling parties endeavored to justify the *cy pres*. They asserted that there was no feasible way to get more value into class members' hands. For reasons detailed above in §I.A.1, this contention must be rejected. They also declared that augmenting claimant recovery may constitute a windfall by exceeding the "full recovery" that claimants were already receiving. Immediately, this overlooks using a method that would compensate the 99% of class members who did not submit any claim, such as supplemental notice and outreach or contacting retailers to enable a direct distribution.

But still, augmenting pre-existing claims would not constitute a legal windfall. Windfall compensation is determined by comparing the relief obtained to the full measure of legal damages sought in the complaint and waived under the settlement release, not by comparison to the agreed-upon payment ceiling of the settlement agreement. *See Klier*, 658 F.3d at 479 ("The fact that the members of Subclass A have received payment authorized by the settlement agreement does not mean that they have been fully compensated."); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("The relief sought in the complaint may be helpful to establish a benchmark by which to compare the settlement terms."); *GM Trucks*, 55 F.3d at 810 (similar); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (no windfall to redistribute to class members when alleged damages are greater than sum after redistribution).

The settling parties' argument is premised on the assertion that the only avenue for relief is "a full refund of the difference in price between the CopperTop batteries and the more expensive Ultra batteries." Dkt. 150 at 2; Dkt. 158 at 1. But the parties

neglect the operative complaint, under which actual differential damages is merely one among many theories of damages or other relief. *See* Dkt. 117 at 16 (seeking punitive damages; disgorgement; restitution; pre and post-judgment interest and "all other entitled awards under the FDUTPA, and similar laws of other states"); *see also* Ryan P. O'Quinn & Thomas Watterson, *Fair is Fair: Reshaping Alaska's Unfair Trade Practices and Consumer Protection Act*, 28 ALASKA L. REV. 295, 305-06 (2011) ("Twenty states set a minimum damages award for successful plaintiffs to encourage litigation of harms normally too insignificant to litigate. The minimum damages award varies from as low as $25 to as high as $2000, and the plaintiff is awarded the higher of the actual or statutory damages.").

Even looking at differential damages on a per-unit basis, there is not full compensation. *See* Dkt. 150 at 3 (suggesting damages of $3.90 on jumbo packs at Costco). And that is to say nothing of the other restrictions preventing complete recovery: the arbitrary unit caps and the failure to obtain any forms of non-differential damage relief. To the point, "[a] vague anxiety over windfalls would not justify [preferring *cy pres* to class redistributions]." Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV.-----, ----- (*forthcoming* 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413951; *accord ALI Principles* § 3.07 cmt. b (2010) (rejecting position that "cy pres remedy is preferable to further distributions to class members").

The bare legitimacy of *cy pres* in the class action context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Food Prods.*

Liab. Litig., 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish et al., *supra*. Although *cy pres* has been given a narrow berth in the Eleventh Circuit via an unpublished opinion,[22] the parties may not cordon off a portion of the settlement for charities and say it "is not intended to be a substitute for actual payments to class members." Dkt. 150 at 14.

B. Failure to identify specific charitable designees deprives class members of notice and objection rights.

Compounding the infirmity of overzealous *cy pres*, neither the class notice nor the settlement informed class members who would be the recipients of the defendant's donations—an omission that deprived absent class members of their rights of notice, objection and exclusion, and now deprives this Court of its ability to conduct meaningful appellate review. *See* Dkt. 113-1 at 26 ("…to charitable organizations, including but not limited to first responder charitable organizations, the Toys for Tots charity, or 501(c)(3) organizations that regularly use consumer batteries…."); *see also* Dkt. 114 at 9-10 (adding "American Red Cross" as a possible recipient). Such an omission makes a settlement "unacceptably vague." *Dennis*, 697 F.3d at 867 (reversing approval). "Just trust us. Uphold the settlement now, and we'll tell you what it is later" is not a permissible limiting principle; it is "not how appellate review works." *Id.* at 869. In a case long before *Dennis*, the Second Circuit agreed. *See*

[22] *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x. 429, 435 (11th Cir. 2012).

In re Agent Orange Prods. Liab. Litig., 818 F.2d 179, 185 (2d Cir. 1987) (reversing for failure to "designate and supervise" "the specific programs that will consume the settlement proceeds.").

Disclosure/notice is the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118-125 (2003). "The best notice practicable under the circumstances cannot stop with generalities." *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation omitted).

The *cy pres* beneficiaries are allotted a plurality of the settlement proceeds, and their identity is a material element of the settlement. If a *cy pres* recipient's identity were simply an immaterial administrative detail, courts would not invalidate distributions on the grounds that the recipient was improperly selected. *See, e.g.*, *Dennis*, 697 F.3d at 866 (reversing where proposed charities had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." (internal quotation omitted); *In re Airline Ticket Commission Antitrust Litig.*, 268 F.3d 619, 626 (8th Cir. 2001); *cf. also Day*, 729 F.3d at 1314-1315 (observing that, after an objection, settling parties changed *cy pres* beneficiary). Class members must have notice and a fair opportunity to vet specific recipients for potential infirmities: conflicts of interest, geographic clustering, lack of fit, and so on. To affirm this settlement "despite its opacity would be to abdicate [the court's] responsibility to be particularly vigilant of pre-certification class action settlements." *Dennis*, 697 F.3d at 868 (internal quotation omitted).

Moreover, in an opt-out settlement such as this, specific designations preserve the right of absent class members to distance themselves from causes or institutions that they would rather not support. A class member has the right not "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715, 97 S. Ct. 1428 (1977). Any conceivable process of down-the-road notification and solicitation of class member objections—a process in no way contemplated or required by the settlement—is inadequate to rectify the up-front lack of notice. By the time class members receive delayed notification, the deadline to opt out of the settlement will have already passed. *Dennis* recognized that a far-off notification, objection and appellate process was no solution. 697 F.3d at 867 ("[E]ncouraging multiple costly appeals by punting down the line our review of the settlement agreement is no solution."); *contra Baby Prods.*, 708 F.3d at 181. This Court should follow *Dennis* and disallow a *cy pres* clause that makes the settlement "unacceptably vague."

Conclusion

The district court committed multiple independent errors of law, each of which requires vacation of the settlement approval and award of fees. This Court should go further, and hold that the settlement is unfair as a matter of law, and remand with instructions to reject this settlement.

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Respectfully submitted,

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Executed on December 3, 2014.

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Proof of Service

I hereby certify that on December 3, 2014, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will provide notification of such filing to all registered ECF filers.

Dated: December 3, 2014

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