No. 11-4156

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DRY MAX PAMPERS LITIGATION
DANIEL GREENBERG,

Objector-Appellant,

v.

ANGELA CLARK, et al.,

Plaintiffs-Appellees,

and

THE PROCTER & GAMBLE COMPANY; PROCTER & GAMBLE PAPER PRODUCTS COMPANY; PROCTER & GAMBLE DISTRIBUTING LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, No. 1:10-cv-00301-TSB

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs do not believe that oral argument is necessary because, as explained more fully below, the "dispositive issue or set of issues has been recently authoritatively decided" and "facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." 6th Cir. R. 34(j).

INTRODUCTION

Plaintiffs are parents who bought Dry Max Pampers—diapers marketed, manufactured, and distributed by Defendants (collectively, "P&G"). Plaintiffs' children developed blisters and welts while wearing the diapers. Many Plaintiffs, uncertain what could be causing the rashes, had to go through a great many unsuccessful treatments before their children's conditions were eased. Once their children stopped wearing Dry Max, though, the rashes dissipated.

Thereafter, Plaintiffs filed suit against P&G. After informal discovery, investigation, and motion practice, and after a mediation overseen by a retired federal judge, the parties settled. The Settlement awards the Settlement class injunctive relief under which P&G must reinstate a money-back guarantee program for Dry Max customers, develop medical programs related to skin health, and change its Dry Max labels and its website to provide customers with useful and

important information about diaper rash—including the rashes that Plaintiffs' children and others experienced while wearing Dry Max Pampers.

After ordering notice to class members and conducting a fairness hearing, the district court approved the Settlement, calling it "an extraordinary deed" that won "significant benefits for the class." (RE #76, Tr. of Fairness Hearing ("Tr.") at 33:2–3, 35:18.) The district court rejected arguments made by objectors to the Settlement, calling them "policy arguments . . . in largest part." (*Id.* at 34:1–2.)

Out of hundreds of thousands, if not millions, of Settlement class members, only one objector, Daniel Greenberg, appeals. Upset that his arguments were rejected below, he now asks this Court to "admonish" the district court. (Br. of Appellant ("Br.") at 36.) But the district court did nothing wrong. It followed this Court's guidelines for approving a settlement, certifying a class, and awarding attorneys' fees. Greenberg's arguments ask this Court to disregard its past decisions and to create new rules for which there is no warrant.

This appeal does not require the Court to venture into new territory. This case is controlled, if not predetermined, by this Court's past decisions. Because the district court did not abuse its discretion by following a well-beaten path, it should be affirmed.

STATEMENT OF THE ISSUES

1. Plaintiffs' infant children suffered blisters and welts while wearing Dry Max Pampers. After Plaintiffs engaged in scientific investigation and received court-ordered core discovery, the parties mediated their dispute and reached a Settlement under which P&G would be ordered to offer Plaintiffs their money back and to provide other injunctive relief. Was the district court within its discretion to find this Settlement fair, reasonable and adequate?

2. Given the terms of the Settlement and the amount of the attorneys' fee, was the district court within its discretion to conclude that class counsel and the named Plaintiffs represented the class fairly and adequately under Federal Rule of Civil Procedure 23(a)(4)?

3. The Settlement awards only equitable relief, preserves all legal claims, and discharges no amount of otherwise available monetary relief. Under these circumstances, was the district court within its discretion to certify the Settlement class under Rule 23(b)(2)?

4. As part of the Settlement, Plaintiffs' counsel will receive an attorneys' fee proposed by the retired federal judge who oversaw the settlement mediation. The awarded fee is less than counsel's lodestar amount. Was the district court within its discretion to find this fee reasonable?

STATEMENT OF THE FACTS

I. Background

A. While Wearing Dry Max Diapers, Plaintiffs' Children Develop Blisters and Welts

Defendants (collectively, "P&G") began distributing a new kind of Pampers diaper, one called Dry Max Pampers. (RE #25, Consol. Compl. ¶ 70.) These were markedly new diapers in composition and construction. (*See id.* ¶¶ 77–102.)

Many parents, meanwhile, began to report problems with the diapers. (*Id.* ¶ 131.) Their children were suffering injuries.

The children of the named Plaintiffs, some of whom were just a few weeks old, typically endured blisters and pustules all over their genitals and bottoms. These sores would ooze and bleed. (*E.g.*, *id.* ¶¶ 11–12, 14, 17, 24, 29, 30, 33, 46, 49.) Many of the children would cry when their diapers were changed, or even when their parents merely touched them. (*Id.* ¶¶ 21, 23, 28, 31, 33, 35, 39, 42.) Still others suffered infections, fevers, vomiting, and loss of weight or appetite. (*Id.* ¶¶ 10, 26, 42–43, 46, 49.)

The parents tried to find out what was hurting their children. Many sought medical help, often without success. (*Id.* ¶¶ 17–18, 21, 24, 27, 29, 33–34, 36, 40, 42.) It was not until the parents stopped using the Dry Max diapers that their

children got better. (*Id.* ¶¶ 11–49.) The sores and rashes eventually went away, but some of the children have been left with permanent scars. (*Id.* ¶¶ 20, 28, 31, 39.)

B. Thousands of Parents Complain to the Consumer Product Safety Commission, Which Launches an Investigation of Dry Max Pampers

Many of the named Plaintiffs reported their ordeals to the Consumer Product Safety Commission (CPSC), which is charged with protecting the public from unreasonable risks of serious injury or death from consumer products. (*E.g.*, *id.* ¶¶ 19, 27, 30, 33, 38, 42, 45; *see also id.* ¶ 147.) Thousands of other parents reported similar problems. (*See* RE #54-9, CPSC Press Release.)

The CPSC—as well as Health Canada, roughly the Canadian equivalent of our Department of Health and Human Services— began an investigation into Dry Max Pampers in May 2010. (RE #25, Consol. Compl. ¶¶ 147–150.) On September 2, 2010, the CPSC and Health Canada announced that they had "not identified any specific cause linking Dry Max diapers to diaper rash." (RE # 54-9, CPSC Press Release.) The agencies said:

> From April through August 2010, CPSC received nearly *4,700 incident reports* about diaper rash . . . . As part of its technical evaluation, staff from each agency considered certain characteristics of the diaper, including the materials used, the construction of the diaper, and heat and moisture retention issues.
>
> In addition, CPSC staff reviewed clinical and toxicological data found in published, peer-reviewed medical literature. CPSC also

> critically reviewed data submitted by Procter & Gamble (P&G) and the results of a human cumulative irritation patch study conducted by P&G in May 2010. Further, chemistry, toxicology and pediatric medicine information provided by Health Canada was reviewed by CPSC.
>
> While the investigation thus far does not find a link between the diapers and the health complaints received, CPSC recognizes the serious concerns expressed by parents. CPSC staff *cannot rule out* that there may exist a health concern for some babies . . . .

(*Id.* (emphasis added).) So the federal governments of the United States and Canada had found no specific link between Dry Max Pampers and diaper rash, but could not rule one out, either. That is where matters stood fewer than two weeks after Plaintiffs had filed their Consolidated Class Action Complaint. (*See* Consol. Compl., Doc 25.)

II. Proceedings in the District Court

A. Plaintiffs Mount an Expert Investigation into Dry Max Diapers While the Parties Conduct Informal Discovery and Motion Practice

After the district court consolidated a number of lawsuits against P&G (RE #15, Consol. Order), it ordered the parties to engage in informal core discovery (RE #20, Prelim. Calendar Order). In accordance with this order, Plaintiffs asked for information about Dry Max patents, ingredients and manufacture, and P&G produced it. (RE #68, J. Mot. for Approval at 5–6.)

Meanwhile, Plaintiffs were deep into an investigation of the Dry Max diapers. Using the information P&G produced, as well as the help of the named Plaintiffs and many different experts, Plaintiffs filed a Consolidated Class Action Complaint on August 23, 2010. (RE #25, Consol. Compl.; *see also* RE # 57, Pls.' Mot. for Attys.' Fees at 8.) The Complaint asserted claims under contract and tort theories, as well as under the consumer protection laws of 24 different states. In all, the Complaint asserted 45 counts for relief. (RE #25, Consol. Compl. ¶¶ 166–720.) Thereafter, P&G filed a motion to dismiss the Complaint in its entirety and a motion to strike the Complaint's class allegations. (RE #39, Mot. to Strike; RE #40, Mot. to Dismiss.)

P&G also filed a motion to bifurcate discovery into two phases: the first dealing simply with class certification, the second with the merits. (RE #28, Mot. to Phase and Sequence Discovery.) Plaintiffs opposed the motion (RE # 33, Pls.' Opp.), and after oral argument the district court denied it. (RE #45, Calendar Order.)

B. With the Help of Retired Judge Layn Phillips, the Parties Mediate

Realizing that litigation of the case would be complex and protracted and the outcome far from certain, Plaintiffs agreed to mediate. The parties decided to retain the Honorable Layn R. Phillips as mediator. Judge Phillips is a retired federal

district court judge who now works in alternative dispute resolution. (RE #54-7, Phillips Decl. ¶¶ 2–3.) Meanwhile, P&G's voluminous motions to dismiss and to strike class allegations remained pending, so the district court extended deadlines to allow for mediation. (RE #50, Order.)

In-person mediation took place before Judge Phillips on February 7 and 8, 2011. The mediation took up the entirety of both days. The parties both submitted opening and reply briefs to Judge Phillips, plus additional briefs he requested during the mediation process. Judge Phillips described the mediation as "vigorous on both sides." (RE #54-7, Phillips Decl. ¶¶ 4–5.)

Two full days, however, were not enough to successfully mediate the case. For nearly a month afterward—throughout February 2011—the parties engaged in continuous negotiations with the help of Judge Phillips. (RE #57-1, Sarko-Cappio Decl. ¶ 15; RE #54-7, Phillips Decl. ¶ 6.) During this time, Plaintiffs consulted with their scientific, medical, and marketing experts to determine what they could and could not agree to. (RE #57-1, Sarko-Cappio Decl. ¶ 16.)

The parties made progress on the Settlement's substantive terms but deadlocked on attorneys' fees and expenses. (*Id.* ¶ 17; RE #54-2, Settlement § VII.A, at 22.) Judge Phillips then made a mediator's recommendation on attorneys' fees. The recommendation was made on a take-it-or-leave-it basis, with

each party submitting its acceptance or rejection exclusively to Judge Phillips. The parties separately agreed, and Judge Phillips then informed them that there was an agreement. (RE #57-1, Sarko-Cappio Decl. ¶¶ 17–19.)

C. P&G Agrees to Extensive Injunctive Relief That Preserves All Legal Claims

Under the Settlement, an injunction requires P&G to reinstate its money-back guarantee program for consumers who had bought Pampers Swaddlers and Cruisers diapers with Dry Max technology. A previous money-back program had begun in July 2010 after Plaintiffs filed their first complaints, and had expired in December 2010. (RE #68, J. Mot. for Approval at 9 n.27; RE #69, Pls.' Resp. to Objections at 5–6.) Under the Settlement, P&G would reinstate the money-back program and continue it for a year. There would be no ceiling on the reimbursement P&G would be required to give dissatisfied Dry Max customers. (RE #54-2, Settlement § V.B.4, at 20–21.)

P&G also agreed to change its labels and website to give parents useful and important information on diaper rash, so that customers would not have to stand by helpless while their children suffered. (RE #54-2, Settlement § V.B.2, at 18–19.) This relief is designed to prevent the confusion that many of the class members experienced when their children broke out in sores and blisters. (*See* RE #76, Tr. at 7:6–8:11.)

In addition to disseminating information on their labels and website, P&G agreed to fund a pediatric residency training program on the treatment of diaper rash, and to fund an American Academy of Pediatrics program on skin health. (RE #54-2, Settlement § V.B.3, at 19–20.)

The Settlement's release of P&G's liability was limited. It discharged only equitable claims. (RE #54-2, Settlement § VIII.A, at 23.) Thus, all legal claims—claims for statutory or compensatory damages, for example—were preserved.

D. The District Court Approves the Settlement After Hearing Objections

After a hearing, the district court preliminarily approved the Settlement and authorized notice to class members. (RE # 55, Order.) Out of the hundreds of thousands—perhaps millions—of class members, only three objected. (RE #25, Consol. Compl. ¶ 153; RE #68, J. Mot. for Approval at 26.) Two of them were serial objectors. (RE #68, J. Mot. for Approval at 26.)

After extensive briefing from the objectors and parties, the district court held a hearing to determine whether the Settlement was fair, reasonable, and adequate.[1] Fed. R. Civ. P. 23(e)(2). At the hearing, the court heard from the parties, and gave

[1] *See* RE #57, Pls.' Mot. for Attys.' Fees; RE #60, Greenberg Objection; RE #66, Walsh Objection; RE #68, J. Mot. for Approval; RE #69, Pls.' Resp. to Objections; RE #72, Walsh Surreply; *see also* RE #65, Am. Calendar Order.

the attorney for objector Daniel Greenberg a full opportunity to explain his position. (*See* RE #76, Tr. at 20:10–29:21.)

The district court praised the Settlement, calling it "an extraordinary credit to you all on behalf of the plaintiffs." (*Id.* at 15:6.) Noting Judge Phillips's role in mediation (*id.* at 15:17), the court "reject[ed] out of hand any suggestion that this settlement agreement was affected by collusion or fraud." (*Id.* at 18:9–11.)

After hearing at length from Greenberg's attorney, the district court then discussed why it would approve the settlement. Examining the "factors the Court's required to evaluate," it marched through them:

(1) Weighing "the likelihood of ultimate success . . . against the amount and form of relief offered in the settlement," the Court concluded that "that balancing tips heavily toward approval." Success was far from assured, and the Settlement "recoup[ed] significant benefits for the class." (*Id.* at 32:20–24, 33:2–3.)

(2) "The risks, expense and delay of further litigation" weighed in favor of approval. The litigation "would have been as complex as they . . . come." (*Id.* at 33:4–5, 15:9–10.)

(3) Recognizing the core discovery the parties had engaged in and counsel's "extraordinarily thorough investigation and analysis," the court concluded that "th[is] stage of proceedings is perfectly appropriate" for settlement. (*Id.* at 33:5–10.)

(4) The court was "unable to ignore the extraordinary professional training and background, reputation and experience of the lawyers." (*Id.* at 33:11–13.)

(5) The negotiations leading to settlement were "ideal and to be encouraged": they "were assisted by a retired federal judge who has a

sterling reputation," and "the presence of a retired judicial officer absolutely leads the Court to conclude without question that the settlement was independently reached and reflects no collusion or fraud." (*Id.* at 33:14–21.)

(6) The three objections out of "this huge class," combined with "approval by the 50 or so individually named plaintiffs," strongly supported the settlement. Greenberg's arguments were "policy arguments as to class actions and attorneys' fees, in largest part," which had been "rebutted thoroughly by the parties' briefs." (*Id.* at 33:22–25, 34:1–4.)

(7) The Settlement was consistent with the public interest and the strong federal policy favoring the voluntary resolution of complex class actions. (*Id.* at 34:5–7.)

After finding that the prerequisites of Federal Rule of Civil Procedure 23(a) had been satisfied and that certification under Rule 23(b)(2) was appropriate (RE #76, Tr. at 34:12–20), the court then considered attorneys' fees and expenses. Noting that the fee amount "was a number that the retired federal judge proposed to the parties rather than something they came up with themselves," the court approved the fee as reasonable because it was "less than what the [l]odestar calculation would reflect." (*Id.* at 35:6–12.) The court later issued a written order approving the Settlement and Plaintiffs' request for attorneys' fees. (RE #73, Order.)

Greenberg appealed. (RE #75, Notice of Appeal.)

STANDARD OF REVIEW

This Court reviews a district court's determination that a settlement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), for an abuse of discretion. *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 625 (6th Cir. 2007). A district court's award of attorneys' fees is also reviewed for an abuse of discretion, *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). Similarly, a finding that class representatives fairly and adequately represent the class under Rule 23(a)(4), *see Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000), and a decision to certify a class under 23(b)(2), *Olden v. LaFarge Corp.*, 383 F.3d 495, 507, 510–11 (6th Cir. 2004), are reviewed for abuse of discretion.

Abuse-of-discretion review is a "highly deferential" standard. *United States v. Owens*, 426 F.3d 800, 805 (6th Cir. 2005) (citing *Hardyman v. Norfolk & W. Ry.*, 243 F.3d 255, 258 (6th Cir. 2001)). A district court abuses its discretion "only if [it] relie[s] upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007) (quoting *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007)). As this standard implies, the district court's underlying factual findings are reviewed for clear error. To be clearly erroneous, a finding must strike this Court "as wrong

with the force of a five-week-old, unrefrigerated dead fish." *United States v. Roper*, 135 F.3d 430, 432 (6th Cir. 1998) (quotation marks and citation omitted).

SUMMARY OF THE ARGUMENT

Like all settlements, the one in this case involved compromise. P&G agreed to an injunction under which it would reinstitute its money-back guarantee program, as well as make significant changes to its Pampers website and the way it labels Dry Max diapers. Plaintiffs had to compromise as well, agreeing to only injunctive relief while preserving absent class members' right to seek money damages. After carefully weighing the factors laid down by long-standing circuit precedent, the district court rejected any suggestion that fraud or collusion had affected the Settlement. It found that the Settlement's hard-fought compromises secured valuable relief for the class while avoiding further costly litigation and a real chance of defeat on the merits. The district court called the Settlement an extraordinary achievement, but for its judgment to be affirmed the parties need show only that the district court acted within its discretion. Because the district court acted well within its discretion to approve the Settlement, its approval should be affirmed.

Similarly, the district court was within its discretion to certify the Settlement class. Because the Settlement was fair and gained significant injunctive relief that

would not have been available to the class otherwise, the district court did not abuse its discretion by concluding that the class representatives represented the class fairly and adequately. *See* Fed. R. Civ. P. 23(a)(4). Nor did the district court abuse its discretion by certifying the Settlement class under Rule 23(b)(2). The Settlement awards only injunctive relief while preserving all legal claims and every cent of otherwise available monetary relief, and contains a class-action waiver whose practical effect is negligible. No rights were infringed by certification under Rule 23(b)(2); its certification should be affirmed.

The district court was also within its discretion to award the requested attorneys' fee. Even though Plaintiffs' chance of success on the merits was not overwhelming, class counsel was able to secure a Settlement that confers valuable benefits on the class. The district court's use of the "lodestar" method in gauging a proper fee has been explicitly approved by this Court's precedent. That the attorneys' fee was first recommended by a retired federal judge overseeing the parties' mediation also suggests that the fee is reasonable. The district court's award should be affirmed.

ARGUMENT

I. The District Court Was Within Its Discretion to Approve the Settlement as Fair, Reasonable, and Adequate

Plaintiffs alleged significant injury but faced an uphill battle to win on the merits. A settlement was very much in the interests of Plaintiffs and the class. The parties' Settlement, negotiated under the auspices of a retired federal judge, achieved valuable injunctive relief while preserving every available cent of monetary relief. In scrutinizing and approving the Settlement, the district court faithfully followed Sixth Circuit precedent.

Greenberg, by contrast, disregards the established standards governing approval of a class-action settlement. He accuses the district court of abusing its discretion simply because it rejected the novel arguments that Greenberg asserted below and rehashes here.

Rather than inventing their own legal standard, Plaintiffs will follow this Court's. Under that standard, district courts determine whether a settlement is "fair, reasonable, and adequate" under Rule 23(e)(2) by considering the following factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representations; (6) the reaction of absent class members; and (7) the public interest.

UAW, 497 F.3d at 631 (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Williams v. Vukovich*, 720 F.2d 909, 922–23 (6th Cir. 1983)). The district court enjoyed "wide discretion in assessing the weight and applicability of these factors." *Granada Invs.*, 962 F.2d at 1205–06. It did not abuse that discretion by finding that Greenberg had not carried his "heavy burden" of demonstrating that the Settlement was unfair, unreasonable, and inadequate. *Williams*, 720 F.2d at 921 (noting that once a court has determined that a settlement is not illegal or tainted with collusion, and has preliminarily approved it, the burden shifts to objectors).

A. Although Facing Heavy Odds, Plaintiffs Achieved Meaningful Relief

"The most important" factor in deciding whether to approve a settlement "is the probability of success on the merits." *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984). Taking into account the likelihood of success allows courts to gauge the fairness and adequacy of a settlement's relief. *Id.* Here, Plaintiffs' likelihood of success was far from overwhelming—but in spite of that, they were able to secure a settlement that confers valuable injunctive relief.

1. To prevail, Plaintiffs would have to prove causation—an uncertain prospect, especially after the CPSC's findings

Plaintiffs' tort claims would have required them to prove either that Dry Max diapers caused their injuries or that the diapers had the capacity to cause injury.[2] Plaintiffs' consumer-protection claims required similar proof.[3] Plaintiffs' contract claims required proof that the diapers contained toxic or harmful substances or had the capacity to cause injury.[4]

On September 2, 2010, after months of investigation, the CPSC and Health Canada both announced that they could identify no "specific cause linking Dry Max diapers to diaper rash." (RE #54-9, CPSC Press Release.) At the same time, the agencies could not "rule out" that Dry Max diapers could pose "a health concern for some babies." (*Id.*)

The U.S. and Canadian agencies' inability to find a specific link between diaper rash and Dry Max diapers indicates that Plaintiffs' chance of success on the merits was not overwhelming. If, like the two agencies, Plaintiffs could not identify how Dry Max diapers specifically caused diaper rash, then proving causation would

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[2] RE #25, Consol. Compl. ¶¶ 542, 553, 563, 577–578, 588, 601–602, 612, 622, 632, 644, 657–658, 671–672, 682, 692, 702, 716–717.

[3] *E.g.*, *id.* ¶¶ 199, 201, 211–212, 221, 233–234, 239, 248, 254, 256, 271, 280, 287, 293, 297, 304, 306, 317–318, 329, 331, 342, 351, 353, 366, 368, 376, 378, 391, 398, 406, 411, 422, 424, 437, 445, 452, 461, 468, 475, 481, 492, 499, 506, 513, 515, 519, 529.

[4] *Id.* ¶¶ 168, 176, 178, 184, 188, 191.

be difficult. Plaintiffs faced a risk that they could prove no more than a strong *correlation* between diaper rash and Dry Max diapers—that proof of a specific causal link might elude their grasp. And if Plaintiffs could not identify the substance or mechanism by which Dry Max diapers caused diaper rash, then Plaintiffs could probably not show that the diapers were hazardous, toxic, or otherwise unfit for their intended use—as required by several causes of action they asserted.

For their own part, of course, the named Plaintiffs and their counsel are convinced that Dry Max diapers can cause diaper rash in some babies. Despite the potential difficulty establishing causation, the facts of this case are far more than "social-media-fed rumors." (Br. at 8.) The question, though, is whether Plaintiffs would be able to successfully *prove* causation. The conclusion of CPSC and Health Canada made such success less likely.

Proving causation posed a problem, but it was hardly the only obstacle Plaintiffs faced. In their motion to dismiss Plaintiffs' complaint in its entirety, for example, P&G shot off a barrage of different reasons why Plaintiffs' claims failed as a matter of law. (*See* RE #40, Mot. to Dismiss at 13–19, 21–30.) Plaintiffs faced some risk of dismissal at the pleadings stage.

The district court was well aware of the challenges confronting Plaintiffs. The court found that Plaintiffs' likelihood of success on the merits "was not overwhelming." (RE #76, Tr. at 15:14–15, 32:25–33:1.) Greenberg does not even attempt to show that this finding was clearly erroneous.

2. Certification under Rule 23(b)(3) would have faced serious challenges

To gain monetary relief, Plaintiffs would likely have been forced to seek certification under Rule 23(b)(3). Yet as P&G's motion to strike Plaintiffs' class allegations demonstrated, Plaintiffs would have had to show that 23(b)(3) certification was not precluded by differences among class members as to usage of the diapers, medical conditions, medical treatment, diet, and more. (RE #39, Mot. to Strike at 5–16.) They would have had to show that 23(b)(3) certification was permissible despite differences in state law. (*Id.* at 16–22.) And perhaps most challenging, they would have had to show that a class action would have been manageable under Rule 23(b)(3)(D). (*Id.* at 22–23.) Whether or not these obstacles were insuperable, they certainly were serious.

At the fairness hearing, the district court commented on the potential difficulty of certification under 23(b)(3). "[C]ertification of a class action to deal with all of these damages questions," the court declared, "probably wouldn't have

occurred." (RE #76, Tr. at 15:12–14.) Greenberg has not shown this finding to be clearly erroneous.

3. Plaintiffs won valuable injunctive relief

In this Settlement, the class got significant relief. There are three main parts of the injunctive relief: reinstitution of a money-back guarantee program, changes to labeling and the Pampers website, and the development of pediatric medicine programs in the area of skin health.

Through P&G's reinstituted money-back guarantee program—which P&G must hold open for a year—class members may demand their money back for a product that did not work for them. There is no cap on the number of families that may take advantage of this relief. Nor is there a cap on the aggregate money that can be refunded. As the class is estimated to number in the hundreds of thousands of families, that is valuable relief indeed.

Greenberg thinks that this Court should disregard the money-back program because it requires some proof of purchase. Greenberg's apparent position—that the money-back guarantee program should have required no proof of purchase—is simply unrealistic. What company would offer the world a money-back guarantee without requiring some proof of purchase? And given the publicity Dry Max diapers have received, it is by no means clear—as Greenberg asserts without

evidentiary support—that very few class members will have retained their proof of purchase. (Br. at 38.) In this regard, Greenberg offers nothing but speculation to support his burden of proof. *See Williams*, 720 F.2d at 921 (objectors have "heavy burden").

Nor do class members need to buy more Dry Max Pampers to take advantage of this money-back guarantee. (*Contra* Br. at 38–39.) The injunctive guarantee stands open to all "who purchased Pampers Swaddlers and Cruisers diapers." (RE #54-2, Settlement § V.B.4, at 20.) There are no temporal limitations on this injunctive guarantee; it benefits all who have purchased the diapers in the past.

Since Greenberg has failed to show that class members won't take advantage of the money-back guarantee, his argument that the refund program will benefit future purchasers does not count against the Settlement. That a settlement benefits more than just class members weighs in favor of approval, not against it.[5]

The second part of the Settlement is an injunction requiring P&G to add important safety information to its packaging and website. P&G is required to change the Pampers label to direct concerned parents to the pampers.com website and a 1-800 number. Those sources, in turn, direct parents to critical information:

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[5] Greenberg also speculates that P&G may raise its prices "to reflect the anticipated costs of the money-back guarantee." (Br. at 39.) The district court did not abuse its discretion by rejecting this speculation.

that switching diaper brands can prevent the rashes that led to this suit. This, as the district court concluded, is extraordinary relief: consumers are provided with information that Dry Max diapers might not be appropriate for certain babies.

Before this lawsuit, many parents, and even some doctors, were unaware that diapers themselves can sometimes cause skin irritation requiring medical attention. It took almost two months for Dr. Victoria Katona—a board-certified family practitioner and one of the named Plaintiffs—to realize that her son's diapers might be causing his burns and pustules. (RE #25, Consol. Compl. ¶ 28.) Her experience is tracked by that of other named Plaintiffs who, unlike Dr. Katona, were not doctors. They were left to flounder, frantically trying ineffective remedies that kept the real cause of the rashes—the diapers themselves—in place. (*E.g.*, *id.* ¶¶ 17, 18, 21, 24, 27, 33, 34, 37, 40, 42.) The change in labeling and at the Pampers website is designed to prevent this from reoccurring. It will ensure that parents and medical professionals have the information they need to make the best choices for babies.

Greenberg asserts by *ipse dixit* that this relief is "valueless" (Br. at 38), but the named Plaintiffs—having stood by helpless while their children suffered—disagree. Indeed, as Plaintiffs' counsel told the district court at the fairness hearing, the idea for the label and website change came partly from the parents themselves.

(RE #76, Tr. at 7:6–15.) Greenberg, by contrast, does not claim that his child suffered rashes while wearing Dry Max diapers—so it is unclear how he could know that the changes in labeling and at the Pampers website are meaningless. The district court did not err by discounting Greenberg's comparatively uninformed opinion on this relief's value.

Greenberg also says that this part of the injunctive relief is "indistinguishable from an advertisement for Pampers" (Br. at 38), but that is a stark misrepresentation. No company with a $8-billion-per-year diaper brand wants to put the words "blisters," "boils," "pus" or "weeping discharge" on its website, but that is what the Settlement requires of P&G. (RE #54-2, Settlement § V.B.2, at 19.) The Pampers website will also direct consumers to the Mayo Clinic website, which tells parents, "If one brand of disposable diaper irritates your baby's skin, try another." Mayo Clinic Staff, *Diaper Rash—Prevention*, http://www.mayoclinic.com/health/diaper-rash/DS00069/DSECTION=prevention (last visited Mar. 19, 2012). These are not advertisements for Pampers. To the contrary, these are encouragements *not* to buy Pampers if they create a rash. That is part of what the district court found so "extraordinary" about this Settlement. (RE #76, Tr. at 35:18–19.)

Greenberg, however, emphasizes that Settlement class members who do not continue to purchase Dry Max diapers will not be able to take advantage of the labeling and website changes. He thinks that the labeling and website changes are worthless because they do not overlap perfectly with the class. (Br. at 37–38.) Because children outgrow children's products, however, prospective injunctive relief can never be perfectly tailored to the class: membership in the class will always be to some extent transitory. Suppose, for example, that an unscrupulous toymaker distributes a dangerous toy but eventually agrees to a class-action settlement under which an injunction wholly eliminates the toy's danger by changing its design. Under Greenberg's approach, that settlement would be "worthless"—and would be disapproved—because anyone who did not continue to buy the toy could not take advantage of it. This Court should reject a proposed rule under which such a settlement would have to be disapproved as unfair or inadequate *as a matter of law*.

In addition to the money-back guarantee and the label and website changes, the Settlement also requires P&G to develop (1) a training program in pediatric dermatology at leading children's health centers and (2) a skin-health program at the American Academy of Pediatrics. (RE #54-2, Settlement § V.B.3, at 19–20.) This relief is designed to train medical professionals to effectively respond to

diaper rash, so that parents and children will not have to endure the series of ineffectual treatments, and waste the money, that the named Plaintiffs did. (*See, e.g.*, RE #25, Consol. Compl. ¶ 28; *see also supra* p. 4.)

The district court found that the Settlement's injunctive relief was "an extraordinary credit" to the lawyers on both sides (RE #76, Tr. at 15:6, 15:25), and provided "significant benefits for the class" (*id.* at 33:2–3; *see also id.* at 32:16). Contrary to Greenberg's claim (Br. at 39), the court expressly weighed the benefits to the class against Plaintiffs' likelihood of success. (RE #76, Tr. at 32:20–33:3.) Greenberg would have weighed the benefits *differently*, but mere disagreement is not enough to show that the district court abused its discretion. *See Granada Invs.*, 962 F.2d at 1205-06 ("The district court enjoys wide discretion in assessing the weight and applicability of [the relevant] factors."); *see also Barlow v. M.J. Waterman & Assocs., Inc. (In re M.J. Waterman & Assocs., Inc.)*, 227 F.3d 604, 608 (6th Cir. 2000) (abuse of discretion shown only when no reasonable person could agree with district court). As Plaintiffs have explained above, the district court's finding was eminently reasonable and did not constitute an abuse of discretion.

4. The district court was within its discretion not to draw the "adverse inference" that Greenberg urges

The district court found that the injunction requiring P&G to reinstate its money-back guarantee program was meaningful relief. Greenberg, however, now

claims that this was an error of law. His argument appears to be this: (1) Greenberg, in passing, requested that the district court require P&G to submit additional evidence about its money-back guarantee program; (2) P&G never submitted such evidence; and therefore (3) the district court should have inferred that the money-back guarantee program was worthless. (Br. at 40–41.) There are four independently sufficient reasons to reject this argument.

First, Greenberg never asked the district court to make the adverse inference he now urges. Greenberg cannot ask that the district court be reversed for failing to do something that he never even requested. *See, e.g.*, *Preferred RX, Inc. v. Am. Prescription Plan, Inc.*, 46 F.3d 535, 549 (6th Cir. 1995) ("[T]his court will not consider issues not presented to the district court but raised for the first time on appeal.").

Second, Greenberg never propounded a discovery request for data about P&G's earlier money-back guarantee program. This is all he said in his objection: "Given that Proct[e]r & Gamble previously offered an equivalent money-back guarantee, it should be little trouble for them to provide to the Court data regarding the number of refunds issued annually. That would serve as a starting point estimation of the [injunctive relief's] value . . . ." (RE #60, Greenberg Objection at 26.) Months later, at the fairness hearing itself, he briefly requested that the district

court "require Procter & Gamble to submit additional data." (RE #76, Tr. at 29:17.) That Greenberg never asked for discovery is important, because in the cases he relies on, a party had "fail[ed] to turn over discovery." *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 752 (6th Cir. 2012) (summarizing *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 711–12, 716 (6th Cir. 2007)). Drawing an adverse inference in such circumstances makes sense, because there a party has made a considered decision not to produce relevant discovery in response to a formally propounded request. But here it is absurd to expect P&G or the district court to have treated Greenberg's passing comments as a formal discovery request. It makes no sense in these circumstances to draw an adverse inference.

Third, even if Greenberg had bothered to make a formal discovery request, the district court would have been well within its discretion to deny it. Objectors are not "automatically entitled to discovery or 'to question and debate every provision of the proposed compromise.'" *In re Gen. Tire & Rubber Sec. Litig.*, 726 F.2d at 1084 n.6 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). A district court may limit the proceedings "to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *UAW*, 497 F.3d at 635 (quotation marks and citation omitted). Here the district court knew that the money-back guarantee program had no cap on the number of persons that could

use it or the aggregate amount of money that could be refunded. It knew that the program required some proof of purchase. It knew that the program would be held open for a minimum of twelve months. Knowledge of these provisions was enough to allow the district court to reach an informed, just, and reasoned decision on the Settlement as a whole, especially since the money-back guarantee program was but one of the factors that the district court had to weigh.

Fourth, drawing an adverse inference lies in the discretion of the factfinder. The cases on which Greenberg relies were appeals from summary judgment. *See Bobo*, 665 F.3d at 750-51; *Clay*, 501 F.3d at 699. On summary judgment, all inferences must be made in favor of the nonmoving party, so naturally the district courts in those cases were *required* to draw adverse inferences against the moving party. Here, where it was the district court's duty to make ultimate findings on disputed questions, it lay within its discretion not to draw the adverse inference urged by Greenberg. *See, e.g.*, *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1098 (7th Cir. 1994) ("[A]lthough the district court *may* have been entitled to draw adverse inferences . . . , whether to draw the inference is a matter of discretion for the fact finder." (quotation marks and citations omitted)); *Kaye v. Agripool, SRL (In re Murray, Inc.)*, 392 B.R. 288, 296 (6th Cir. B.A.P. 2008) (adverse inference "rule is a permissive one which directs that the inference *may* be drawn by the trier

of fact; it is not mandatory"). In light of the other information it had and Greenberg's failure to make a formal discovery request, the district court was well within its discretion not to draw an adverse inference.

B. There Was No Risk of Fraud or Collusion

The district court "reject[ed] out of hand any suggestion that this settlement agreement was affected by collusion or fraud." (RE #76, Tr. at 18:9–11.) This finding was not clearly erroneous; instead, it was clearly right.

The parties reached their Settlement with the help of retired federal judge Layn Phillips. He ran the parties' two-day mediation session and oversaw the negotiations that followed it. He told the district court under oath that the Settlement was "the result of vigorous arm's-length negotiation by both sides," and that it was "negotiated in good faith and that it is fair and reasonable." (RE #54-7, Phillips Decl. ¶¶ 10–11.) The district court relied in part on Judge Phillips's role in the negotiations when it found that the Settlement "reflect[ed] no collusion or fraud." (RE #76, Tr. at 33:20–21.) Does Greenberg think that Judge Phillips lied to the court, or that the parties somehow fooled a retired judge with years of mediation experience? Only if one of those two things happened could the Settlement be the product of collusion or fraud. The district court was justified in believing that Judge Phillips's account of the Settlement was neither dishonest nor

deceived. *See Moulton*, 581 F.3d at 351 (rejecting allegations of collusion where settlement was the "product of months of supervised negotiations").

The Settlement was reached less than a year after the case began, but "[t]he timing of a settlement by itself does not establish collusion." *UAW*, 497 F.3d at 633. In *UAW*, for example, this Court affirmed the approval of two settlements: one was "in place the day the complaint was filed," *id.* at 622, and the other was reached less than two months after the complaint was filed, *id.* at 623. And as in that case, the timing of this Settlement "has a far-from-nefarious explanation." *Id.* at 633. Here, that explanation is the announcement by the CPSC and Health Canada that they could find no link between Dry Max diapers and diaper rash—an announcement that came a couple of weeks after Plaintiffs filed their consolidated class action complaint. (*Compare* RE #25, Consol. Compl., *with* RE #54-9, CPSC Press Release.) That announcement made Plaintiffs reevaluate their likelihood of success, and when an opportunity for mediation soon came, they took it. Moreover, by the time of mediation, Plaintiffs had already conducted informal core discovery, consulted with numerous experts, and were thoroughly familiar with the strengths and weaknesses of their case. (*E.g.*, RE #57-1, Sarko-Cappio Decl. ¶¶ 3–4, 8.)

To support his claim of fraud and collusion, Greenberg points to nothing in the Settlement negotiations themselves. Instead, in an attempt to change class-

action law generally, he relies on his own expansive version of *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). The problems with the *Bluetooth* settlement, however, are not present here, however much Greenberg wishes they were.

In *Bluetooth*, the relief received and the claims released were quite different from the relief and release here. *Bluetooth* settled a 23(b)(3) class, but awarded *no* monetary relief to the class. *See id.* at 939–40. In exchange, the class agreed to a "release and waiver of *all* asserted claims." *Id.* at 939 (emphasis added). This case settles not a 23(b)(3) class, but rather a 23(b)(2) class, under which—according to Greenberg, at least (Br. at 19)—no monetary relief *can* be awarded. And this Settlement provided valuable injunctive relief, including a year-long money-back program, and did not release *any* monetary relief. *See infra* p. 43.

It is certainly true that P&G agreed not to challenge Judge Phillips's proposed fee award, and that any fees not awarded would return to P&G. But *Bluetooth* never suggested that such provisions *require* a district court to disapprove a settlement. *See id.* at 950 (in remanding the court "express[ed] no opinion on the ultimate fairness of what the parties have negotiated"). The Settlement fee was proposed by Judge Phillips independently to both parties on a take-it-or-leave-it basis—and only *after* the substantive terms of the Settlement had been reached.

(RE #57-1, Sarko-Cappio Decl. ¶ 19; RE #54-2, Settlement § VII.A, at 22.) In such circumstances, a realistic fear of collusion is simply not present. Nor does it suggest collusion that unawarded fees would return to P&G, since here the relief was solely injunctive and under Rule 23(b)(2) significant monetary relief could *not* go to the class; there was no "pot of money" to which unawarded fees could go. In *Bluetooth*, by contrast, certification under Rule 23(b)(3) meant that unawarded fees could indeed go to the class if the parties had so agreed.

Bluetooth, then, is inapposite, and in any event laid down broad guidelines rather than setting absolute rules that require the disapproval of certain settlements. For these reasons, the district court did not abuse its discretion by "reject[ing] out of hand any suggestion that this settlement agreement was affected by collusion or fraud." (RE #76, Tr. at 18:9–11.)

C. Litigation Would Have Been Costly, Lengthy, and Complex

The district court found that this case "would have been as complex as they could have come." (*Id.* at 15:9–10.) This finding, which Greenberg does not challenge, was not clearly erroneous. The case involved 59 named Plaintiffs, 45 causes of action, and the laws of all 50 states. (RE #25, Consol. Compl. ¶¶ 10–52, 151, 165–720.) Plaintiffs identified more than 145 fact witnesses from almost every state in the union, and the parties identified experts in the fields of pediatric

medicine, statistics, toxicology, manufacturing, product design, consumer behavior, and damages. (RE #27, Rule 26(f) Rep.) Fact and expert discovery would have been byzantine and costly, and summary judgment motions and trial preparation would have consumed hundreds, if not thousands, of billable hours. The expense, length, and complexity of the expected litigation all weigh heavily in favor of Settlement approval—as the district court recognized. (RE #76, Tr. at 32:11–16, 33:4–5.)

D. By the Time of Negotiation and Settlement, the Parties Had Developed More Than Enough Discovery to Support the Settlement

The district court, relying on the "informal core discovery" that the parties had undertaken and counsel's "extraordinarily thorough investigation and analysis," found that "the stage of proceedings [was] perfectly appropriate to support the settlement." (RE #76, Tr. at 33:5–10.) This finding was not clearly erroneous.

Besides the thorough investigation that Plaintiffs' complaint itself evidences (RE #25, Consol. Compl. ¶¶ 73–102), the parties also engaged in significant discovery. When the cases were consolidated in front of Judge Black, he ordered informal core discovery. (RE #20, Prelim. Calendar Order.) Under that order, Plaintiffs requested and P&G provided all Dry Max patents; the identities of the

suppliers of Dry Max ingredients and components; the identities and locations of Dry Max manufacturers; a full list of all Dry Max ingredients, including their respective quantities, concentrations and grades; and information about the Dry Max assembly process. (RE #68, J. Mot. for Approval at 23 & n.39.) This discovery provided crucial information for Plaintiffs' experts to analyze. That consultation with experts had begun even before Plaintiffs filed their complaint, and it continued even after core discovery was complete. (RE #57-1, Sarko-Cappio Decl. ¶¶ 3–4, 8.)

Courts reviewing a class-action settlement examine the progress of discovery because they want to determine whether counsel had "sufficient information intelligently to determine to agree to the compromise." *Cotton*, 559 F.2d at 1332 (upholding settlement where parties had engaged only in informal discovery). Here, Plaintiffs' counsel had more than enough information to make an intelligent decision on settlement. They had at their disposal the fruits of their own exhaustive investigation, the parties' informal discovery, the analysis of their experts, their own experience as class action litigators, and the results of two government investigations. Combined, this was more than enough information to allow counsel to bargain at arm's length with P&G. Courts have emphasized time and again that formal discovery is unnecessary to uphold a settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239–40 (9th Cir. 1998); *In re Corrugated Container Antitrust*

Litig., 643 F.2d 195, 211 (5th Cir. 1981); *Cotton*, 559 F.2d at 1332; *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 161–62 (S.D. Ohio 1992). The district court made no error in finding that the stage of the proceedings was appropriate to support the settlement.

E. The Class Counsel and the Class Representatives Strongly Support the Settlement

In deciding whether to approve a class action settlement, courts "should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." *Williams*, 720 F.2d at 922–23. By according weight to counsel's judgment in this case, the district court did not abuse its discretion.

The district court praised the "professional training and background, reputation and experience of the lawyers." (RE #76, Tr. at 33:12–13.) Plaintiffs' counsel have years of experience litigating class actions on behalf of consumers and employees and have special expertise in protecting children from dangerous products. (RE #57-1, Sarko-Cappio Decl. ¶¶ 43, 45, 47–48; RE #54-10, Sarko-Cappio Decl. ¶¶ 7, 9–10; *see also* RE #54-11, Counsel Resume.) Numerous federal courts have lauded counsel's integrity and skill. (RE #57-1, Sarko-Cappio Decl. ¶ 46.) The district court had good reason to defer to counsel's judgment.

Counsel had developed more than enough information about their case in order to intelligently and honestly evaluate its strength. *See supra* pp. 34–36. In a case where the parties had engaged in limited informal discovery, the Fifth Circuit

deferred to the attorneys' judgment, given their experience. *Cotton*, 559 F.2d at 1332. The district court did not abuse its discretion by doing the same here.

In addition, all the class representatives approved the Settlement. (*See, e.g.*, RE #68, J. Mot. for Approval at 25; RE #76, Tr. at 31:10–11.) *Cf. Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1216–17 (5th Cir. 1978) (disapproval by class representatives was "significant factor"). There were over 50 named Plaintiffs, and their unanimous support weighs in favor of approving the Settlement.

F. The Small Number of Objectors, and the Almost Complete Absence of Non-Serial Objectors, Support the Settlement

Here, there were only three objectors out of a class of hundreds of thousands of people. As the district court recognized, this fact "strongly support[s] settlement." (RE #76, Tr. at 33:25.) Two of the objectors, moreover, were serial objectors. As for Greenberg, the district court characterized his arguments as ones of policy rather than law. (*Id.* 34:1–2.) As Greenberg's studied disregard for settled Sixth Circuit law shows, this characterization is accurate.

G. The Voluntary Settlement of Complex Class Actions Is in the Public Interest

The public interest strongly favors the voluntary resolution of complex class actions. *See, e.g.*, *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 648 (6th Cir. 2009); *UAW*, 497 F.3d at 632; *see also Cotton*, 559 F.2d at 1331 ("Particularly in

class action suits, there is an overriding public interest in favor of settlement.”). The settlement of this case conserved federal judicial resources, ended what would have been expensive and protracted litigation, and conferred meaningful relief on the class.

* * *

The district court concluded that all of the relevant factors supported approving the Settlement. Greenberg says the district court committed errors of law, but these alleged errors amount to no more than disagreement with how the district court weighed the factors. That disagreement does not show an abuse of discretion. The district court’s approval of the Settlement as fair, reasonable, and adequate should be affirmed.

II. The District Court Was Within Its Discretion to Certify the Settlement Class

A. The District Court Correctly Concluded That the Class Representatives and Class Counsel Fairly and Adequately Represented the Class

Before a class may be certified, the district court must conclude that the “representative parties will fairly and adequate protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The representative parties will fairly and adequately represent the class if (1) they “have common interests with” the other class members, and if (2) they “will vigorously prosecute the interests of the class

through qualified counsel." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). Courts presume that class representatives and class counsel fairly and adequately represent the class; the burden to show otherwise rests on the person challenging that presumption. *See UAW*, 497 F.3d at 628.

The named Plaintiffs have common interests with the other class members. Because the injunctive relief applies equally to all class members, the named Plaintiffs do not have interests that are antagonistic to the class. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 562–63 (6th Cir. 2007) (in reviewing the adequacy of class representation, courts consider whether class members have interests that are antagonistic to one another). Further, all class members retain their right to seek monetary relief—all class members, that is, except for the named plaintiffs themselves, who will be barred by *res judicata* and the Settlement from seeking monetary relief. (*See* RE #54-2, Settlement § VIII.A, at 23.) But that fact only weighs in favor of a finding of adequate representation under Rule 23(a)(4), since it shows that the named Plaintiffs were willing to give up their own monetary claims so that the claims of the unnamed Plaintiffs could be preserved.

To determine whether the class representatives will vigorously prosecute class interests, courts examine "whether class counsel are qualified, experienced and generally able to conduct the litigation." *Stout*, 228 F.3d at 717. Here, class

counsel have extensive experience handling complex class actions and they committed significant resources to this case. (RE #57-1, Sarko-Cappio Decl. ¶¶ 3–4, 6–12, 44–48.) There was oversight by class representatives, who had input in shaping the Settlement. (RE #76, Tr. at 7:13–15.) *See Olden v. Gardner*, 294 F. App'x 210, 220 (6th Cir. 2008). The district court did not abuse its discretion by concluding that the requirements of Rule 23(a)(4) are satisfied.

Greenberg disagrees. In arguing that Rule 23(a)(4) was not satisfied, he mostly repeats his argument that the Settlement was unfair. (Br. at 57–58.) Because the district court did not abuse its discretion in deeming the Settlement fair, reasonable, and adequate, Greenberg's reiterated argument cannot show that the district court abused its discretion in concluding that the class representatives fulfilled Rule 23(a)(4). *See supra* Argument, Part I.

Greenberg's only new argument is that *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011), demonstrates inadequate representation under Rule 23(a)(4) as a matter of law. His reliance on *Aqua Dots* is badly misplaced. In that case, a toymaker, upon learning of problems with a product, issued a recall and allowed consumers to exchange or return the defective product. *Aqua Dots*, 654 F.3d at 750. A putative class of plaintiffs sued the toymaker. The Seventh Circuit noted that the putative class representatives sought "relief that

duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class." *Id.* at 752. Because the class representatives wanted class members to incur costs of notice and attorneys' fees merely for a refund that was already available, they inadequately protected the class members' interests. *Id.* Here, P&G's money-back guarantee program lapsed on December 31, 2010 (RE #68, J. Mot. for Approval at 9 n.27; RE #69, Pls.' Resp. to Objections at 5–6), and there is not a whit of evidence that P&G would have reinstated it without the Settlement's injunction. The Settlement also provides the class with label and website changes—which, again, is injunctive relief that would not have been available before the Settlement. Because the Settlement is giving the class valuable relief that it would not have otherwise received, *Aqua Dots* is not relevant.

B. The District Court Properly Certified the Settlement Class Under Rule 23(b)(2)

In addition to the discussion in P&G's brief—whose arguments Plaintiffs fully join—there are several other reasons that the district court was right to certify the Settlement class under Rule 23(b)(2).

1. The relief actually awarded in the Settlement is equitable: Nowhere does Greenberg argue that the Settlement actually provides anything other than equitable relief. He is thus forced to argue that the complaint and the release

somehow make certification under Rule 23(b)(2) inappropriate. The meritlessness of this argument is fully explained in P&G's brief.

2. The release preserves all legal claims: The language of the Settlement's release is expressly limited to "equitable Claims." (RE #54-2, Settlement § VIII.A, at 23.) The release, then, is unambiguous: it does not discharge legal claims of any kind. Greenberg's resort to canons of interpretation (Br. at 28) is therefore unnecessary. *Cf. Neuberger v. Comm'r*, 311 U.S. 83, 88 (1940) (noting, in interpreting a statute, that because the *expressio unius* maxim is "an aid to construction not a rule of law," it cannot override unambiguous language). More fundamentally, the parties' joint interpretation of the Settlement, under which the release discharges no legal claims, should dispel Greenberg's invented doubts about its scope. *See Restatement (Second) of Contracts* § 202 cmt. g (1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.").

3. Statutory, treble, and punitive damages are preserved: Because the Settlement discharges only equitable claims, Greenberg's argument about the waiver of "statutory liquidated damages" (Br. at 28) is incorrect. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-55 (1998) (holding that a claim for statutory damages constitutes a legal, not an equitable, claim). Also incorrect is

Greenberg's argument about the purported release of treble and punitive damages. *See Curtis v. Loether*, 415 U.S. 189, 196 (1974) (punitive damages is a legal, not an equitable, remedy); *Ross v. Bernhard*, 396 U.S. 531, 536 (1970) (treble-damages remedy is legal, not equitable, relief).

4. The Settlement discharges not a cent of otherwise available monetary relief: The only monetary causes of action that the Settlement's release may actually discharge are rescission and restitution—and even the discharge of restitution is not so clear. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-14 (2002). As P&G points out, however, the discharge of these *causes of action* does not diminish the amount of *monetary relief* still available to Settlement class members; what restitution and rescission could have provided, Settlement class members can still receive through other causes of action. (P&G Br., Argument, Part II.C.2.) The Settlement preserves all monetary damages otherwise available to the Settlement class.

5. The negligible effect of the Settlement's class-action provision: The class-action provision of this Settlement is highly limited in its practical effect. Because the Settlement discharges equitable claims but carves out monetary relief, a Rule 23(b)(3) class would be the only kind of class that absent Settlement class members could certify in the future in a different action. But as the district court noted,

certifying a Rule 23(b)(3) class might not be possible. (RE #76, Tr. at 15:12-14.) For this reason, the class-action provision has little practical effect on Settlement class members' future potential relief.

6. Settlement class members retain an incentive to bring individual actions: Under the Settlement's limited release, Settlement class members retain the right to bring legal claims under state consumer protection acts. Because many of these acts contain provisions authorizing the award of attorneys' fees to prevailing parties, *see, e.g.*, Cal. Civ. Code § 1780(d); N.Y. Gen. Bus. Law § 349(h), the mere fact that Settlement class members waive the class-action procedure does not mean that they and their attorneys will lack an adequate incentive to bring individual claims.

III. The District Court Was Within Its Discretion to Find the Attorneys' Fee Reasonable

The district court did not abuse its discretion in awarding attorneys' fees. The fees are reasonable and supported both by the relief achieved for the class and by Sixth Circuit precedent.

This Court has numerous grounds on which to affirm the district court, but three reasons stand out. First, as Plaintiffs have described, the class got significant relief even though its likelihood of success was far from overwhelming. *See supra* Argument, Part I.A. Second, the fee award is below counsel's presumptively

reasonable lodestar[6] amount and meets all of this Court's requirements for reasonableness. Third, while the parties, often with a mediator's assistance, typically negotiate a fee award in class-action settlements, here the fee award was the *mediator's* recommendation. Judge Phillips did not simply oversee fee negotiations; he was the one who recommended a reasonable fee amount.

Greenberg eschews this Court's well-established standard for attorneys' fees. Nor does he argue that the hourly rates of Plaintiffs' attorneys are too high or that the number of hours they billed are unreasonable. Instead, he simply repeats, in a slightly different key, his argument against the fairness of the Settlement. Thus, his argument against the fees is inextricably intertwined with his argument against the Settlement itself. If his argument against the Settlement fails, as Plaintiffs believe it does, then his argument against the fee award must fail too.

Rather than try to create new law, Plaintiffs will analyze the fee award using the six factors that this Court has encouraged district courts to address when they award fees:

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[6] A "lodestar" fee amount is arrived at by multiplying the hours that have been spent on a case by a reasonable hourly rate of compensation for each attorney involved in the case. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986). Courts then often apply a "multiplier" to this lodestar amount to more accurately reflect the quality of the work, the difficulty of the case, and other factors. *See, e.g.*, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 499–500 (6th Cir. 2011).

> (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.

Moulton v. U.S. Steel Corp., 581 F.3d 344, 352 (6th Cir. 2009). (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)).

A. The Settlement Conferred Valuable Benefits on the Class

In awarding fees, the district court called the Settlement "an extraordinary deed [that] brought benefit to the class members," and "a credit to all of you who were involved." (RE #76, Tr. at 35:17–20.) Plaintiffs have explained at length why the district court was right: the Settlement did indeed provide the class with valuable relief, especially given Plaintiffs' uncertain chance of victory on the merits. *See supra* Argument, Part I.A.

Greenberg, of course, disagrees. He argues that the fee award is facially unreasonable because—in his view—the fees are disproportionate to the results obtained. (Br. at 47–48.) At bottom, this is just an argument that the Settlement achieved nugatory relief for the class (and so cannot justify an award of fees). Because the district court did not abuse its discretion in rejecting that argument, it did not abuse its discretion in its fee award, either.

B. The Fee Award Is Less Than the Value of Counsel's Services on an Hourly Basis

The "value of [counsel's] services on an hourly basis," *Moulton*, 581 F.3d at 352 (citation and quotation marks omitted), favors approval. Plaintiffs' counsel submitted billing records totaling 9,063 hours. That is a reasonable expenditure of hours. In securing significant relief for the class, counsel had to conduct a thorough factual investigation, field thousands of calls and emails from concerned parents, consult with medical and scientific experts, litigate discovery issues and review discovery, and engage in extensive settlement discussions overseen by Judge Phillips, among other things. (*See* RE #57-1, Phillips Decl. ¶¶ 3–4, 8–16, 39.)

At the time the Parties moved for final approval, the lodestar figure itself came to $3,080,827.80.[7] Courts apply a "strong presumption" that the "lodestar figure represents a reasonable fee." *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) (quotation marks and citation omitted); *accord Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 853 (5th Cir. 1998); *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 98 (2d

[7] *See* RE # 57-2, Heiskell Decl. ¶ 4; RE #57-3, Collins Decl. ¶ 4; RE #57-4, Devereux Decl. ¶ 4; RE #57-5, Bartos Decl. ¶ 4; RE #57-6, Gustafson Decl. ¶ 4; RE #57-7, Hodge Decl. ¶ 4; RE #57-8, Sarko-Cappio Decl. ¶ 4; RE #57-9, Hillwig Decl. ¶ 4; RE #57-10, Mantese Decl. ¶ 4; RE #57-11, Mullaney Decl. ¶ 4; RE #57-12, Arsenault Decl. ¶ 4; RE #57-13, Nast Decl. ¶ 4; RE #57-14, Corwin Decl. at 3; RE #57-15, Scott Decl. ¶ 4; RE #57-16, Tycko Decl. ¶ 4; RE #57-17, Varian Decl. ¶ 4; RE #57-18, Rudd Decl. ¶ 4.

Cir. 1997). And here, the lodestar is significantly *higher* than the fees the district court actually awarded: $2,730,000. (RE #76, Tr. at 35:5.) Since under the lodestar method courts often award *positive* "multipliers" to class counsel—awarding two times the lodestar amount, for example—counsel's negative multiplier, plus the presumptive reasonableness of the lodestar, both strongly suggest that the fees awarded here are reasonable. *See, e.g.*, *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 517 (6th Cir. 1993) (affirming a multiplier of 2).

In this case, calculating attorneys' fees by the lodestar method rather than by the percentage-of-the-fund method makes a great deal of sense. Under the percentage-of-the-fund method, a percentage of the class's total monetary recovery is awarded to class counsel. *See, e.g.*, *Bowling*, 102 F.3d at 780. Here, however, the relief in the Settlement was entirely injunctive—there was no monetary relief out of which to award class counsel. In these circumstances, as courts have recognized, the lodestar method is far preferable to the percentage-of-the-fund method. Because "the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (in "injunctive relief class actions, courts often use a lodestar calculation"); Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.13(c) (2009) (approving the

lodestar method in injunctive- or declaratory-relief cases). Class counsel were trying to assure the district court that they were *not* overreaching when they urged it to gauge the reasonableness of the proposed award by reference to the lodestar amount. (*E.g.*, RE #57, Pls. Mot. for Attys.' Fees at 7, 12–13.) The district court did not abuse its discretion when it looked to the lodestar.[8]

Using the lodestar method was particularly appropriate given the stage of the case. The risk of the lodestar method is that it may provide "incentives for overbilling and the avoidance of early settlement." *Rawlings*, 9 F.3d at 517. Settlement at a relatively early stage in this lawsuit indicates that class counsel were not trying to run their bills up, thereby removing a major risk of the lodestar method.

Greenberg, however, contends that the district court should have awarded fees that were a percentage of the class's total recovery. (Br. at 44–46.) By gauging the fee award against counsel's lodestar amount, Greenberg says, the district court erred as a matter of law. (*Id.*)

To the extent that this argument is just another way of saying that the Settlement was valueless, it must be rejected for reasons that Plaintiffs have given

[8] The question is not whether there is a "common fund," but whether the Settlement awards solely injunctive relief. (*Cf.* Br. at 45 n.15.) The Settlement awarded only injunctive relief, so applying the lodestar method was proper.

already. *See supra* Argument, Part I.A. Greenberg's argument against what he calls the "kicker" provision is also inapposite, since there is no pool of monetary relief to which unawarded fees could revert. *See supra* p. 33.

Greenberg suggests that in class-action litigation, calculating fees solely by reference to the lodestar amount is always unlawful. To begin with, Greenberg's position conflicts with *Rawlings*, where this Court held that calculating fees solely by the lodestar method was proper. The Court said that the appeal raised the question "whether the district court erred in applying the lodestar method rather than the percentage of the fund method." *Rawlings*, 9 F.3d at 515. To this question the Court answered "no," reasoning that the appropriate method of calculating attorneys' fees varies based on the circumstances:

> When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved. The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.

Id. at 516 (citation omitted). This case rejected precisely the argument Greenberg makes here: that lodestar fee awards are impermissible in class actions. The district court did not abuse its discretion by awarding fees under the lodestar method.

Greenberg cites three cases that encourage district courts to use the percentage-of-the-fund method, *see In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001), and two other cases holding that the percentage-of-the-fund method is mandatory in "common-fund" cases, where the attorneys' fees and the class's recovery comes from the same money, *see Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).[9] With the exception of *Bluetooth*—a 23(b)(3) case where the class received no monetary relief while releasing all its claims—none of Greenberg's cases feature class relief that was exclusively, or even predominantly, injunctive. *See Wal-Mart*, 396 F.3d at 103–04 (compensatory damages); *Cendant*, 243 F.3d at 725 (issuance of securities at a stated value); *Swedish Hosp.*, 1 F.3d at 1263 (damages); *Camden I Condo. Ass'n*, 946 F.2d at 770 (monetary award). Here, by contrast, the relief is exclusively injunctive, which counsels strongly in favor of the lodestar method. *Staton*, 327 F.3d at 974; *Hanlon*, 150 F.3d at 1029. To the extent *Swedish Hospital* and *Camden I Condominium Association* rule out using the

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[9] Greenberg also cites *Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000), which explains that district courts have discretion to use either the lodestar method or the percentage-of-the-fund method in calculating attorneys' fees. It is unclear why this case is cited.

percentage-of-the-fund method in any consumer class action, they conflict with *Rawlings*.

Greenberg also makes the frivolous argument that Rule 23(h) mandates the percentage-of-the-fund method. (Br. at 44.) Rule 23(h) "does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable." Fed. R. Civ. P. 23, 2003 amend. cmt.

C. Counsel Undertook This Case on a Contingent-Fee Basis

Plaintiffs' counsel litigated this matter on a contingent basis, placing at risk their own resources to do so. (RE #57-1, Sarko-Cappio Decl. ¶ 42.) This risk looms especially large in a complex case like this, where counsel had to commit significant time and resources upfront. (*Id.*) Absent the Settlement, the class risked no recovery at all, and Plaintiffs' counsel risked getting no fees. In the face of this risk, Plaintiffs' counsel won an excellent result. Nor is its work yet done, as evidenced by this appeal. The contingent nature of this case favors the district court's award of fees. *See Moulton*, 581 F.3d at 352; *see also, e.g.*, *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) (Posner, J.) ("The need for [a risk] adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.").

D. The Public Interest, the Complexity of this Case, and the Skill of the Attorneys All Favor the District Court's Award

A reasonable fee is designed "to maintain an incentive" to other attorneys who might not otherwise take on a risky case. *Moulton*, 581 F.3d at 532. Plaintiffs' counsel have agreed to accept considerably less than their lodestar, but any further reduction risks discouraging other attorneys from taking on similar cases. Despite the legal and factual complexity of this case—and despite the uncertain chances of success—counsel decided to take on this case because of the significant injuries that Plaintiffs' children had suffered while wearing Dry Max diapers. Further reducing counsel's fees risks discouraging other lawyers from vindicating similar consumers' rights.

The "complexity of the litigation" also favors the district court's award of fees. *Id.* As the district court noted, this was no run-of-the-mill consumer class action. (RE #76, Tr. at 15:9–10.) Class counsel's willingness to thoroughly investigate, competently litigate, and expeditiously settle this enormously complex case brings the district court's award well within the realm of reason.

The "professional skill and standing of counsel involved on both sides," *Moulton*, 581 F.3d at 352, likewise favors the district court's award. Plaintiffs' counsel are highly respected members of the bar, with extensive experience in prosecuting high-stakes complex litigation, including consumer class actions. (RE

#57-1, Sarko-Cappio Decl. ¶ 45.) They have litigated hundreds of class action cases during the past 20 years and have successfully recovered over $4 billion for the benefit of victims of price-fixing conspiracies, securities fraud, breaches of fiduciary duty, and deceptive practices. (*Id.*) It was because of this demonstrated skill and experience that Plaintiffs obtained a favorable resolution despite the strong opposition of well-funded opponents and the lack of supportive findings by two government agencies.

P&G's counsel are similarly highly respected and experienced in defense of class action litigation. *See In re Charter Commc'ns, Inc., Sec. Litig.*, No. 02-CV-1186, 2005 WL 4045741, at *17 (E.D. Mo. June 30, 2005) ("The quality and vigor of opposing counsel is important in evaluating the services rendered by Lead Counsel."). Given the formidable opposition by well-heeled defendants represented by a well-respected counsel, a high level of experience was required for success.

E. The Fee's Proposal by Judge Phillips, Rather Than by the Parties, Attests to Its Reasonableness

The district court's award carries another mark of reasonableness in addition to the six factors just discussed: the fee award came from the mediator, not from the parties. (RE #57-1, Sarko-Cappio Decl. ¶¶ 18–19.) It was Judge Phillips who recommended the fee based on his review of the result achieved and the work

performed. (*Id.* ¶ 18.) As the district court noted, the award was "a number that the retired federal judge proposed to the parties rather than something they came up with themselves." (RE #76, Tr. at 35:6–8.) The fact that the award springs from the recommendation of Judge Phillips, an experienced and neutral third party, further demonstrates the reasonableness of the award. *See Hanlon*, 150 F.3d at 1029 (holding that district court did not err in relying on the fact that the parties accepted the mediator's fee recommendation as "independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class").

F. The District Court's Explanation of the Award Was Sufficient

In awarding attorneys' fees, a district court must "provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The district court's explanation here was succinct but sufficient. Earlier in the fairness hearing, it had engaged in a colloquy with Plaintiffs' counsel about the fee, comparing the lodestar amount with the fees requested in the Settlement.[10] (RE #76, Tr. at 16:15–17:3.) After noting that the fee was proposed by Judge Phillips, the district court emphasized that the award was less than the lodestar amount, and concluded that the award was fair in light of counsel's efforts.

[10] The figure that Plaintiffs' counsel gave for the lodestar amount during the fairness hearing was higher than the figure given in earlier submissions because counsel had since spent additional hours on the case. (*Compare* RE #76, Tr. at 17:1, *with supra* p. 47 & n.7.)

(*Id.* at 35:3–12.) This is enough to indicate that the district court had adopted the lodestar method, and that it believed the award was fair given the Settlement's benefit to the class, the value of counsel's services on an hourly basis, and the professional skill and standing of counsel. This Court has never required district courts to explicitly analyze all six of the canonical attorney-fee factors; a district court's explanation "by no means invariably" will address all of those factors. *Moulton*, 581 F.3d at 352. The district court's explanation was brief but adequate. *See Eagles, Ltd. v. Am. Eagle Found.*, 356 F.3d 724, 727–28 (6th Cir. 2004) ("The adequacy of a district court's statement is determined by this Court's ability to understand its reasoning, not by the number of sentences it uses.").

CONCLUSION

Because the district court was well within its discretion to approve the Settlement, certify the Settlement class under Rule 23(b)(2), and make its award of attorneys' fees, its judgment should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of March, 2012.

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