No. 14-13882-FF
Multi-Appeal Nos. 14-14165-FF, 14-14170-FF, 14-14221-FF, 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
The Honorable Gregory A. Presnell

BRIEF OF APPELLEES THE GILLETTE COMPANY AND THE PROCTER & GAMBLE COMPANY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, appellees The Procter & Gamble Company ("P&G") and The Gillette Company ("Gillette") hereby certify that they believe the Certificates of Interested Persons previously submitted to this Court in this appeal contain a complete list of all persons and entities known to have an interest in the outcome of this appeal. Appellees further certify that P&G has no parent company and no publicly held company owns 10% or more of P&G's outstanding common stock. Gillette is a wholly-owned subsidiary of P&G.

STATEMENT REGARDING ORAL ARGUMENT

Appellees The Gillette Company and The Procter & Gamble Company believe that oral argument is unnecessary. The district court followed well-settled law from this Circuit and elsewhere in approving the settlement, and its exercise of discretion on the particular facts here can and should be affirmed on the basis of the briefs and the record. Objectors argue that oral argument is warranted because of a purported conflict between the decision below and rulings from other circuits. But, as this brief demonstrates, no such conflict exists. No decision has held that a settlement agreement that offers class members full cash compensation for their alleged losses, as well providing injunctive relief and a substantial donation of product, may be rejected as unfair, unreasonable, or inadequate

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INTRODUCTION

Objectors' challenges to the settlement approval betray a hostility to class action settlements that is irreconcilable with this Court's precedents and the strong policy favoring settlement over protracted and expensive litigation.

Faced with a lawsuit it believes lacks merit, but recognizing the certain expense and potential risk in continued litigation, Duracell agreed to a settlement that offered cash compensation to each class member. The compensation roughly equals or exceeds the full amount of damages the class members could have obtained had they prevailed at trial. The settlement imposed no overall limit on the number of claims or the total pay-out—every class member who submitted a valid claim was entitled to the full per-package amount offered. Duracell also agreed to injunctive relief and to make an in-kind donation of batteries valued at $6 million retail. By any measure, the compensation offered to class members was fair and reasonable.

Objectors argue that all of this is insufficient because only a relatively few class members made a claim, which resulted in the cash paid out to class members being relatively small. But the small number of claims reflected only that each class member's recoverable damages were small because plaintiff sued over an inexpensive consumer product, with alleged damages of as little as $1 or $2 per

class member. It does not mean the compensation provided by the settlement was inadequate. To the contrary, it was fully compensatory.

Nor is the class compensation rendered inadequate by the fees the district court awarded to class counsel. Objectors argue that the fee award shows that the settlement proceeds were misallocated, and that more should have been paid to class members. But the payments offered to class members already effectively equaled or exceeded the amount of their alleged loss. Thus, any excess in the fees class counsel requested provides no basis for finding the class compensation inadequate. Paying even more to class members who have already submitted a claim would have resulted in an impermissible windfall. Tacitly recognizing as much, Objectors argue that the parties should have made direct payments to all class members. But there is no dispute that Duracell has no records from which individual purchasers can be identified. And no law or legitimate policy supports Objectors' assertion that, as a condition of settling this lawsuit, the parties were required to subpoena hundreds or thousands of retailers to try to ferret out such information, if the information even exists.

In short, the compensation offered to class members fully satisfies the requirements to be fair, reasonable, and adequate, regardless of the Court's resolution of the attorneys' fees issue. The district court did not abuse its discretion in approving that compensation. This Court should affirm that approval.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Duracell agrees that the district court had jurisdiction over this case for the reasons stated in Objectors' brief.

Duracell disputes, however, that Objectors have standing to appeal. Although Objectors filed objections in the court below, none of them formally intervened. Objectors rely on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), as holding that such intervention is unnecessary. *Devlin*, however, addressed a ***mandatory*** class action certified under Rule 23(b)(1), not a class action certified under Rule 23(b)(3) in which objecting class members have the right to opt out. The distinction is important because *Devlin* relied for its holding on the fact that, because of the mandatory nature of a Rule 23(b)(1) class, "appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." 536 U.S. at 10.

In a case like this one certified under Rule 23(b)(3), in which dissatisfied class members can opt out, that rationale does not apply. In *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310 & n.7 (11th Cir. 2004), this Court acknowledged this distinction, and observed that the Arkansas Supreme Court has ruled that non-intervening objectors in a Rule 23(b)(3) class may not appeal. *Id*. (citing *Ballard v. Advance Am.*, 79 S.W.3d 835 (Ark. 2002)). As this

Court noted, the Eighth Circuit has expressed approval of that ruling. *Id.* (citing *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002)).[1] But this Court found it unnecessary to reach the issue because the appellants in *AAL* were not class members at all. This Court has on occasion entertained appeals in other cases from non-intervening objectors. But those decisions carry no weight on this issue because the Court did not address the standing issue. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Nor should the Court accord weight to the decisions of other circuits that have granted standing to non-intervening objectors. These cases have generally reasoned that, even in a Rule 23(b)(3) class action, the class members are effectively bound by the judgment despite the right to opt out because the stakes are too small to justify an individual suit. *E.g., Churchill Vill., L.L.C. v. Gen. Elec.,* 361 F.3d 566, 572 (9th Cir. 2004). But, under *Devlin*, the question is whether an appeal is the objector's only means of avoiding being bound. In a Rule

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[1] *See also Barnhill v. Fla. Microsoft Anti-Trust Litig.*, 905 So. 2d 195, 199 (Fla. App. 2005) (court "agree[d] with those courts which have found that the basis of the *Devlin* decision was that the objectors were bound by the terms of the settlement because they did not have the opportunity to opt out").

23(b)(3) action, it is not, and thus *Devlin* does not apply. Nicholas Barnhorst, *How Many Kicks at the Cat: Multiple Settlement Protests by Class Members Who Have Refused to Opt Out*, 38 Tex. Tech L. Rev. 107, 124 (2005) (criticizing *Churchill Vill*. on this basis).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in approving a class action settlement that offers full compensation to class members.

STATEMENT OF THE CASE

A. Plaintiff's claim.

Plaintiff alleged that Duracell falsely advertised that its Ultra AA and AAA batteries last longer than CopperTop batteries. Dkt. 117.[2] Plaintiff asserted that Duracell advertised its Ultra Advanced batteries as lasting "Up to 30% Longer in Toys* *vs Ultra Digital" (Ultra Digital was the Ultra battery that preceded Ultra Advanced). *Id.*, ¶ 14. Plaintiff likewise alleged that the later Ultra Power battery packages carried the claim "Our Longest Lasting." *Id.* ¶¶ 19-21.

Plaintiff asserted that these statements appeared on all Ultra Advanced or Ultra Power packages, and that all class members were accordingly exposed to them. *Id.* ¶ 23. Plaintiff alleged the statements were false because the Ultra

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[2] The settlement also resolves a similar case filed in the Northern District of California. *Heindel v. The Gillette Co.,* No. 12-cv-01778-EDL (N.D. Cal.).

batteries did not last materially longer than Duracell's other batteries. *Id.* ¶¶ 16, 21. As damages, plaintiff sought the difference in price between the Ultra batteries and the CopperTop batteries, which plaintiff alleged was on average about 30 cents per battery (or $2.40 for an eight-pack). *Id.* ¶ 25.

B. Duracell's Defenses and Plaintiff's Litigation Risk.

Had the case not settled, plaintiff faced considerable risk as to each part of his claim:

1. Duracell's advertising was supported by extensive testing.

Each of the challenged statements on Duracell's Ultra battery packs was supported by extensive testing. Dkt. 78, ¶¶ 12, 15-17. Duracell tests thousands of batteries each year, using industry-standard testing methods approved by the American National Standards Institute. *Id.*; Dkt. 79, ¶ 7. These tests are designed to match as closely as possible the manner in which consumers use the batteries, so as to approximate the battery life consumers would experience. Dkt. 79, ¶ 14. The tests simulate usage in a variety of different devices, such as toys, digital cameras, electric toothbrushes, and flashlights. In accord with industry practice, Duracell then uses an average of the results for each battery type across all devices, weighted according to the frequency by which consumers use batteries in each device, to determine the expected performance of that battery type. Dkt. 78, ¶ 14; Dkt. 80, Ex. A, p. 7.

Duracell's testing confirms that, as advertised, the Ultra Advanced batteries did in fact last up to 30% longer in toys as compared to the Ultra Digital batteries. Dkt. 78, ¶ 12. The testing likewise confirms that the Ultra batteries (both Ultra Advanced and Ultra Power) were Duracell's longest lasting alkaline batteries, outlasting the CopperTop batteries by approximately 4% on a weighted average basis. *Id.* ¶¶ 15, 16.

Plaintiff relied on battery testing by his own expert that plaintiff claimed showed that no statistically significant difference existed in battery life between Ultras and CopperTops. Dkt. 67-1. Plaintiff further asserted that a 4% difference in battery life was in any event not material in light of the price differential between Ultras and CopperTop. Dkt. 66, pp. 5-6. Had the case not settled, Duracell would have vigorously contested both assertions. In connection with class certification, Duracell moved to exclude plaintiff's expert's testimony on the grounds that his testing methods were unreliable and inconsistent with industry standards and that he was not qualified to testify on the statistical significance of the results. Dkt. 74. Duracell was also prepared to show that, particularly combined with the PowerCheck feature available only on Ultras, the additional battery life in the Ultras made them meaningfully more valuable than CopperTops.

2. As many as half of the battery packages did not contain the challenged statements.

Plaintiff rests his false advertising claim on the battery's packaging. Duracell did not advertise Ultra batteries in print or on television, and plaintiff admits that he did not see any representations about battery life other than what was on the packaging. Dkt. 82, Ex. B, pp. 35:16-36:3, 150:19-23. Thus, plaintiff's allegation that the challenged statements appeared on every Ultra battery package was critical to his assertion that a litigation class could be certified. Unless the alleged false advertising uniformly appeared on all packages, class certification would be improper because the only way to determine which class members were exposed to the advertising (and thus could potentially have a claim) would be an individual-by-individual inquiry.[3]

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[3] *See Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 229 (S.D. Fla. 2002) ("[T]o prove liability under FDUTPA, the Court must determine that . . . each putative class member was exposed to the Defendants' advertising and marketing materials alleged to constitute a deceptive trade practice . . ."); *Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 628 (S.D. Fla. 2008) (denying class certification because "the issue of whether each putative class member actually received Defendant's marketing materials is an individual question of fact critical to each member's claim that predominates over any common issues of fact"); *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 596 (9th Cir. 2012) ("California courts have recognized that . . . a consumer who was never exposed to an alleged false or misleading advertising . . . campaign [cannot] recover damages") (quotations and citations omitted); *O'Shea v. Epson Am., Inc.*, 2011 U.S. Dist. LEXIS 105504, at *35-*36 (C.D. Cal. Sept. 19, 2011) (denying class certification in part because the class included consumers who were not exposed to the alleged misrepresentation).

In opposing class certification, Duracell showed that the Ultra battery packages were not at all uniform. *See* Dkt. 73, pp. 4-5; Dkt. 76. They carried a variety of different claims, with many packages having no representation at all about battery life. For example, the claim that Ultra Advanced batteries lasted longer than Ultra Digital batteries appeared on only 30% of the AA Ultra packages and 7% of the AAA Ultra packages shipped during the class period. *Id.* The claim that the Ultra batteries were Duracell's "longest lasting" or "most powerful" appeared on only 51% of the AA packages and 44% of the AAA packages. *Id*.

Plaintiff argued below that, even in the absence of an actual "longest lasting" claim, Duracell misleadingly conveyed the message that Ultra batteries were superior to CopperTops because of their name, higher price, distinctive color scheme, in-store placement, in-store displays and the like. Dkt. 98, pp. 1-6. Because of the settlement, the district court never ruled on this argument. At the very least, however, plaintiff faced considerable risk that it would be rejected, both as a basis for class certification and on the merits. As for class certification, the retail pricing of Ultra batteries varied from store to store, as did such things as product placement and displays. *See* Dkt. 76. On the merits, courts have consistently rejected claims that a company falsely advertised a product as superior through higher pricing, distinctive names or color schemes or other such differential promotion. *See, e.g.*, *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d

910, 917 (Ill. 2007) (rejecting claim that name "Pentium 4" implied chip was superior to "Pentium 3").

3. The PowerCheck feature provided value.

Plaintiff also faced the risk that he would not be able to prove any recoverable damages or that the damages would be much less than the full price differential between CopperTops and Ultras. Beginning in October 2009 (shortly after the class period began), Ultra batteries came with PowerCheck, a valuable feature on each battery that shows the consumer the battery's remaining power. This feature was not offered on CopperTop batteries. Dkt. 77 ¶¶ 7, 9. Thus, the additional value of the PowerCheck feature would have to be accounted for in determining what portion of the price differential, if any, was attributable to the "longest lasting" claim. The jury would have been entitled to find that PowerCheck by itself was sufficient to justify the price differential, resulting in the class recovering zero damages.

C. Settlement.

The parties actively litigated for 16 months before agreeing to settle. In that time, both parties engaged in significant discovery, including expert discovery. Dkt. 114-1, ¶ 4. At the time of the settlement, plaintiff's motion for class certification had been fully briefed and argued before the district court.

Contemporaneous with their class certification briefing, the parties engaged in four months of extensive settlement discussions overseen by Rodney A. Max, whom the district court had designated to mediate the case. Dkt. 114-1, ¶¶ 6-8.[4] With Mr. Max's assistance, the parties participated in two lengthy in-person mediation sessions in August 2013, followed by extensive further negotiations by telephone and e-mail. *Id.* ¶¶ 7-8. When those negotiations initially failed to resolve the case, the parties proceeded with the hearing on plaintiff's class certification motion. One week after the hearing, they finally agreed on the principal settlement terms and executed a memorandum of understanding. *Id.* ¶ 8.

As documented by Mr. Max's post-settlement declaration (Dkt. 114-3), the settlement negotiations were hard-fought, adversarial, protracted, and without collusion. The parties separately negotiated the relief to be provided to the class, and addressed attorneys' fees and compensation to the named plaintiff only after the class relief was agreed upon. Dkt. 114-3, ¶ 15; Dkt. 114-1, ¶ 14.

The principal terms of the settlement are:

- ***Class definition***: The settlement class consists of all end-user purchasers in the United States of AA or AAA Ultra Batteries from

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[4] Mr. Max is an experienced and highly regarded mediator, having conducted more than 5,000 mediations in 32 states. Dkt. 114-3, ¶¶ 2-9. He is a past president of the American College of Civil Trial Mediators and has published numerous articles and frequently lectured on mediation. *Id.* ¶¶ 7-9.

June 2009, excluding judges assigned to this case, officers and directors of Duracell, or purchasers who opt-out or who have previously released their claim. Dkt. 113-1, ¶ 31. The parties estimate that the class includes about 7.26 million purchasers. Dkt. 114-1, ¶ 12.

- ***Cash compensation to the class:*** All class members who submit a claim are entitled to $3 cash compensation per package of Ultra batteries purchased, up to 2 packages per household without proof of purchase and up to 4 packages with proof of purchase. Dkt. 113-1, ¶ 59. Claims may be submitted on-line or by mail. *Id.* ¶ 39. The claim form is a simple, one-page form, requesting the class member's contact information, number of packages purchased, type and size of batteries purchased, location purchased and devices in which the battery was used. Dkt. 122-1, Ex. B. The settlement agreement does not cap the total cash payments. All valid claims will be paid in full, subject only to the limit of two or four packages per household.
- ***Injunctive Relief:*** Defendants are permanently barred from stating on packaging or displays in the United States that Ultra batteries in their current chemical formulation last longer than CopperTop batteries. Dkt. 113-1, ¶ 58. This prohibition takes effect 60 days after the

effective date of the settlement agreement. *Id.* The settlement agreement acknowledges that the filing of this lawsuit was a material factor in defendants' discontinuation of the challenged advertising. *Id.*

- ***In-Kind Payment:*** Duracell will donate $6 million of Duracell products (retail value) over a period of five years to charitable organizations, including first responder charitable organizations, the Toys for Tots charity, the American Red Cross, or other 501(c)(3) organizations that regularly use consumer batteries or related products. *Id.* ¶ 61. The payment is separate from, and does not include, any donation of products Duracell had already made or was committed to donate as of the date of the settlement agreement. *Id.*
- ***Attorneys' Fees:*** Plaintiff is entitled to an award of fees and expenses as approved by the court, up to a maximum of $5.68 million. Duracell agrees not to oppose an award up to that amount. *Id.* ¶ 63. The court's award of fees is to be separate from its determination whether to approve the settlement. *Id.* ¶ 65.
- ***Named plaintiff compensation:*** Class counsel will apply for, and Duracell will not oppose, an award of $1,500 to named plaintiff

Joshua Poertner for his time and efforts in representing the class and actively participating in the case. *Id.* ¶ 66.

The settlement agreement also called for an extensive notice plan. It included five major components:

- ***Magazines***: Notice was published in the following national magazines with large and widespread circulation—*Better Homes & Gardens, Ebony, National Geographic, People, People en Espanol,* and *T.V. Guide.* Dkt. 151, ¶ 3.
- ***Newspapers***: Notice was published in USA Today, the Orlando Sentinel, and the San Francisco Chronicle. *Id.* ¶ 6.
- ***Internet Banners***: Internet banners were placed on numerous, widely read websites. 92,497,977 unique impressions were purchased, which is nearly 500,000 more impressions than were anticipated in the Notice Plan. *Id.* ¶ 4.
- ***Settlement Website and Internet Coverage***: Since December 5, 2013, the settlement website, www.UltraBatteriesSettlement.com, has been accessible. In addition, the settlement received significant coverage in various other media outlets. Scores of blogs, class action websites, consumer advocate websites and others have picked up on and further

publicized the settlement, with links to the settlement website and the claim form. *See* Dkt. 152, ¶ 6; Dkt. 151, ¶ 7.

- ***Link on Duracell Website***: A visible link to the settlement website was placed on the Duracell website (www.duracell.com) for a period of 93 days (from December 5, 2013 through February 18, 2014), which far exceeded the 30-day period called for in the Settlement Agreement and Notice Plan. *See* Dkt. 153, ¶ 6.

This robust notice plan was calculated to reach in excess of 70% of the class members. Dkt. 151, ¶¶ 4-8. The courts have repeatedly found this kind of notice plan to comply with Rule 23 and satisfy applicable constitutional requirements.[5]

D. Approval Proceedings.

The district court granted preliminary approval on November 5, 2013. Dkt. 118. Following class notice, seven class members filed objections, and

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[5] *E.g., Rossi v. The Procter & Gamble Co.*, No. 2:11-cv-07238, Dkt. 69, pp. 4-5 (D.N.J. Feb. 22, 2013) (requiring a summary notice to be published once in *USA Today* and once in *People* magazine, 15 days of internet banner ads, and a visible link to the settlement website posted on crest.com); *Courtney v. Welch Foods, Inc.*, No. 8:10-cv-01427, Dkt. 27, pp. 3, 4-5 (C.D. Cal. Mar. 14, 2011) (requiring a newspaper notice coupon and a visible link to the settlement website posted on welchs.com for a consumer class action regarding Welch's White Grape Pomegranate Flavored juice blend); *DeLarosa v. Borion, Inc.*, No. 8:10-cv-01569, Dkt. 318, pp. 3-4 (C.D. Cal. June 4, 2013) (requiring notice to any known class members, advertisements in *USA Today* and *Parents*, online banner advertisements, a Facebook page, and a twitter account for a misleading advertising claim against a sleep aid for children with colds).

12 class members opted out. Dkt. 168, p. 4. To ensure that the parties and the class would have sufficient time to address the number of claims filed before the court considered final approval, the district court deferred the hearing date on final approval and permitted the objectors an additional round of briefing. Dkt. 141. The deadline for submitting claims was April 10, 2014. *Id.* Claims were submitted by 55,346 class members. Dkt. 156, ¶ 6. The final approval hearing was held on May 22, 2014. Among the objectors, only counsel for objector Ted Frank appeared at the hearing.

The district court issued its final approval order on August 21, 2014. Dkt. 168. Exercising its authority under Rule 23, and applying the factors prescribed in *Bennett v. Behring Corp.,* 737 F.2d 982 (11th Cir. 1984), the court ruled that the settlement was fair, reasonable, and adequate to the class. It found that the settlement "eliminates a substantial risk that the Class would end up empty-handed" and further that the settlement avoided the time, expense, and delay that would be entailed in a "complex, lengthy, and expensive" trial and likely appeal. Dkt. 168, p. 7. The court found that the settlement was achieved through arm's length negotiations overseen by a well-qualified court-appointed mediator. Because the settlement was entered after 16 months of discovery and motion practice, the court ruled that "Plaintiff was sufficiently informed to negotiate, execute, and recommend approval of the Settlement." *Id.*, p. 8. As the court

found, "There is no suggestion of fraud or collusion between the parties and no evidence of want of skill or lack of zeal on the part of Class Counsel." *Id.*

Reviewing the substance of the settlement, the court rejected the Objectors' arguments that the settlement should have provided greater cash compensation to class members. The court concluded that, given that Duracell does not have records that identify individual purchasers, there was "no practical alternative by which to deliver greater value to Class Members." *Id.,* p. 5. The court rejected as "difficult, expensive, and essentially fruitless" Frank's suggestion that the parties be required to try to track down purchasers by subpoenaing retailers around the country who sold Ultra batteries. *Id.,* p. 6. The court also ruled that the in-kind donation of batteries was relevant to the value of settlement overall, because it provided an indirect benefit to the class. *Id.,* p. 5. And the class obtained a direct benefit from the cessation of the challenged advertising, a result that "was motivated by this lawsuit and was formalized through the Settlement Agreement." *Id.,* pp. 5-6.

Finally, the court granted class counsel's request for $5.68 million in fees and expenses, finding that it was reasonable either as a percentage of a common fund or under a lodestar approach. *Id*., pp. 8-9.

SUMMARY OF ARGUMENT

The district court's order approving the settlement was not an abuse of discretion. As the court correctly recognized, the cash compensation offered to each class member was fully compensatory and was thus fair, reasonable, and adequate by any measure. Awarding additional cash per claim would have overcompensated class members and created an impermissible windfall. The district court also properly took into account the injunctive relief and in-kind donation as additional value provided by the settlement.

The Objectors' various arguments against the adequacy of the class compensation are groundless. The district court correctly rejected Objectors' argument that the parties were required to individually notify class members and make direct payments. No case supports that argument. To the contrary, the courts have rejected any such requirement in circumstances indistinguishable from those here. Imposing an individual notice and direct payment requirement in a case like this—where the amount at stake is small and the product is sold through hundreds or thousands of retailers spread all around the country—would be unworkable, unreasonably expensive, and a huge deterrent to beneficial settlements.

Nor does the amount of the attorneys' fee award cast any doubt on the reasonableness of the amount offered to class members. Where, as here, the class

is offered fully compensatory cash payments, no finding can be made that any misallocation of the settlement proceeds occurred. Similarly, it was entirely proper for Duracell to agree not to oppose class counsel's fee request up to $5.68 million in exchange for class counsel's agreement to not seek an award higher than that. The district court found, and Objectors do not challenge, that that agreement was negotiated only after the fully compensatory cash payments were agreed upon. Moreover, as this Court has recognized, such agreements simply reflect the defendant's legitimate desire to provide some certainty regarding its maximum exposure. And because the amount offered to class members here was itself reasonable, any excess in the amount of fees requested or awarded simply means that class counsel should have been given a smaller award, not that class members are entitled to be overcompensated for their alleged losses.

ARGUMENT

I. STANDARD OF REVIEW.

"In reviewing the validity of a class action settlement, a district court's decision will be overturned only upon a clear showing of abuse of discretion." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2012) (internal quotation marks omitted). In exercising this review, the Court's "judgment is informed by the strong judicial policy favoring settlement as well as by the

realization that compromise is the essence of settlement." *Bennett,* 737 F.2d at 986.

II. THE COMPENSATION TO THE CLASS IS FAIR AND REASONABLE.

As Objectors recognize, "settlement fairness 'must be evaluated primarily on how it *compensates class members*." Br. 1 (quoting *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (emphasis in original)). In evaluating the degree to which the settlement fully compensates class members, the court must consider the risk that plaintiffs would not prevail (or not prevail to the full extent of their damage claim). *Bennett,* 737 F.2d at 986 (district court must consider, among other factors, "the likelihood of success at trial . . . [and] the complexity, expense and duration of litigation"). Giving class members more than they could recover at trial (as appropriately discounted by the risk they face of not prevailing) would constitute an impermissible windfall.[6]

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[6] *See, e.g., In re Lupron Mktg. & Sales Practices Litig.,* 677 F.3d 21, 34–35 (1st Cir. 2012) (affirming denial of additional distributions to fully-compensated claimants, and affirming distribution of $11.5 million in unclaimed settlement funds to *cy pres* recipient, on grounds that "[i]t is well accepted that protesting class members are not entitled to windfalls in preference to cy pres distributions."); *Klier v. Elf Atochem North Am., Inc.,* 658 F.3d 468, 475 (5th Cir. 2011) (holding that additional distributions to class members should not be made where they "would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution"); *Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 177 (E.D.N.Y. 2011) (ordering remaining funds to revert to defendant because further distribution to class would be a windfall); *Hartless v.*

(continued)

Here, the district court correctly ruled that the settlement offers full compensation to class members.

A. Cash Payments Offered to Class Members Generally Equal or Exceed What They Could Have Recovered Per Package if the Case Were Tried.

As his alleged damages, plaintiff sought a full refund of the difference in price between CopperTop batteries and the more expensive Ultra batteries. For the average class member, the cash payments offered by the settlement equal or exceed that amount. At stores other than Costco, the average price differential was 39 cents per AA battery and 41 cents per AAA battery. Dkt. 154, ¶ 14. The average AA package contained 7.4 batteries and the average AAA package was 7.1 batteries. *Id.* On average, therefore, the full amount of the alleged overcharge was $2.89 per AA package and $2.91 per AAA package—in both cases, ***less*** than the $3 per package offered by the settlement. Further, the most popular size package of both AA and AAA batteries contained 4 batteries. *Id.* ¶¶ 3-4. For purchasers of this package, the alleged overcharge was $1.56 per package for AA batteries and $1.64 for AAA batteries—again, well below the $3 per package offered by the

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Clorox Co., 273 F.R.D. 630, 642 (S.D. Cal. 2011) (rejecting request that unclaimed funds be distributed to claimants on a *pro rata* basis because claimants had already been fully compensated and further payments "would result in a substantial windfall"); *Hall v. AT & T Mobility LLC*, 2010 WL 4053547, at *38 (D.N.J. Oct. 13, 2010) (rejecting objector's argument that unclaimed funds should be distributed on *pro rata* basis due to "the potential of a windfall to certain Class members").

settlement. And, because the settlement does not impose any overall limit on the number of packages for which this compensation will be paid, every class member who submitted a valid claim will receive payment in this amount. By that measure alone, the compensation to the class is reasonable.[7]

The reasonableness of the compensation, however, is not determined simply by the maximum amount the class could recover if plaintiff were to prevail. As noted, the district court must also take into account the risk of the plaintiff not prevailing (or recovering less than the full amount of damages sought). Under that measure, the settlement indisputably offers class members full compensation. For the reasons outlined above (*supra*, pp. 6-10), plaintiff faced multiple, significant hurdles to prevailing on his claim, all of which were avoided by the settlement. These significant risks of not prevailing at all, or of recovering far less than the full damages sought, would have supported a settlement here of far less than the $3 per package payment to which the parties agreed. When those risks are considered here, the payments available through this settlement (generally exceeding the ***full***

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[7] The average price differentials for batteries sold at Costco are even less—13 cents for AA batteries and 6 cents for AAA batteries. Dkt. 154, ¶ 15. These differentials result in an alleged overcharge of $2.08 for a package of 16 batteries and $3.90 for a 30-battery package. *Id.* For AAA batteries (which are sold at Costco only in 16-packs), the alleged overcharge is 96 cents. *Id.* Costco accounts for 11% of Ultra AA battery sales and 5% of Ultra AAA sales. *Id.*

amount a class member could obtain if plaintiff prevailed on ***every*** point at trial) are more than reasonable.

B. The Cases On Which Objectors Rely Did Not Involve Fully Compensatory Recovery To The Class.

Because the payments available under this settlement generally exceed what class members could obtain if they were to prevail at trial, the cases on which the Objectors rely in which settlements were disapproved are inapposite.

Objectors rely most heavily on *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). There is no indication in that case, however, that the settlement offered class members effectively the full amount of the alleged damages or that awarding additional amounts would overcompensate the class members. Moreover, the court relied heavily on what it said was a "burdensome" claim form and notice that it believed was designed to "minimize the number of claims." *Id.* at 783. Here, Objectors do not challenge the claim form, which was a simple form that could be easily submitted on-line or by mail.[8] The Seventh Circuit also relied on the fact that the defendant had in its possession contact information for 4.7 million class members and could have mailed checks directly to such purchasers. *Id.* at 784. It is undisputed that Duracell possesses no such information (and Objectors'

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[8] Objectors' groundless argument that the settlement here unreasonably caps the number of packages for which a class member could make a claim is addressed below. *Infra*, pp. 29-32.

contention that class counsel or Duracell were required to try to ferret it out from hundreds or thousands of retailers is unfounded (*see infra*, pp. 34-41)).

Objectors' other cases are similarly inapposite. The settlements they considered offered far less than (and sometimes only a small fraction of) the value of the claim, or offered only coupons toward future purchases with no cash component. *See, e.g., Eubank v. Pella Corp.,* 753 F.3d 718, 723-24 (7th Cir. 2014) (up to half of class members were only given coupons; other class members could receive monetary payments, but such payments were capped and (if the claimant elected a higher cap) required that the claim be arbitrated with the defendant preserving the right to assert defenses; court also found that the class counsel had a conflict of interest, because he was the son-in-law of the class representative and because he was embroiled in state bar disciplinary proceedings that gave him an incentive to settle quickly); *In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 176 (3d Cir. 2013) (likely damages per class member were $150 after trebling but settlement offered only $5 without proof of purchase); *In re Dry Max Pampers*, 724 F.3d at 718-19 (compensation offered to the class was a coupon for one free box of disposable diapers for class members who had an original receipt and the UPC code from a previous purchase; relief was similar to an earlier refund program that had been offered to the class separate and apart from the litigation); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (no

cash compensation at all to class members; $100,000 *cy pres* award to non-profit organizations).

By contrast, the settlement here offers full cash compensation to class members (not a coupon for more product) without any required proof of purchase, with even greater compensation if consumers have proof of purchase. Objectors cite no case in which a settlement of this type has been disapproved as inadequate to class members.

C. The Additional Forms of Recovery Provided by the Settlement Further Support the Adequacy of the Settlement.

For the reasons discussed above, the cash payments available under the settlement are sufficient by themselves to make the compensation to the class fair, reasonable, and adequate. Thus, even if Objectors' arguments regarding the injunctive relief and in-kind payment components of the settlement had any merit, that would not affect the adequacy of the compensation to the class. In fact, however, the objections do not have merit and these additional components of value to the class are further reason to find the settlement reasonable.

1. The in-kind payments benefit class members.

Objectors argue that Duracell's commitment to donate a retail value of $6 million in batteries should be discounted (or found improper) because such distributions must be limited to cases in which it is not feasible to make direct

payments to class members. Br. 43-52. Objectors characterize the donation as a "premature" *cy pres* distribution. Br. 45. This argument is unfounded for at least two reasons. First, the in-kind payment is not intended to substitute for actual payments to class members and does not displace those payments. The settlement agreement provides for cash payments to every class member in amounts that generally exceed their total alleged damages, without any limitation on the total overall payment to the class. Thus, there is no issue here of diminishing direct recovery to class members by "favoring" *cy pres* over the class. Br. 2. *See In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico*, 910 F. Supp. 2d 891, 960 (E.D. La. 2012) (approving creation of separate fund to promote tourism as creating additional value for class "on top of the full compensation that [class members] will receive for their economic losses"). Second, as discussed below, it is not in any event feasible to make cash payments directly to class members, who are consumers whose identities are unknown and not discoverable through any reasonable effort. *See infra*, pp. 34-41.

Nor is there any merit to Objectors' assertion (Br. 43) that the in-kind donation does not benefit the class because the recipient organizations are not themselves individual class members. The donations benefit consumers of batteries (volunteer firefighters and emergency workers, parents, etc.), and no other readily identifiable group is significantly more likely to include purchasers of Ultra

batteries. Donating batteries to these organizations, which in turn put the batteries in the hands of individuals and families, benefits individuals who otherwise would have to spend their own money to purchase the batteries. Dkt. 153, ¶ 7. Courts have approved similar settlement distributions to groups that include potential purchasers of the goods in question. *See In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 350 (E.D.N.Y. 2000) (cash and in-kind donations distributed to non-profit organizations "to benefit children by providing them with toys, books or other educational materials"); *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D. 349, 355 (D.D.C. 2007) (approving donation of $3 million worth of contraceptive product to medical organizations that prescribed similar contraceptives without receiving free samples of the product).

Moreover, the types of organizations to which the batteries will be donated are defined in the settlement agreement—*i.e.*, first responder charitable organizations, the Toys for Tots charity, the American Red Cross or 501(c)(3) organizations that regularly use consumer batteries or related products. *Compare In re Tyson Foods Inc., Chicken Raised Without Antibiotics Consumer Litig.*, 2010 U.S. Dist. LEXIS 48518 at *14-*15 (D. Md. May 11, 2010) (identifying *cy pres* recipients at fairness hearing). Objectors complain that this description is "unacceptably vague" (Br. 50), but they do not suggest any reason why a more specific provision would be materially important to class members. They assert

that some class members might have an "ideological" objection to a particular charity. Br. 52. But this is a damages case over batteries, not a civil rights action. Objectors do not explain what legitimate ideological objection could be made to giving batteries to charitable organizations that purchase and use batteries.

2. The injunctive relief is also a valuable benefit to the class.

The settlement agreement requires that Duracell stop using any of the advertising statements challenged in this action—*i.e.*, any advertising that Ultra batteries in their current chemical formulations are Duracell's "longest lasting" or that they last "up to 30% longer in toys* *vs. Ultra Digital." Dkt. 113-1, ¶ 58. Objectors argue that this injunctive relief provision has no value because Duracell had already decided to stop selling Ultra batteries. Br. 33. But this contention ignores the timing of these lawsuits and of the settlement. The lawsuits were filed in April 2012. Duracell did not announce that it would discontinue the Ultra batteries until July 2013, when mediation and settlement negotiations were underway. Dkt. 153, ¶ 3. And the filing of these lawsuits played a material role in Duracell's decision to do so and to discontinue the challenged advertising. *See* Dkt. 113-1, ¶ 58; Dkt. 153, ¶ 4.

Objectors argue that injunctive relief has no value to people "who have done discrete business with defendants in the past." Br. 34. But they do not—and cannot—assert that buying batteries is a "discrete" activity that occurs only once.

That being the case, the injunctive relief benefits both past purchaser class members (who are likely to buy again), as well as future purchasers. *See Pom Wonderful LLC v. Purely Juice, Inc.*, 2008 U.S. Dist. LEXIS 55426, at *44 (C.D. Cal. July 17, 2008) ("the public interest clearly favors injunctive relief to prevent the false advertising of . . . product[s]"); *Hot Wax, Inc. v. S/S Car Care*, 1999 U.S. Dist. LEXIS 16444, at *27-*28 (N.D. Ill. Oct. 13, 1999) (same); *see also In re Ferrero Litig.*, 2012 U.S. Dist. LEXIS 94900, at *12 (S.D. Cal. July 9, 2012) (modification of product label, among other concessions, "provides an appropriate remedy to class members").

D. Objectors' Argument That Class Members Should Have Been Offered More Money Is Meritless.

Objectors assert that the payments offered to class members were not fully compensatory and could have been "augmented" without creating a windfall. This argument is groundless.

1. The limit on the number of packages individual class members may claim is reasonable.

Objectors argue that more money might have been claimed if the settlement had relaxed the proof of purchase requirement or the cap on the number of packages class members could claim. *E.g.*, Br. 28. The limits on claims, however, were necessary to prevent fraud, and did not result in less-than-full compensation.

The marketing data available to Duracell shows that the average household that purchased Ultra batteries purchased only slightly more than one package during the class period. Dkt. 154, ¶¶ 13C & 13D. Thus, for the average purchaser, the right to claim two packages without any proof of purchase (and up to four with proof of purchase) offered them more than full compensation. And, even for class members who purchased more than the average, the per package compensation is sufficiently generous that they are likely receiving a large percentage of the full price differential even with the limits. When the risk of not prevailing is taken into account, these purchasers are receiving full compensation.

Beyond that, requiring proof of purchase for claims for more than two packages was itself reasonable. Some mechanism must exist to prevent fraudulent claims. Thus, courts routinely approve settlement agreements that limit the number of claims a class member may make without proof of purchase.[9] And

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[9] *See, e.g., Nigh v. Humphreys Pharmacal, Inc.*, 2013 U.S. Dist. LEXIS 161215, at *21 (S.D. Cal. Oct. 23, 2013) (final approval of settlement that limited reimbursement five purchases of product without proof of purchase and 10 purchases with such proof); *Bruno v. Quten Research Inst., LLC*, 2013 U.S. Dist. LEXIS 35066, at *4 (C.D. Cal. Mar. 13, 2013) (final approval of settlement agreement that capped reimbursement for claims without proof of purchase to three purchases); *Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, at *10 (E.D. Cal. Aug. 13, 2008) (final approval of settlement agreement that capped reimbursement for claims without proof of purchase to six purchases); *see also Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 568 (S.D. Iowa 2011) (final approval of settlement agreement that capped claims without proof of purchase to 1/3 the value of claims that submitted such proof); *In re Tyson Foods Inc.*, 2010 U.S. Dist.

(continued)

given that, on average, class members purchased less than two packages, to the extent that raising or eliminating the proof of purchase requirement and the cap on packages would have resulted in more claims being made, it is highly likely that the vast majority of those additional claims would have been fraudulent.[10] It is also likely that increasing the amount that could be claimed without proof of purchase by another $3 or $6, would induce few, if any, additional claims. The low claims rate here reflects only that plaintiff sued over an inexpensive consumer product, in which the alleged damages amount to only a few dollars, or less, per purchase. It does not mean that the settlement is invalid or that claims have been artificially or improperly limited. Objectors themselves describe a $6 payment as too "feeble" to motivate purchasers to make claims. Br. 30. But $6 exceeds the full amount of alleged damages for the average class member. *See supra*, pp. 21-22. The issue here is not the amount offered in settlement, but the amount of the alleged damage.

LEXIS 48518, at *6 (final approval of settlement agreement that created three tiers of claimants, first two tiers did not require proof of purchase and were limited to recovery of $5 coupon or $10 cash, respectively, third tier required such proof and provided up to $50 in compensation).

[10] Among the websites that linked to the settlement website in this case were freestufftimes.com, www.totallyfreestuff.com, thefreebieblogger.com, freesamplesite.com, heavenlysteals.com, and fatwallet.com. Dkt. 152, ¶ 6.

Numerous cases have upheld settlements where the response was low due to the small amounts at issue.[11]

2. Plaintiff had no material damages claim other than for the price differential.

Nor is there any merit to Objectors' argument (Br. 49) that plaintiff's allegations regarding punitive damages, disgorgement, resitution and statutory damages could justify a higher payment per package.

Objectors do not show that plaintiff had any realistic prospect of recovering any of this relief. Plaintiff asserted a single cause of action under the Florida Deceptive and Unfair Trade Practices Act. Dkt. 117, pp. 13-15. That statute permits recovery only of "actual damages." Fla. Stat. § 501.211. It does not allow for punitive damages, disgorgement, or other forms of monetary relief. *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. App. 1984) ("A claim for punitive damages is outside the scope of chapter 501 and the FDUTPA."). Similarly, the California action that was dismissed as part of the settlement asserted a claim

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[11] *E.g., Shames v. Hertz. Corp.*, 2012 U.S. Dist. LEXIS 158577, at *47-*49 (S.D. Cal. Nov. 5, 2012) (upholding settlement with 4.9% response rate at time of hearing); *Touhey v. United States*, 2011 U.S. Dist. LEXIS 81308, at *21-*22 (C.D. Cal. July 25, 2011) (finding that 2% response rate did not militate against final approval); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 2011 U.S. Dist. LEXIS 40843, at *25 (D. Me. Apr. 13, 2011) (approving settlement where response rate was 3.9% of claimants eligible to receive cash payment and 0.6% of the overall class); *Spillman v. RPM Pizza, LLC*, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (granting approval where less than 1% of class had submitted claim at the time of approval).

under California's Unfair Competition Law ("UCL"). That statute permits recovery only of "restitution," which in a case like this is measured by the "difference between what the plaintiff paid and the value of what the plaintiff received." *In re Vioxx Prods. Liab. Litig.*, 180 Cal. App. 4th 116, 131 (2009). Punitive damages and disgorgement are not permitted. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003) (holding that disgorgement is not an available remedy under the UCL); *Kraus v. Trinity Mgmt. Servs., Inc.* 23 Cal. 4th 116 , 137 (2000) ("the Legislature has not expressly authorized monetary relief other than restitution in UCL actions"). Nor are statutory damages.[12]

Plaintiff also refers in his complaint to making a claim under the similar laws of other states. Dkt. 117, ¶ 39. But Objectors do not show that the laws of other states provide for meaningfully greater relief than the deceptive trade practices laws of Florida and California. Objectors cite (Br. 49) to a law review article to support the notion that states around the country permit statutory damages. In fact, the article shows that statutory damages are generally not permitted in class actions such as this. Ryan P. O'Quinn & Thomas Watterson,

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[12] The California action also included a claim under the California Consumer Legal Remedies Act. But that statute—unlike FDUPTA, the UCL and other similar deceptive practices statutes—requires proof of actual reliance and individual injury, thus making class certification and ultimate recovery in a case like this unlikely. *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) ("actual reliance must be established for an award of damages under the CLRA").

Fair is Fair: Reshaping Alaska's Unfair Trade Practices and Consumer Protection Act, 28 Alaska L. Rev. 295, 305-06 (2011).

3. The parties were not required to individually notify class members.

Finally, Objectors argue that class counsel should have been required to identify and notify class members individually. Br. 24-29. Objectors do not dispute that Duracell does not sell batteries at retail and has no records from which individual battery purchasers can be identified. *See* Dkt. 154, ¶ 5. Thus, Objectors argue that plaintiff was required to try to obtain that information from retailers.

If accepted, Objectors' argument would require an enormous, protracted, uncertain, and expensive effort that would make settlement in cases such as this infeasible. Duracell batteries are sold in an exceedingly broad array of retailers around the country—grocery stores, drug stores, home improvement stores, big-box retail stores, hardware stores, electronics stores, corner markets, office supply stores, toy stores, camera stores, gas station convenience stores, sporting goods stores, and so on. Objectors' proposal would require issuing subpoenas to these hundreds or thousands of retailers, the vast majority of which are unlikely to have any records that could identify their customers or what they purchased. For any retailers who may have such information, legitimate customer data privacy concerns will likely cause the retailers to resist providing the information, resulting in a multitude of judicial proceedings around the country to enforce subpoenas.

And, to the extent that this process can identify any purchasers, there will be additional processing costs to cull their information from the data and prepare and send any individualized notice.

Objectors cite no authority supporting a requirement that this road be traveled as a condition of class settlement approval. Objectors rely principally on the settlement in *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 09-md-2023 (E.D.N.Y.). But the court there did not rule that individual notice is required, let alone that class counsel must embark on a campaign of third-party subpoenas to try to identify class members as a condition of settlement approval. It merely approved an amended settlement under which direct payments would be made to consumers whose identity had already been determined through a handful of subpoenas plaintiffs had issued to retailers in the discovery phase of the case. *Id.,* Dkt. 218-1, p. 6.

Objectors' other cases are similar. In *Pearson,* 772 F.3d at 783, the court observed that the defendant knew who 4.72 million of the purchasers were and payments could have been made directly to those purchasers. In *McDonough v. Toys "R" US, Inc.*, No. 06-cv-00242, Dkt. 895 (E.D. Pa. Jan 21, 2015), the defendant was itself the retailer, and its own business records allowed it to identify purchasers. *Id.*, p. 6.

Objectors also rely on *Pecover v. Electronic Arts Inc.*, No. C 08-02820, Dkt. 449 (N.D. Cal. Apr. 2, 2012), as a case in which the district court "augmented" the class recovery by ordering "automatic distribution" to class members. Br. 29. In fact, the district court ***rejected*** Frank's assertion in that case that the defendant should be ordered to "'reach out' to video game retailers and conduct other search efforts" to identify additional purchasers. *Id.* Instead, as in the other cases Frank cites, the court ordered direct payments only to the purchasers who could be identified from the defendant's own records. *Id.*

At best, these cases stand for the proposition that direct notice or payments may reasonably be made when the parties have in their possession records that identify individual purchasers. They do not hold that parties cannot settle their cases (or cannot settle where the claims rate is low because the value of the claim is low) unless they incur the time and expense of affirmatively scouring the country to ferret out the names and addresses of millions of individual class members to send them a $3 or $6 check.

Imposing such a requirement would be particularly unfounded in a case like this, in which the battery sales are dispersed across such a wide variety of retailers and the dollar amounts at stake are so small. Whether or not it would be reasonable to seek out individual class members when the product at issue is sold at a small number of retailers who likely have purchaser information, it is not

reasonable when the retailers number in the hundreds or thousands. Nor is it reasonable to demand such an effort when the amount paid to any individual class member is only a few dollars, reflecting that any true damage incurred by class members is minimal and the compensatory function served by the payments is slight.

Indeed, it is precisely in these circumstances that the courts have ruled that it is ***not*** reasonable, and would defeat the purposes of a class action, to require class action litigants to try to identify individual class member purchasers. In *Hughes v. Kore of Ind. Enter.*, 731 F.3d 672, 676–77 (7th Cir. 2013), a putative class of up to 2,800 consumers brought suit alleging that the defendant had failed to put a sticker notice regarding ATM transaction fees on two ATM's, as required by the Electronic Funds Transfer Act. The maximum recoverable damages for each class member was $3 per ATM transaction. The Seventh Circuit ruled that individual notice to the class members was impractical, because the ATM machines did not store customer names. Instead, identifying individual customer names would require subpoenaing each of the "hundreds of banks" at which the ATM customers had their accounts. *Id.* at 676. The court found that such extensive work, for a case with small per person damages, was unreasonable. Individual notice is required only to those class members "who can be identified through reasonable effort." *Id.* at 676 (quoting Fed. R. Civ. P. 23(c)(2)). The court concluded that,

because the damages at stake were so small and the number of banks whose records would have to be subpoenaed so large, the members could not be individually "identified through *reasonable* effort, effort commensurate with the stakes." *Id.* (emphasis in original). Accordingly, notice by publication was sufficient.

This case presents an even stronger circumstance for not requiring the parties to try to identify individual class members. Whereas subpoenas to the banks would have permitted identification of each class member, subpoenas in this case would identify at best only a fraction of the class members. Moreover, the millions of class members in this case, and the large number of retailers from which they purchased those batteries, dwarf the 2,800 class members in *Hughes* and their home banks.

That the Seventh Circuit was considering class notice under Rule 23(c)(2), rather than notice of a settlement under Rule 23(e), does not change this analysis. Rule 23(c)(2) imposes a higher standard than Rule 23(e), which means that notice that suffices under Rule 23(c)(2) necessarily also satisfies Rule 23(e). *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at *38 (N.D. Tex. Nov. 8, 2005) (Rule 23(e) "is considered less stringent than Rule 23(c)(2)"); *In re Oil Spill*, 910 F. Supp. 2d at 913 (same). No other result would make sense. If Objectors'

argument were accepted, the class could have been ***certified*** in *Hughes* without individual notice, but it could not have been ***settled*** without such notice.

Imposing higher discovery and notice requirements in the context of settlement also ignores that the whole point of a settlement is to avoid the expense and risk of litigation. *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) ("The parties to litigation may by compromise and settlement not only save the time, expense, and psychological toll but also avert the inevitable risk of litigation."). Conditioning the right to settle on the parties' embarking on a gargantuan discovery effort, with innumerable contested judicial proceedings around the country, would defeat that purpose. Not only would it significantly increase the cost of resolving the case, but the amount of the costs would be highly variable and difficult to predict, making it virtually impossible for parties to know at the time of settlement what they are agreeing to. Imposing these additional costs and uncertainty as the price of settling a case will chill settlements of these kinds of cases, in direct contradiction of the courts' longstanding recognition that settlements are desirable and should be encouraged. *Bennett,* 737 F.2d at 986 (in class action case, referring to the "strong judicial policy favoring settlement"); *Pilkington v. Cardinal Health, Inc.* (*In re Syncor ERISA Litig.*), 516 F.3d 1095,

1101 (9th Cir. 2008) ("there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned").[13]

There will be external costs as well, as the additional costs would not be limited to the litigants. Retailers whose customer purchase records are sought will incur legal fees in responding to the subpoena and insuring that proper measures are taken to protect privacy rights. At least a portion of these expenses will be incurred even by retailers who have no records to produce (but who must nonetheless properly respond to the subpoena). For those retailers who have the records, they will incur the further expense of their employees accessing the company's data to find the relevant purchase data, and producing a data report or file that contains only the relevant purchases, with only the relevant accompanying customer information.

In short, the district court was entirely correct in ruling that it would be "difficult, expensive, and essentially fruitless" to require that retailers be

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[13] Objectors complain that the parties did not present evidence to the district court quantifying these costs when Frank raised this argument in his closing memorandum in support of his objection (a memorandum to which the parties had no right to reply). Dkt. 162. But there is—and can be—no dispute that retailers for Duracell batteries are ubiquitous around the country, and that any attempt to subpoena records from these retailers would be enormously expensive. Nor can it be disputed that a very large percentage of these retailers do not have any records that would identify individual customers and their purchases. Objectors do not argue otherwise, referring only to membership stores and stores with loyalty programs as likely having individual customer purchase records.

subpoenaed. Dkt. 168, p. 6. No court has imposed such a requirement, and no legitimate basis exists for doing so.

E. Defendant's Agreement Not To Oppose Class Counsel's Fee Request Was Reasonable and Proper.

Objectors attack as improper, and as casting doubt on the adequacy of the settlement, the settlement's provision that Duracell would not oppose class counsel's request for fees and expenses up to $5.68 million. Br. 35-37. This Court, however, has recognized that such "clear sailing" clauses serve the entirely legitimate purpose of giving "defendants a more definite idea of their total exposure." *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1292-93 n.3 (11th Cir. 1990). As the Second Circuit has observed, "where . . . the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems . . . that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985), *abrogated on other grounds, Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997); see also Fed. R. Civ. Proc., Rule 23(h), 2003 Advisory Committee Comment (noting that an "agreement by a settling party not to oppose a fee application up to a certain amount . . . is worthy of consideration, but the court remains responsible to determine a reasonable fee.")

Objectors argue that a "clear sailing" provision may show that the parties colluded to agree to a lesser payment to the class in exchange for a larger fee award to class counsel. Br. 35. The district court—which presided over this case from the beginning and was well familiar with the issues—rejected this argument, finding "[t]here is no suggestion of fraud or collusion between the parties and no evidence of want of skill or lack of zeal on the part of Class Counsel." Dkt. 168, p. 8. This ruling was not an abuse of discretion for at least three reasons.

First, the settlement negotiations were conducted through an experienced and respected court-appointed mediator, Rodney Max. Mr. Max submitted a sworn declaration, in which he affirmed that the settlement was the "product of lengthy and particularly hard-fought negotiations." Dkt. 114-3, ¶ 12. He stated that he "never witnessed or sensed any collusiveness between the parties. To the contrary, at each point during these negotiations, the settlement process was conducted at arm's-length and, while professionally conducted, was quite adversarial." *Id.* ¶ 14. This evidence demonstrates that there was no collusion in the settlement process. *Hainey v. Parrott*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007) (the "participation of an independent mediator in the settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties"); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) ("Parties colluding in a settlement would hardly need the services

of a neutral third party to broker their deal."); *Shames*, 2012 U.S. Dist. LEXIS 158577, at *43 (rejecting objection to inclusion of clear-sailing provision in class settlement since there was "no evidence of collusion in the settlement process"); *McKinnie v. Hertz. Corp.,* 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009) (approving settlement with a clear sailing provision because, among other things, "the settlement was achieved after arms-length negotiation with the assistance of a Seventh Circuit mediator").

Second, as Mr. Max attested, the "provisions of the settlement providing for attorneys' fees and payment to the Named Plaintiff were negotiated only after the substantive relief to class members was agreed upon. There were no discussions of attorneys' fees, costs, or payment to the named Plaintiff until the substantive terms of the settlement were negotiated." Dkt. 114-3, ¶ 15; *see In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 335 (3d Cir. 1998) (rejecting objection to inclusion of clear-sailing provision in class action settlement since there was "no indication the parties began to negotiate attorneys' fees until after they had finished negotiating the settlement agreement"); *Fladell v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 156307, at *14 (S.D. Fla. Oct. 29, 2014) ("Furthermore, although the Settlement Agreement includes a "clear-sailing" provision, that is immaterial. There was no collusion in the settlement negotiations and the Parties

began negotiations regarding attorneys' fees only after finishing negotiating the Settlement itself.").

Third, any implication that class counsel shortchanged the class in exchange for higher fees is defeated by the full compensation the settlement offers to class members. The class was not shortchanged when the settlement provides them the full amount of the damages to which they would have been entitled had they prevailed at trial—and certainly no finding of inadequacy can be made when the risk of plaintiff not prevailing is factored in. *Gascho v. Global Fitness Holdings, LLC*, , 2014 U.S. Dist. LEXIS 46846, at *74 (S.D. Ohio Apr. 4, 2014) ("Where, as here, the value of the settlement to class members is reasonable, the risk of collusion associated with a clear sailing provision . . . is diminished.").

Objectors focus on the amount actually claimed by class members. But that amount does not reflect any shortchanging, but only that plaintiff brought suit over an inexpensive consumer product that class members only infrequently purchased, with the result that their claimed damages are small. Duracell was not obligated to agree to provide class members a windfall—in the form of payments that exceed any appropriate measure of potential recovery—simply to generate additional claims and a larger class payout.

Nor is it correct that Duracell's agreement to not oppose a fee award of up to $5.68 million means that Duracell was agreeing that some or all of that amount

could be paid to the class if the fee request was found excessive. Duracell's only agreement regarding cash compensation to the class was its agreement to pay the cash amount offered per package. If the amount class counsel requested for fees was excessive, that means only that the amount requested was excessive, not that the amount agreed to for the class was inadequate and should be augmented.

Objectors assert that an economically rational defendant is indifferent as to how the total amount it pays is allocated between class members and class counsel. Br. 39. At least in the context here, however, where class members are already offered fully compensatory payments and the fee award is to be paid separately by the defendant, that is not true. A defendant has a legitimate interest in class members not being offered excessive compensation, as such overcompensation increases its liability and improperly incentivizes class action lawsuits. For similar reasons, defendants also have an interest in class counsel not being awarded excessive fees. If the amount of fees requested is determined by the court to be unreasonable, that determination means that the defendant has no obligation to pay such fees. It does not mean the class should be paid the amount excessively sought.

Similarly, Objectors are incorrect in asserting (Br. 35-36) that the only possible consideration for a clear sailing provision is class counsel's agreement to accept lower compensation for class members. Separately agreeing to the class

compensation before commencing negotiations on fees prevents that kind of bargaining. Rather than a reduction in amounts paid to the class, the benefit to the defendant from a clear sailing agreement is class counsel's agreement not to seek fees higher than the amount the defendant agrees not to oppose. Dkt. 113-1, ¶ 63.

Objectors argue that clear sailing provisions prevent district courts from considering an adversarial presentation as to the amount of the fees to be awarded. Br. 36. Here, however, the district court postponed the due date for objections to the settlement until after class counsel filed their motion for fees, thus ensuring that Objectors and any others who wished could examine the fee request and object to any portion deemed excessive. Dkt. 141. Likewise groundless is Objector's argument that clear sailing clauses can improperly encourage class counsel to "submit only the barest of lodestar billing records." Br. 36. To the extent litigants in a case like this submit insufficient records, district courts have ample power (whether or not a clear sailing clause exists) to deny the fee request or defer ruling on the fee request until such records are submitted.

F. The Settlement Agreement Properly Employs a Claims Process.

Objectors assert that settlement here was "inferior" and should have been subjected to a strong presumption of invalidity" because it was not a common fund settlement—*i.e.,* a settlement in which the defendant agrees to pay an unsegregated lump sum from which class counsel's fees are paid. Br. 38. Instead, the settlement

calls for Duracell to pay all valid class member claims, without any overall limit, and for class counsel to apply separately to the court for an award of fees from Duracell.

The parties' settlement structure is valid. It is commonly known as a "claims made" settlement, which courts have routinely approved. "There is nothing inherently objectionable with a claims-submission process, as class action settlements often include this process, and courts routinely approve claims-made settlements." *Shames,* 2012 U.S. Dist. LEXIS 158577, at *31 (citing *Guschausky v. Am. Family Life Assur. Co.,* 851 F. Supp. 2d 1252, 1259 (D. Mont. 2012); *Pelletz v. Weyerhaeuser Co.,* 255 F.R.D. 537, 544 (W.D. Wash. 2009); *Lemus v. H & R Block Enters. LLC,* 2012 U.S. Dist. LEXIS 119026 (N.D. Cal. Aug. 22, 2012); *Morales v. Stevco, Inc.,* 2012 U.S. Dist. LEXIS 68640 (E.D. Cal. May 16, 2012); *Harris v. Vector Mktg. Corp.,* 2012 U.S. Dist. LEXIS 13797 (N.D. Cal. Feb. 6, 2012)).[14]

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[14] *See also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011) ("there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment"); *McKinnie*, 678 F. Supp. 2d at 814 ("requiring claimants to verify on the claim forms that they meet class requirements" was not improper); *Milliron v. T–Mobile USA, Inc.,* 2009 U.S. Dist. LEXIS 101201, at *19 (D.N.J. Sept. 10, 2009) (finding "it perfectly appropriate to require Class members to submit certain information proving that they are entitled to collect the relief awarded in this case"), *aff'd*, 423 F. App'x 131 (3d Cir. 2011); *Mangone First USA Bank*, 206 F.R.D. 222, 234–35 (S.D. Ill. 2001) (rejecting objectors' argument that bank should bear the burden of establishing which class

(continued)

Here, a claims process was necessary because Duracell does not have records that identify class members apart from whatever claims they file. The claims process was also necessary to determine which purchasers possess proof of purchase of more than two packages and are thus entitled to a higher payment. Other than their groundless argument that the parties should have been required to track down purchasers through retailers, Objectors offer no means by which payments could be made without a claims process.

Objectors argue that, if a common fund had been created and the fees paid out of that fund, the court could have re-allocated to class members any excess in the fees requested. Br. 38. But, for the reasons already discussed, any such re-allocation would be improper, because the cash payments offered to the class members are already fully compensatory and any additional payments would only create a windfall.

III. THE UNDERLYING SETTLEMENT CAN AND SHOULD BE AFFIRMED NOTWITHSTANDING ANY ISSUES REGARDING THE FEE AWARD.

As explained above, the underlying settlement in this case is fair and reasonable. This Court can and should therefore affirm the district court's order approving the underlying settlement regardless of its resolution of the issues raised

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members were entitled to relief because "[c]lass action status does not alter th[e] basic principle" that "a plaintiff in a civil lawsuit bears the burden of proving liability and damages in his or her case.").

by Objectors on attorneys' fees. The settlement agreement does not condition any of the substantive relief to the class (or the release of class members' claims) on the Court granting class counsel's fee request in any specific amount. To the contrary, it provides that the "Court's award of any fees, costs and expenses to Class Counsel shall be separate from its determination of whether to approve the Settlement and this Agreement." Dkt. 113-1, ¶ 65.

This Court and others have affirmed approval of underlying settlements notwithstanding issues on attorneys' fees. *See Dikeman v. Progressive Express, Inc.*, 312 Fed. Appx. 168, 171 (11th Cir. 2008) (finding that district court did not abuse its discretion in approving the settlement agreement, but remanding for further consideration of fee request); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967-68 (9th Cir. 2009) (same); *see also In re Prudential*, 148 F.3d at 346 ("For the foregoing reasons, we will affirm the certification of the proposed class and the approval of the settlement, and vacate and remand on the issue of attorneys' fees.").

CONCLUSION

The judgment should be affirmed.

Dated: February 4, 2015

Respectfully submitted,

By:/s/ Craig E. Stewart

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CERTIFICATE OF COMPLIANCE WITH 11TH CIR. R. 28-1(m)

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 11,873 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4, as counted by Microsoft Word 2007.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in proportionally spaced typeface in 14-point Times New Roman font.

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On February 4, 2015, I electronically filed the foregoing document BRIEF OF APPELLEES THE GILLETTE COMPANY AND THE PROCTER & GAMBLE COMPANY using the CM/ECF system and it was served electronically on the following: David Matthews Allen, Christopher A. Bandas, Christopher Bandas, Sam Cannata, Darren Cottriell, Dennis G. Pantazis, Sr., John Jacob Pentz III, Noah Schubert, Robert C. Schubert, Adam Ezra Schulman, and Brian Mark Silverio.

I further certify that on February 4, 2015, I mailed the foregoing document by first-class mail to the following non-CM/ECF participants: See attached list.

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