APPENDIX A
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-13882

D.C. Docket No. 6:12-cv-00803-GAP-DAB

JOSHUA D. POERTNER,
Individually and on behalf of all others similarly situated,
Plaintiff–Appellee,

CHRISTOPHER BATMAN, ROBERT FALKNER, THEODORE H. FRANK, WANDA J. COCHRAN, GRACE M. MANNATA,
Interested Parties–Appellant,

versus

THE GILLETTE COMPANY,
THE PROCTOR & GAMBLE COMPANY,
Defendants–Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(July 16, 2015)

Before JORDAN and DUBINA, Circuit Judges, and GOLDBERG,* Judge.
PER CURIAM:

In this consolidated appeal, several objecting, unnamed class members challenge the district court's conclusions that (1) the settlement in a consumer class action was "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e); and (2) the attorneys' fees award was "reasonable" under Rule 23(h). After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm.

I.

Defendant The Gillette Co. owns the Duracell battery brand and is itself a wholly owned subsidiary of Defendant The Proctor & Gamble Co. For simplicity, we refer to both Defendants as Gillette.

In 2009, Gillette introduced a new line of batteries branded Ultra Advanced. According to Gillette's on-the-package marketing, these batteries were supposed to last longer than standard Duracell CopperTop batteries. In January 2012, Gillette began to phase out Ultra Advanced batteries, replacing them with batteries branded Ultra Power. Gillette also marketed Ultra Power batteries as superior to CopperTop batteries. Indeed, Ultra Advanced and Ultra Power batteries had the same

---

* Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

model number. For simplicity, we refer to both brands as Ultra batteries.

In May 2012, Gillette removed to the Middle District of Florida the class action that Joshua Poertner had brought in Florida state court. (Around the same time, Gillette removed a similar class action to the Northern District of California.) In his complaint, Poertner alleged that Gillette's marketing of Ultra batteries violated the Florida Deceptive and Unfair Trade Practices Act in several ways. On behalf of the class of Florida purchasers of Ultra batteries, Poertner sought actual damages, restitution, declaratory and injunctive relief, as well as costs and attorneys' fees.

In July 2013, while the parties were mediating, Gillette stopped manufacturing, packaging, marketing, and selling Ultra batteries.

In September, after months of court-ordered mediation, the parties settled. Under the settlement agreement, Poertner filed a third amended complaint that gave the class nationwide scope. The nationwide class comprised nearly 7.26 million persons who, with certain exclusions not relevant here, "purchased size AA or AAA Duracell brand Ultra Advanced and/or Ultra Power batteries at Retail from or after June 2009." Gillette thus obtained global peace as all class members released any nonpersonal-injury claims related to the allegations in the third amended complaint.

In return, class members were offered monetary relief. Those who filed valid claims would receive $3 per pack of batteries—up to four packs with proof of purchase and two packs without such proof. Claims

could be submitted online or by mail, and the form was straightforward: a one-page document that asked for the class member's contact information, the number of packages purchased, the type and size of the batteries, the purchase location, and the devices in which the batteries were used. Additionally, the class representative, Poertner, was allowed to seek an incentive award of $1500.

Class members were also provided nonmonetary relief. Gillette agreed to stop putting the allegedly misleading statements on the packaging of Ultra batteries. A material factor in Gillette's decision to do so was the litigation underlying the settlement.

Additionally, the settlement included a cy pres award. Gillette agreed to make a donation of $6 million of batteries to "first responder charitable organizations, the Toys for Tots charity, The American Red Cross or 501(c)(3) organizations that regularly use consumer batteries" (calculated at retail value) over the next five years. This amount was in addition to its previously agreed upon product donations.

Finally, the settlement addressed class counsel's fees and costs. The parties agreed that class counsel could seek up to $5.68 million in fees and costs without opposition from Gillette, an award that was to be shared by counsel in the Florida and California actions. The settlement, however, limited Gillette's payment obligation to the amount awarded by the district court. Class counsel and Gillette did not negotiate these terms until an agreement on all other material terms had been reached.

In November, the district court preliminarily approved this settlement. Because Gillette did not have any personal information about the unnamed class members, class notice was provided by publication through national periodicals and popular internet outlets.

In February 2014, class member Theodore H. Frank objected through counsel. The gist of his objection was that the settlement was structured so that class counsel benefited at the expense of the class. Others made similar objections. In light of these objections, the district court continued the fairness hearing to obtain claims data and additional briefing. The claims administrator reported that 55,346 class members made claims totaling $344,850.

After considering the parties' briefs and holding a fairness hearing, the district court overruled the objections and approved the settlement and class counsel's fees-and-costs request. Despite finding that "the $50 million [settlement valuation] calculation [was] somewhat illusory,"[1] the court concluded that the settlement was fair, reasonable, and adequate. In reaching this conclusion, the court found that the settlement's nonmonetary relief provided the class with "substantial equitable benefit" and that "it is

---

[1] Class counsel calculated this amount by multiplying the number of class members (7.26 million) by the amount that could be claimed without proof of purchase ($6) and adding the fees-and-costs award.

appropriate to consider the [charitable] donation in evaluating the settlement overall" because it indirectly benefits the class. The court also emphasized its analysis of the six factors in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), and found that "this settlement is the best practical means of providing relief to the Class."

Turning to attorneys' fees and costs, the district court found that class counsel's request was reasonable under either the percentage-of-the-fund method, which class counsel argued applied, or the lodestar method (applying a 1.56 risk multiplier). Lastly, the court reaffirmed its earlier findings that settlement provided the best practical notice and that the named representative was adequate.

For procedural reasons, the objectors filed separate appeals, and we combined them under the name of the first objector to appeal. On appeal, all objectors joined Frank's brief, so we refer to them as a single objector named Frank.

II.

Two standards of review apply here. First, we review our subject-matter jurisdiction de novo. *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1316 (11th Cir. 2013). Second, we review the approval of a class action settlement for abuse of discretion. *Id.* And "a district court's decision will be overturned only upon a clear showing of abuse of discretion." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983).

Discretion means that the district court has a "range of choice, and that its decision will not be

disturbed as long as it stays within that range and is not influenced by any mistake of law." *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1324 (11th Cir. 2005). Indeed, the district court abuses its discretion only "if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014) (quoting *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010)).

III.

We begin with Gillette's contention that Frank (and the other objectors) lack standing to appeal because none formally intervened in the district court. Relying on *Devlin v. Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002), Gillette argues that only class members who are part of a mandatory class action certified under Rule 23(b)(1)—as opposed to one like this that was certified under Rule 23(b)(3)—can appeal a settlement's approval. The crucial distinction between the two types of classes, according to Gillette, is the existence of opt-out rights. This is so, the company says, because *Devlin*, which involved a Rule 23(b)(1) class, recognized that "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 finding legally inadequate." *Id.* at 10-11, 122 S. Ct. at 2011. As a result, Gillette reads *Devlin* to deny objectors the

right to appellate review unless an appeal is their only way to avoid being bound.

Gillette's appellate-standing argument is unavailing. For starters, four of our sister circuits—the First, Sixth, Ninth, and Tenth Circuits—have expressly rejected such arguments. *See Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 39-40 (1st Cir. 2009); *Fidel v. Farley*, 534 F.3d 508, 512-13 (6th Cir. 2008); *Churchill Vill.*, L.L.C. v. GE., 361 F.3d 566, 572-73 (9th Cir. 2004); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257-58 (10th Cir. 2004). And the Seventh Circuit referred to a similar argument as "frivolous," disposing of it without discussion. *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014). Next, we agree with the First Circuit that "*Devlin* . . . is about party status and one who could cease to be a party is still a party until opting out." *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 40. We thus decline to adopt Gillette's cramped reading of *Devlin* and hold that Frank (and the other objectors) have standing to appeal.

We now turn to the merits of Frank's appeal.

IV.

The district court concluded that the settlement in this case was fair, reasonable, and adequate and that class counsel's request for fees and costs was reasonable. It did so after allowing the parties to fully brief the issues, holding a fairness hearing, and considering the relevant fairness factors established by this court. Based on our thorough review of the record, we hold that neither of the district court's conclusions constitutes a clear abuse of discretion.

The monetary relief that the settlement offered the class was fair. Indeed, the $6 that could be claimed without proof of purchase exceeded the damages that an average class member would have received if the class had prevailed at trial. And while monetary relief was available to only those class members who submitted claims, the use of a claims process is not inherently suspect. *See* 4 William B. Rubenstein, *Newberg on Class Actions* § 12:18 (5th ed. 2011), Westlaw (database updated June 2015) (noting that "a claiming process is inevitable" in certain settlements such as those involving "defective consumer products sold over the counter"). Nor was the claiming process—completing a one-page form and submitting it either online or by mail—particularly difficult or burdensome. *Contra Pearson v. NBTY, Inc.*, 772 F.3d 778, 782-83 (7th Cir. 2014) (concluding that the claims process of a consumer class action settlement appeared to have been designed "with an eye toward discouraging the filing of claims").

To determine whether the settlement's allocation of benefits was fair, the district court concluded that the value of the nonmonetary relief and cy pres award were part of the settlement pie. Neither conclusion rests on an incorrect or unreasonable application of our precedents. For example, in a case involving a class action settlement that created a reversionary common fund, we held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class," describing 25 percent as the "bench mark" attorneys' fee award. *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 770, 774, 775

(11th Cir. 1991).[2] But because "the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary," we concluded that district courts could also consider the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron,* 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989),[3] as well as "[o]ther pertinent factors," including "any non-monetary benefits conferred upon the class by the settlement[] and the economics involved in prosecuting a class action," in determining the reasonableness of a fee award. 946 F.2d at 775. And

---

[2] While no published opinion of ours extends *Camden I*'s percentage-of-recovery rule to claims-made settlements, no principled reason counsels against doing so. For, as one learned treatise aptly illustrates, properly understood "[a] claims-made settlement is . . . the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant"; indeed, the two types of settlements are "fully synonymous." 4 Rubenstein, *supra*, § 13:7.

[3] Johnson's twelve factors are:

> (1) time and labor, (2) novelty and difficulty of the questions, (3) requisite skill, (4) preclusion of other employment, (5) customary fee, (6) fixed or contingent fee, (7) time limitations, (8) amount involved and results obtained, (9) experience, reputation and ability of attorneys, (10) "undesirability" of the case, (11) nature and length of professional relationship with client, and (12) award in similar cases.

Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1294 n.5 (11th Cir. 1999) (summarizing factors in *Johnson*, 488 F.2d at 717-19).

in another case, we affirmed the district court's decision to disburse unclaimed compensatory damages through the use of fluid recovery, which is similar to a cy pres award.[4] *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986). Thus, by including the value of the nonmonetary relief and cy pres award as part of the settlement pie, we conclude that the district court did not abuse its discretion.

Nor was the district court's finding that the class received substantial benefit from the settlement's nonmonetary relief clearly erroneous. On appeal, Frank contends that the nonmonetary relief was illusory. This is so, he says, because Gillette was no longer selling Ultra batteries when it agreed to stop putting the allegedly misleading statements on the batteries' packaging. While true, this is only part of the story. The record, as the district court acknowledged, makes clear that Gillette's decision to stop selling and marketing Ultra batteries with the challenged statements on the packaging was motivated by the present litigation. Frank did not present any contradictory evidence to the district court. Thus, we conclude that the district court's valuation of the nonmonetary relief was supported by the record. *See Thelma C. Raley, Inc. v. Kleppe*, 867 F.2d 1326, 1328 (11th Cir. 1989) ("[A] finding of

---

[4] "At the highest level of generality, both fluid recovery and *cy pres* capture situations in which the class members' monies are directed in whole or part to third parties, though the specifics vary." 4 Rubenstein, *supra*, § 12:27.

fact [is] clearly erroneous if the record lacks substantial evidence to support it.").

And, despite Frank's contrary contention, we conclude that the district court's approval of the cy pres award was not inappropriate. As part of the settlement, Gillette agreed to donate $6 million worth of batteries to charity over five years. Importantly, the settlement's structure makes clear that nonclass-member charities have not been favored over class members because Gillette's battery donation is independent of the monetary relief available to the class. Given this fact and Frank's failure to identify any binding precedent prohibiting this type of cy pres award, we decline to overturn the district court's settlement approval. Also, we are unpersuaded by Frank's claim that the district court erred in approving the settlement because the charitable recipients of Gillette's distribution are unacceptably vague. The settlement provides that the donation recipients will be "charitable organizations, including but not limited to first responder charitable organizations, the Toys for Tots charity, The American Red Cross or 501(c)(3) organizations that regularly use consumer batteries." Neither Rule 23 nor due process requires more. We thus hold that district court's approval of the cy pres award was not a clear abuse of discretion.

Also, Frank contends that the record does not support the district court's finding that "this settlement is the best practical means of providing relief to the Class." We disagree. As the district court noted, the record is clear: "Gillette does not sell at retail, so it has no records from which to identify

actual purchasers of Ultra batteries." In the district court, Frank did not contest this fact or the evidence introduced to support it. Instead, he pointed out that in other class actions, including those involving inexpensive consumer products, the identities of many class members were ascertained by subpoenaing the customer records of a handful of major retailers. He thus concluded that the settling parties could provide individualized notice or direct payment to at least some class members by taking a similar approach here. But even if it was possible to identify *some* unnamed class members, that does not mean that the district court lacked the discretion to approve the settlement as fair absent the identification of these class members. Nor does Frank's "evidence"—which consisted of his beliefs that "several vendors" have "loyalty cards or other customer records" and a 2012 newspaper article "documenting [the] degree" to which retailers collect and use customer information—negate the fact that Gillette lacked any class-member contact information. Hence, the district court's finding that "attempting to gain [class members' contact] information from retailers would be difficult, expensive, and essentially fruitless" was not unsupported by the record.[5]

---

[5] Even though the crux of Frank's arguments on appeal center on settlement fairness, he makes a couple of references to adequacy-of-representation issues that potentially cast doubt on the propriety of the settlement's approval. But because these issues were raised only in passing, they have been waived. *See*

Further, Frank devotes a lot of attention to the settlement's "red flags" of unfairness: the "clear-sailing" and "kicker" clauses relating to class counsel's fees and costs.[6] In his view, these clauses are "'subtle signs' that objectively the class is not getting as good of a deal as it could have if class counsel was not self-dealing." But we conclude that Frank's self-dealing contention is belied by the record: the parties settled only after engaging in extensive arms-length negotiations moderated by an experienced, court-appointed mediator.

Finally, Frank claims that the settlement is unfair because class counsel's slice of the settlement

---

Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

[6] A "clear-sailing" clause is an "agreement[ ] whereby the defendant agrees not to contest class counsel's fee petition as long as it does not exceed a specified amount." 4 Rubenstein, *supra*, § 13:9. Some courts and commentators have noted that clear-sailing clauses could allow "a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class." *E.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

A "kicker" clause provides that "all fees not awarded would revert to defendants rather than be added to the *cy pres* fund or otherwise benefit the class." *Id.* Some courts and commentators have noted that kicker clauses are potentially problematic because they deprive the class of benefits that the defendant is willing to pay. *See, e.g., id.* at 949.

pie is too large (i.e., the fees-and-costs award is unreasonable). But this objection is based on Frank's flawed valuation of the settlement pie: limiting the monetary value to the amount of Gillette's actual payments to the class along with excluding the substantial nonmonetary benefit and the cy pres award. Given the district court's settlement valuation, which we conclude from the record is not clearly erroneous, we hold that the district court's approval of class counsel's fees-and-costs award was not an abuse of discretion.

V.

After carefully reviewing the settlement in this case, we conclude that the district court did not use the wrong legal standards, apply our precedents unreasonably or incorrectly, follow improper procedures, or make clearly erroneous findings of fact in deciding that the settlement was fair, reasonable, and adequate and that class counsel's fees-and-costs request was reasonable. Accordingly, we affirm the district court's final order and judgment approving the settlement and awarding class counsel fees and costs.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:12-cv-803-Orl-31DAB

JOSHUA D. POERTNER,
Plaintiff,

v.

THE GILLETTE COMPANY,
THE PROCTOR & GAMBLE COMPANY,
Defendants.

ORDER AND FINAL JUDGEMENT APPROVING CLASS ACTION SETTLEMENT

This matter is before the Court on Plaintiff's Motion for Approval of Settlement and Award of Attorneys' Fees. (Doc. 157). On November 5, 2013, the Court granted preliminary approval of the settlement and directed dissemination of notice and related activities. (Doc. 118). Seven objections to the Settlement were filed. (Doc. 126, 127, 130, 131, 132,

133, and 140). Plaintiff and Defendants filed consolidated responses to these objections (Docs. 158 and 150, respectively), and a fairness hearing was held on May 22, 2014.[1]

A. Background

On April 19, 2012, Joshua D. Poertner ("Plaintiff") brought this case in Florida Circuit Court against the Gillette Company ("Gillette") and Proctor & Gamble Company ("P&G")[2] alleging that the Defendants had violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida Statutes, § 501.201 et seq. (Doc. 1-3). Shortly thereafter, the case was removed to this Court.[3]

In his Complaint, brought individually and on behalf of all other similarly situated individuals, Plaintiff alleged that he purchased Defendants' Duracel Ultra Advanced batteries three to four times in 2010 and Ultra Power batteries in early 2012 (the two types of batteries are the "Ultra batteries"). He

---

[1] For all capitalized terms not defined herein, the Court adopts the definitions within the Settlement Agreement. (See Doc. 113-1).

[2] Gillette is a wholly owned subsidiary of P&G.

[3] A similar action was filed in California and is included in this Settlement. *Heindel v. The Gillette Company et al*, Case No. CV-12-01778 EDC (N.D. Cal.) (previously titled *James Collins v. Duracell, Inc. and The Proctor & Gamble Co*.) (the "California Case"). The California Case is currently stayed pending the approval of the Settlement and, following the entry of this Order, the parties have agreed to dismiss the California Case with prejudice. (*See* California Case Doc. 53).

purchased the Ultra batteries with the expectation that they would last longer than the standard Duracell CopperTop batteries ("CopperTop") based on representations made on the packaging. The claim asserted, at base, that the labeling on the packaging constituted an unfair and deceptive trade practice because it expressed the deceptive message that Ultra batteries are longer lasting and more powerful than the CopperTop. (Doc. 117 ¶ 4). While the individual messages in the marketing differed, the underlying message was the same.

Defendants denied the allegations and extensive litigation ensued. Class motions were fully briefed and the Court held a hearing on Plaintiff's Motion for Class Certification (Doc. 66) on September 4, 2013. On September 13, 2013, while the Motion for Class Certification was pending, the parties reached a mediated settlement agreement.

B. The Settlement Agreement

The Settlement Agreement (Doc. 113-1) provides both monetary and equitable relief to the class and a $6,000,000 in-kind contribution of batteries by Gillette to charitable organizations.

The monetary part provides for a payment to claimants of between $6.00 and $12.00 per household, depending on whether they submit proof of purchase. There is no limit on the total amount payable by the Defendants under the Settlement Agreement. In terms of equitable relief, Gillette

agreed to cease selling Ultra batteries in the United States with the "our longest lasting" wordage.[4]

After reaching agreement on the substantive terms of the settlement, the parties negotiated Class Counsel's fee of $5,407,724.40 plus expenses of $272,275.60, for a total of $5,680,000.[5] (*See* Doc. 151-7 ¶ 17).

C. The Applicable Legal Standards

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. In determining whether to approve a settlement, the Court must ensure that the settlement is fair, adequate, reasonable, and not the product of collusion between the parties. *Leverso v. SouthTrust Bank of Ala., Nat'l Ass'n*, 18 F.3d 1527, 1530 (11th Cir. 1994); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). The Eleventh Circuit has outlined the following factors to be used in assessing a class action settlement: (a) the likelihood that Plaintiff would prevail at trial; (b) the range of possible recovery if Plaintiff prevailed at trial; (c) the fairness of the Settlement compared to the range of possible recovery, discounted for the risks associated with litigation; (d) the complexity, expense, and duration

---

[4] Gillette stopped selling Ultra batteries in July, 2013. (Doc. 153 ¶ 3).

[5] The Settlement Agreement also provides a $1500 award to Poertner as the class representative.

of litigation; (e) the substance and amount of opposition to the Settlement; and (f) the stage of the proceedings at which the Settlement was achieved. *Bennett*, 737 F.2d at 986; *Corrugated Container*, 643 F.2d at 212; *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 538-39 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990).

D. Class Certification

This Court has jurisdiction over these claims, pursuant to 28 U.S.C. § 1332(d). As this Court previously found in its Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement (Doc. 118), certification of the Settlement Class for the purpose of settlement is appropriate because: (a) the Settlement Class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Named Plaintiff are typical of the claims of members of the Settlement Class; (d) Named Plaintiff and Class Counsel will fairly and adequately represent the interests of the Settlement Class; (e) for purposes of settlement only, questions of law and fact common to Settlement Class Members predominate over any questions affecting only individual members of the Settlement Class; and (f) for purposes of settlement only, certification of the Settlement Class is superior to other methods for the fair and efficient adjudication of this controversy. In determining that class treatment is superior, this Court has considered the following: (a) the interest of members of the Settlement Class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the

controversy already commenced by or against members of the Class; (c) the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and (d) the difficulties likely to be encountered in the management of a class action.

E. Objections

Only seven Class Members objected, and only twelve Class Members excluded themselves from the Settlement, both of which represent a minuscule percentage of the estimated 7.26 million member Class. The objections principally raise issue with the value of the settlement to the Class Members and assert that the attorney's fees are excessive.[6]

1. Common Objections

Class members Frank, Cannata, Batman, Falkner, Gaspar, and Cochran submitted objections that focus primarily on the value of the settlement that will accrue to the Class Members. (*See* Docs. 126, 127, 131, 132, 133, 140, 162, and 163). While not

---

[6] The various objections also raised issue with the timing of the objection deadline, asserting that it was problematic because it pre-dated the attorney's fee motion deadline. (See, e.g., Docs. 126 at 36; 130 at 10-16). While this would not, by itself, require the rejection of the Settlement Agreement, the Court's extension of the Final Fairness Hearing ameliorated the timing issue by giving objectors additional time to consider the number of claims presented. (See Doc. 141). Further, objectors Frank and Gaspar filed supplemental memoranda regarding the additional information disclosed by the extended deadlines. (See Docs. 162, 163).

all of these objections argue the same points, they largely assert three central themes. First, they argue that the total monetary value that will personally accrue to the Class Members is relatively small as compared to the attorney's fees. Second, they seek to discount the in-kind charitable donation on the basis that there is no direct benefit to the Class Members. Finally, they argue that the injunctive relief is not of substantial value to the Class Members. While the amount of benefit to the class members is small, as addressed more fully below, there is no practical alternative by which to deliver greater value to Class Members. The charitable donation's direct benefit will not flow to the class members, however, it is appropriate to consider the donation in evaluating the settlement overall and it will have an indirect benefit to the Class. *C.f. Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012) (affirming class action settlement which considered *cy pres* distribution in evaluating fairness). Finally, this litigation, and Class Counsel's efforts have played a large part in ending the Defendants' practice of selling the Ultra batteries, which is a direct benefit to the class members. While the cessation of Ultra battery sales predates the Settlement Agreement, that business decision was motivated by this lawsuit and was formalized through the Settlement Agreement.

2. Frank's Objection

Class member Frank's counsel appeared at the Final Fairness Hearing. His primary contention was that there should be a way to provide monetary relief to a greater number of Class Members. But, this would require a means by which to identify and

contact members of the Class. Gillette does not sell at retail, so it has no records from which to identify actual purchasers of Ultra batteries. And, attempting to gain this information from retailers would be difficult, expensive, and essentially fruitless. The Court thus concludes that this settlement is the best practical means of providing relief to the Class.

3. Dorsey's Objection

Class member Dorsey's objection focuses on asserted problems with certifying the settlement class. Dorsey's first objection is that the class has no terminal date. (Doc. 130). However, the pleadings make clear that the subject batteries were no longer sold after July 2013. (*See* Doc. 158 at 18). Accordingly, the class is necessarily limited to persons who purchased the Ultra batteries prior to the end of July 2013. Dorsey's second argument is that the claims website did not include a Spanish language version, this is wrong. The settlement plan did not guarantee a Spanish language website, only links to Spanish language versions of the notice and claims form. The website, based on the Court's brief review, still includes Spanish language versions of the forms as of the date of this Order.[7] Dorsey's final certification argument is based on the fact that the promised claims website, www.UltraBattery

[7] The forms are accessible via a link titled "Notificación/Formulario de Reclamación" on the main claims webpage, which directs a browser to https://eclaim.kccllc.net/caclaimforms/DUB/docs_sp.aspx which links to the relevant forms in Spanish.

Settlement.com, redirects to a different website—which Dorsey asserts would induce a fear reflex for an internet user. The specified web address leads a user to the relevant information through an automatic redirect. Dorsey's arguments are without merit and do not give reason to reject the Settlement.

The Court fully considered each of the objections made to the settlement and finds that they lack merit for the reasons stated above and in Plaintiff's and Defendants' Responses to them. (*See* Docs. 150, 158). The small number of exclusions and objections from Class Members relative to the size of the Class, and the lack of merit to the objections that were made, further support approval of the Settlement. *See, e.g., Bennett*, 737 F.2d at 988 & n.10 (holding that the district court properly considered the number and substance of objections in approving a class settlement).

F. *Bennett* Factors Support Approval of the Settlement

In considering this Settlement, the Court has considered the submissions of the parties, and the discovery conducted, all of which show that Plaintiff faced considerable risk in prosecuting this case to conclusion. The Settlement eliminates a substantial risk that the Class would end-up empty-handed. *See Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992). Further, Defendants have defended this action vigorously and if this case were to proceed without settlement, the resulting trial and the almost inevitable appeal would be complex, lengthy, and expensive. Accordingly, it could be years before Class Members receive any benefit, and the ultimate net recovery could well be less than that received under

this Settlement. *Behrens*, 118 F.R.D. at 543 (settlement "shortened what would have been a very hard-fought and exhausting period of time, which may have realistically ended with a decision similar to the terms of this settlement").

This action was settled after more than sixteen months of discovery and motion practice, including briefing and argument on class certification. The Settlement was achieved after arm's-length negotiations between Class Counsel and attorneys for the Defendants during formal mediation overseen by a well-qualified mediator appointed by this Court. The facts demonstrate that the Plaintiff was sufficiently informed to negotiate, execute, and recommend approval of this Settlement. *See, e.g., Davies v. Continental Bank*, 122 F.R.D. 475, 479-80 (E.D. Pa. 1988) (finding the stage of proceedings factor weighing in favor of settlement where the parties had engaged in substantial discovery actions). There is no suggestion of fraud or collusion between the parties and no evience of want of skill or lack of zeal on the part of Class Counsel.[8] *Bennett*, 737 F.2d at 986. In sum, the Court finds that the *Bennett* factors support approval of the Settlement.

---

[8] The Court also may consider the opinions of Class Counsel. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828, 103 S. Ct. 63, 74 L. Ed. 2d 65 (1982). Class Counsel have experience in the prosecution of consumer class actions, and this Court gives credence to the opinion of Class Counsel, supported by the Court's independent review, that this Settlement is a beneficial resolution of the Class claims.

G. Class Counsels' Fee and Expense Claim is Reasonable

Under the Agreement, Class Counsel will receive a fee of $5.4 million and an expense reimbursement of $272,000 for a total of $5.68 million. This sum was arrived at independently of the class settlement, and was the result of extensive arms-length negotiations.

In their Motion, Class Counsel relies primarily on fee awards in common fund cases; i.e., a reasonable percentage of the fund established for the benefit of the class. *See Camden I Condo. Assoc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Although a benchmark of 25% has been recognized, the reasonableness of the fee must be based upon the facts of each case. *Id*. (noting that determinations must be made on the facts of each case and that the majority of common fund fees fall between 20% and 30% of the fund).

Here, Class Counsel contends that the $5-plus million fee is only 10% of the $50 million common fund and therefore well within the range of reasonableness. Counsel computes this common fund by multiplying the estimated number of class members (7.26 million) by $6.00 per claim, totaling $43.56 million and adding the $5.6 million fee and cost payment. But, the $50 million calculation is somewhat illusory, because the parties never expected that Gillette would actually pay anything

close to that amount.[9] Indeed, as expected, the claims rate in this case was only .076% (55,346 claims/7.2 million people), with a total pay-out of $344,850 (114,950 packages at $3.00 per package).

In determining a reasonable fee, however, the Court is not limited by the actual amount of claims to be paid. Rather, the Court should consider both the monetary and non-monetary benefits to the class and the economics involved in prosecuting the case. *Camden I Condo. Assoc.*, 946 F.2d at 775. In addition to the claimant's fund established for the benefit of the class, the class also received a substantial equitable benefit by reason of Gillette's agreement to stop selling Ultra batteries.

With respect to the economics of prosecuting the case, Class Counsel expended more than 6000 billable hours to these cases, worth approximately $3.5 million at their normal hourly rates, plus costs advanced in the sum of $270,000. Using a lodestar analysis, the requested fee represents a risk multiplier of 1.56, which is well within the range of reasonableness for a contingent fee complex class action case.

Thus, whether viewed as a percentage of a common fund or by lodestar analysis, the fee requested here is reasonable.

---

[9] In the Declaration of McComb it is noted that the expected claims rate in a consumer class action such as this is less than 1%. (Doc. 156 ¶ 5).

H. Class Certification—Notice

The parties timely caused the Notice to be disseminated in accordance with the Agreement and the prior order of this Court. The Notice advised Class Members of, among other things: the allegations in the Complaint; the terms of the proposed Settlement; the requirements and deadline for submitting claims; the requirements and deadline for requesting to be excluded from the settlement; the requirements and deadline for objection to the proposed Settlement; and the scheduled Final Approval Hearing.[10] The Notice further identified Class Counsel and set forth that Class Counsel would seek an award of up to $5.68 million in attorneys' fees and expenses. The Notice also set forth in full the claims released by Class Members as part of the Settlement and advised Class Members to read the Notice carefully because it would affect their rights if they failed to object to the Settlement.

This Court has again reviewed the Notice and the accompanying documents and finds that the "best practicable" notice was given to the Class and that the Notice was "reasonably calculated" to (a) describe the Action and the Plaintiff's and Class Members' rights in it; and (b) apprise interested parties of the pendency of the Action and of their right to have their objections to the Settlement heard. *See Phillips*

---

[10] The date of the Final Approval Hearing was continued so class members could consider the total claims submitted. (Doc. 141). Further, two class members filed supplementary memoranda in support of their objections. (*See* Docs. 162, 163).

Petroleum Co. v. Shutts, 472 U.S. 797, 810, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). This Court further finds that Class Members were given a reasonable opportunity to opt out of the Action and that they were adequately represented by Plaintiff Joshua D. Poertner. *See id*. The Court thus reaffirms its findings that the Notice given to the Class satisfies the requirements of due process and holds that it has personal jurisdiction over all Class Members.[11]

It is, therefore

ORDERED that Plaintiff's Motion for Approval of Settlement and Award of Attorney's Fees (Doc. 157) is **GRANTED**.

It is further **ORDERED** that:

1. The Agreement is hereby approved and the parties are required to implement its provisions and otherwise comply therewith.

2. Without limiting any term of the Agreement, this Final Approval Order and Judgment, including all exhibits hereto, shall forever be binding upon Joshua D. Poertner and all other Class Members, as well as their heirs, executors and administrators, successors and assigns. This Final Approval Order and Judgment releases the Defendants as set forth in the Agreement. This Final Approval Order and Judgment shall have res judicata, collateral estoppel, and all other preclusive effect on any claims for relief,

---

[11] The list of exclusions from the Settlement is attached hereto as Exhibit A.

causes of action, suits, petitions, demands in law or equity, or any allegations of liability, losses, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interest, or expenses, including the Released Claim as described in the Agreement, that were asserted or could have been asserted in this action.

3. The Released Parties and each member of the Settlement Class are subject to the exclusive jurisdiction and venue of the United States District Court for the Middle District of Florida for any suit, action, proceeding, case, controversy, or dispute relating to the Settlement Agreement that is the subject of this final judgment. All Class Members, excepting only the twelve individuals who effectively excluded themselves from the Settlement Class in accordance with the terms of the Class Notice, and all persons and entities in privity with them, are barred and enjoined from commencing or continuing any suit, action, proceeding, case, controversy, or dispute relating to the Settlement Agreement that is the subject of this Order of Final Approval and Final Judgment.

4. This Court shall have exclusive jurisdiction and authority to rule upon and issue a final order with respect to the subject matter of any such action, suit, or proceeding whether judicial, administrative, or otherwise, which may be instituted by any person or entity, individually or derivatively, with respect to (i) the validity or enforceability of the Settlement Agreement; (ii) the authority of any Released Party to enter into or perform the Settlement Agreement in accordance with its terms; (iii) the remedies afforded by this Order of Final Approval and Final Judgment

and the Settlement Agreement, or the attorneys' fees, representatives' fees, interest, costs, or expenses provided for in this Order of Final Approval and Final Judgment; (iv) any other foreseen or unforeseen case or controversy relating to or impacted by this Order of Final Approval and Final Judgment and Settlement Agreement; or (v) the enforcement, construction, or interpretation of the Settlement Agreement or this Order of Final Approval and Final Judgment. This reservation of jurisdiction does not limit any other reservation of jurisdiction in this Order of Final Approval and Final Judgment nor do any other such reservations limit the reservation in this sub-section.

5. Neither this Order of Final Approval and Final Judgment nor the Agreement shall be construed or deemed evidence of or an admission or concession on the part of Defendants with respect to any claim or of any fault or liability or wrongdoing or damage whatsoever, or any infirmity in the defenses asserted.

6. This Action including all individual and class claims that were or could have been raised in these action, are hereby dismissed on the merits and with prejudice.

7. The Clerk is directed to close this file.

DONE and **ORDERED** in Chambers, Orlando, Florida on August 21, 2014.

/s/ Gregory A. Presnell

GREGORY A. PRESNELL

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Case No. 6:12-CV-00803-GAP-DAB

JOSHUA D. POERTNER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE GILLETTE COMPANY, and THE PROCTOR & GAMBLE COMPANY,

Defendants.

Dept. 5A
Judge: Hon. Gregory A. Presnell

DECLARATION OF DEBORAH MCCOMB RE REQUESTS FOR EXCLUSION FROM CLASS SETTLEMENT

I, Deborah McComb, declare and state as follows:

1. I am a Senior Consultant at Kurtzman Carson Consultants LLC ("KCC"), located at 75 Rowland Way, Suite 250, Novato, California. As a senior Consultant at KCC, my responsibilities include overseeing and implementing legal notice campaigns in order to provide notice to class members of class

action settlements, as well as administration and handling of claims and exclusions in class action settlements. I am over 21 years of age and am not a party to this action. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently hereto.

2. KCC is the court appointed settlement administrator of the class settlement in the above-captioned matter (the "Settlement"). I am one of the individuals at KCC responsible for KCC's work in implementing the notice to class members of the Settlement, and administering and handling claims by potential class members.

3. The purpose of this declaration is to provide the Parties and the Court with a summary of the number of claims submitted by Class Member for the Settlement in this matter.

4. As discussed in the Notice Plan filed with the Court on October 25, 2013 as an exhibit to the Preliminary Approval Motion (Doc. 113-8), the class of purchasers of the Duracell Ultra batteries that are the subject of this case is estimated to be approximately 7,260,000 members. As also discussed in the Notice Plan and in prior declarations filed in connection with the Settlement in this matter, due to the consumer nature of this case, the identity of class members and their contact information is unknown and the class members therefore had to be reached through a consumer media campaign involving publication notice in national magazines, newspapers, internet banners, a settlement website and automated settlement telephone system. The Notice Plane and media campaign are discussed in detail in the previously filed declaration of Gina

Intrepido-Bowden on Adequacy of Proposed Settlement Notice Program (Doc. 114-4) and in my previously filed declaration Re Settlement Administrator's Notice Procedures and Compliance with Court Approved Notice Plan (Doc.122), as well as in Ms. Intrepido-Bowden's and my additional declarations filed concurrently herewith.

5. To project claims rates in a given case, we review other cases that are similar in scope and method of dissemination. Having administered hundreds of class settlements, it is KCC's experience that consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%). For example, KCC did and analysis six months ago of all consumer class action settlements that KCC administered where the notice provided to class members relied entirely on media notice rather than direct mail notice. These settlements included products such as toothpaste, children's clothing, heating pads, gift cards, an over-the-counter medication, a snack food, a weight loss supplement and sunglasses. The claims rate in the cases ranged between .002% and 9.378%, with a median rate of .023%. In my years of experience administering class settlements in similar consumer cases these settlements and the claims rates in these settlements are representative or typical of other class action settlements in consumer cases which I have been involved in administering.

6. As of the date of this declaration, KCC has received 55,346 claims by class members in this matter, which claims represent 114,950 packages of batteries. In accordance with the "Class Action Settlement Agreement" in this matter and based

upon three dollars ($3.00) per package claimed, the total reimbursement to Class Members submitting claims would be $344,850.00, assuming all of the aforementioned claims are valid. KCC is currently completing the processing and validation of such claims. Based upon the number of claims submitted in this case, this equates to approximately a 0.76% claim filing rate. This claim filing rate is above average when compared to class settlements in other recent similar consumer class action cases, as discussed in the previous paragraph.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and that this declaration was executed this 21st day of April 2014 at Novato, California.

s/ Deborah McComb

Deborah McComb