NO. 11-4156

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DRY MAX PAMPERS LITIGATION

DANIEL GREENBERG,

Objector-Appellant,

v.

ANGELA CLARK, *et al.*,

Plaintiffs-Appellees,

and

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

Defendants-Appellees.

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

BRIEF OF DEFENDANTS-APPELLEES THE PROCTER & GAMBLE COMPANY; PROCTER & GAMBLE PAPER PRODUCTS COMPANY; AND PROCTER & GAMBLE DISTRIBUTING LLC

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Company; and Procter & Gamble
Distributing LLC

CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-4156 Case Name: In re Dry Max Pampers Litigation

Name of counsel: D. Jeffrey Ireland and Brian D. Wright

Pursuant to 6th Cir. R. 26.1, The Procter & Gamble Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/D. Jeffrey Ireland

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-4156 Case Name: In re Dry Max Pampers Litigation

Name of counsel: D. Jeffrey Ireland and Brian D. Wright

Pursuant to 6th Cir. R. 26.1, The Procter & Gamble Paper Products Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

The Procter & Gamble Paper Products Company is a wholly-owned subsidiary of The Procter & Gamble Company

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-4156 Case Name: In re Dry Max Pampers Litigation

Name of counsel: D. Jeffrey Ireland and Brian D. Wright

Pursuant to 6th Cir. R. 26.1, The Procter & Gamble Distributing LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

The Procter & Gamble Distributing LLC is a wholly-owned subsidiary of The Procter & Gamble Company

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees The Procter & Gamble Company, Procter & Gamble Paper Products Company, and Procter & Gamble Distributing LLC (collectively "P&G") do not believe oral argument is necessary for purposes of deciding this appeal. However, in the event this Court grants Appellant Daniel Greenberg's request for oral argument, P&G respectfully requests the opportunity to participate in the argument, in accordance with the Federal Rules of Appellate Procedure and the Sixth Circuit Rules. Such participation by P&G will provide the Court with the benefits of the analysis and argument presented by P&G when considering the issues raised by this appeal. Because the issues relevant to Plaintiffs-Appellees and P&G differ, P&G respectfully requests that Plaintiffs-Appellees and P&G each be allotted time to present their respective oral arguments.

STATEMENT OF THE ISSUES

1. Was the District Court within its discretion to approve a settlement of equitable claims that preserves all individual claims for personal injury or actual damages?

2. Was the District Court within its discretion in certifying a class pursuant to Fed. R. Civ. P. 23(b)(2), where it found that all of the elements of Rule 23(b)(2) were satisfied and the Settlement offered only injunctive relief?

3. Was the District Court within its discretion to define the Settlement Class to include those persons who purchased the product from August 2008 until the date of final approval?

4. Was the District Court within its discretion in finding the Settlement was fair, adequate and reasonable?

5. Was the District Court within its discretion in approving the Settlement based upon the information submitted to the District Court?

6. Was the District Court within its discretion in finding the Named Plaintiffs and Lead Class Counsel met the adequacy requirements under Fed. R. Civ. P. 23(a)(4)?

7. Was the District Court within its discretion in approving an award of attorneys' fees?

8. Did the District Court find correctly that the notice provided in this case satisfied the requirement of Fed. R. Civ. P. 23(e)?

STATEMENT OF THE CASE

After the Consumer Products Safety Commission ("CPSC") and Health Canada announced an investigation of Dry Max Pampers diapers on May 5, 2010, twelve class actions were filed by Plaintiffs Angela Clark, et al.,[1] asserting claims on behalf of "all purchasers" of Dry Max Pampers diapers. The class actions were transferred to the District Court and consolidated into In Re Dry Max Litigation, No. 1:10-cv-00301.

Plaintiffs and P&G were able to reach a settlement that is uniquely tailored to this litigation and that provides substantial benefits to Settlement Class Members.[2] As part of the Settlement, P&G agreed to an injunction that requires it to: (1) reinstate and extend its money-back guarantee program for unsatisfied consumers (including Settlement Class Members who purchased the product during the class period); (2) change its Dry Max Pampers product label; (3) disseminate important health information on the Pampers website directed to the issues in this litigation; and (4) develop programs in the area of babies' skin health. In exchange, the Settlement Class Members agreed to release only equitable

[1] There are 59 Named Plaintiffs (collectively "Plaintiffs ") in the consolidated action.

[2] All capitalized terms not defined in this Brief shall have the same meaning as set forth in the RE #54-2, Settlement Agreement and Release ("Settlement Agreement").

Claims; all Class Members (other than Named Plaintiffs) preserved the right to bring individual claims for personal injury or actual damage.

The Settlement has been well-received by the Settlement Class Members. While the Settlement Class Members likely number in the hundreds of thousands, only three objected to the Settlement, two of whom are serial objectors. Now one of those professional objectors has appealed the final approval.[3]

Rejecting the arguments presented by the objectors (including Greenberg), the District Court found the Settlement satisfied the requirements of Fed. R. Civ. P. 23(a), (b)(2) and (e). The Court found that the Settlement was fair, reasonable, and adequate, and consistent with applicable laws. None of the objectors moved for reconsideration of the Final Approval Order, but Greenberg now appeals the District Court's Order.

[3] Objector-Appellant Greenberg argues that he is not a professional objector and seeks solely to "overturn an unfair settlement." (Objector-Appellant Brief, p. 1). Greenberg is an attorney employed by the Center for Class Action Fairness ("CCAF") and a serial objector that disagrees with class action settlements in general and the payment of class attorneys' fees in particular. See Dewey v. Volkswagen of Am., 728 F. Supp. 2d 546, 575 (D.N.J. 2010). CCAF's client, Greenberg, has been the CCAF's "objector" in several other class action settlements, e.g., Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766 (N.D. Ohio 2010); McDonough v. Toys "R" Us, Inc., Nos. 2:06-cv-0242 and 2:09-cv-06151, 2011 U.S. Dist. LEXIS 150851, at *34-35 (E.D. Pa. Dec. 20, 2011).

STATEMENT OF THE FACTS

I. BACKGROUND OF LITIGATION AND SETTLEMENT

The Settlement provides considerable benefits in exchange for a limited release, and is uniquely attuned to the issues in this litigation.[4]

A. The Parties Reached a Settlement After Significant, Hard-Fought and Contentious Litigation

Plaintiffs filed the first of twelve complaints on May 11, 2010, asserting claims on behalf of "all purchasers" of Dry Max Pampers diapers. RE #1, Class Action Complaint, Clark et al. v. The Procter & Gamble Co., et al., Case No. 10-cv-301 (filed May 11, 2010). Each of the twelve actions was ultimately transferred and consolidated into In Re Dry Max Pampers Litigation, Case No. 1:10-cv-00301. RE #15, June 16, 2010 Order on Plaintiffs' Motion For Consolidation and Appointment as Interim Lead Counsel.

On August 23, 2010, Plaintiffs filed a 720-paragraph, 207-page Consolidated Class Action Complaint after consultation with numerous experts and over 700 parents, and participation in scientific experiments. RE #57, Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Representative

[4] P&G disputes many of the factual allegations contained in the Statement of Facts section of the Brief of Plaintiffs-Appellees. As it has done throughout this litigation, P&G stands behind the Dry Max Pampers as an innovation that has benefited millions of children, and it continues to dispute the allegations in this case.

Plaintiff Award Payments, p. 8. Plaintiffs conducted "informal . . . core discovery," as ordered by the District Court. As part of that discovery, P&G produced: (1) all Dry Max patents; (2) the names of ingredients and/or component suppliers, with corresponding names of items supplied; (3) the names and locations of manufacturers; (4) a list of all ingredients, including quantities, concentrations and grades of raw materials; and (5) information about the assembly process. RE #20, July 20, 2010 Preliminary Calendar Order; RE #68, Joint Motion of Plaintiffs and Defendants for Final Approval of Settlement ("Final Approval Motion"), p. 5.[5]

The litigation was contentious. The Parties argued about discovery. RE #28, Motion to Phase and Sequence Discovery. On November 12, 2010, after oral argument, the District Court denied P&G's Motion and required full discovery and class certification briefing by October 2011, with a trial scheduled for May 2012. RE #45, Calendar Order. Early in the proceedings, P&G also challenged the viability of Plaintiffs' class and other claims by filing lengthy, significant pre-motions to strike the class action allegations and to dismiss all of Plaintiffs' claims. RE #39, Motion of Defendants The Procter & Gamble Company, Procter & Gamble Paper Products Company and Procter & Gamble Distributing LLC to Strike Plaintiffs' Class Allegations; RE #40, Motion of Defendant The Procter &

[5] RE #25, Consolidated Class Action Complaint ("Consol. Compl."), ¶¶ 53-142.

Gamble Company, Procter & Gamble Paper Products Company and Procter & Gamble Distributing LLC to Dismiss the Consolidated Class Action Complaint.

The litigation was complex -- more than 150 different witnesses were identified, including several experts. Plaintiffs identified 13 witnesses from P&G and the Parties were working with experts in at least seven different fields. RE #27, Rule 26(f) Report of the Parties. Plaintiffs identified approximately 145 fact witnesses, including parents, caregivers and neighbors who had knowledge about the diapers. RE #68 Final Approval Motion, p. 6 (citing Plaintiffs' Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1)).

The Plaintiffs faced significant risks in continuing this litigation, the success of which was seriously in doubt. After investigating consumer complaints (some of which were made by Plaintiffs) and extensive scientific data, the CPSC announced on September 2, 2010, that it had identified no specific cause linking Dry Max Pampers to diaper rash. RE #40-1, No Specific Cause Found Yet Linking Dry Max Diapers to Diaper Rash, U.S. Consumer Product Safety Commission, September 2, 2010 (available at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10331.html). Health Canada, an analogous regulatory agency in Canada, reached the same conclusion. RE #40-2, Health Canada, US Consumer Product Safety Commission Find No Link Between Pampers Dry Max Diapers and

Severe Diaper Rash, Health Canada, September 2, 2010 (available at http://www.hc-sc.gc.ca/ahc-asc/media/ftr-ati/_2010/2010_149-eng.php). The CPSC reviewed over 4,700 consumer complaints, "clinical and toxicological data found in published, peer-reviewed medical literature," and it "critically reviewed data submitted by [P&G] and the results of a human cumulative irritation patch study conducted by P&G in May 2010." Id. The CPSC also reviewed "chemistry, toxicology and pediatric medicine information provided by Health Canada." Id.

In November 2010, in light of the pending discovery, factual investigation, pending Motions and the agencies' decisions, the District Court held the litigation schedule in abeyance to allow Plaintiffs and P&G to mediate and attempt to resolve the litigation. RE #50, November 19, 2010 Order Granting Joint Motion to Amend Calendar Order and Adjust Deadlines.

For the mediation, the Parties were assisted by the Honorable Layn Phillips, former Judge of the United States District Court for the Western District of Oklahoma. RE #68-3, May 24, 2011 Declaration of Hon. Layn Phillips, ("Phillips Decl.") ¶ 3. Judge Phillips presided over in-person mediation sessions on February 7 and 8, 2011, in Southern California. Id. ¶ 4. When these sessions failed to result in a complete agreement, Judge Phillips continued to communicate with Plaintiffs and P&G in order to mediate a settlement. Id. After additional

telephonic mediation sessions, Plaintiffs and P&G eventually reached a heavily negotiated Settlement Agreement in May 2011. Id. ¶¶ 5-9.[6]

B. The Proposed Settlement Provides for Injunctive Relief

1. The Settlement Class

The Parties agreed (for purposes of settlement only) to seek to certify a mandatory, nationwide Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(2), as follows:

> All persons in the United States and its possessions and territories, who purchased or acquired (including by gift) Pampers brand diapers containing "Dry Max Technology" from August 2008 through Final Judgment.[7]

Settlement Agreement, p. 11. Because the Settlement Class was certified under Rule 23(b)(2), there was no opt-out feature for the Settlement Class. Id. at 12.

2. Comprehensive Injunctive Relief

The Settlement provided for injunctive relief. The Parties agreed to move jointly for the District Court to enter an injunction applicable to P&G and the issues in the litigation. Settlement Agreement, p. 17. The District Court expressly

[6] Judge Phillips confirmed that the discussions were vigorous on both sides and the Settlement was the result of arm's-length negotiations. Id. ¶ 10. The Settlement was negotiated in good faith and is fair and reasonable. Id. ¶ 11.

[7] "Final Judgment" was defined as "the hearing date set by the Court for the final approval of the Settlement Agreement." Settlement Agreement, p. 6.

incorporated by reference the Settlement Agreement and Release into the Final Approval Order and Judgment. Final Approval Order, p. 3.

a. Reinstatement of Money-Back Guarantee Program

The injunction requires P&G to reinstate and extend its money-back guarantee program and to continue the program for twelve (12) months after the Effective Date. Settlement Agreement, p. 20. The terms of the program, including requirements for proof of purchase, are to be consistent with the prior program. Id. at 20-21.

b. Label Modifications

The injunction requires P&G to modify the Pampers Swaddlers and Cruisers label to read as follows:

> *For more information on common diapering questions such as choosing the right Pampers product for your baby, preventing diaper leaks, diaper rash, and potty training, please consult Pampers.com or call 1-800-Pampers.*

Settlement Agreement, p. 18. This statement must remain on the Pampers package for a minimum of twenty-four (24) months. Id.[8]

c. Website Modifications

[8] P&G is to modify the label as part of a rolling effort to be completed within twenty-four (24) months of the Effective Date. Id. at 4.

Within thirty (30) days of the Effective Date,[9] the injunction requires P&G to post the following additional information on the Pampers website:

> *"Diaper rash is usually easily treated and improves within a few days after starting home treatment. If your baby's skin doesn't improve after a few days of home treatment with over-the-counter ointment and more frequent diaper changes, then talk to your doctor.*
>
> *Sometimes, diaper rash leads to secondary infections that may require prescription medications. Have your child examined if the rash is severe or the rash worsens despite home treatment.*
>
> *See your child's doctor if the rash occurs along with any of the following: (1) fever; (2) blisters or boils; (3) a rash that extends beyond the diaper area; (4) pus or weeping discharge.*
>
> *Useful links: http://www.mayoclinic.com/health/diaper-rash/DS00069 and http://www.patiented.aap.org/content.aspx?aid=5297."*

Settlement Agreement, pp. 18-19. This statement is to remain on the Pampers website for a minimum of twenty-four (24) months after the Effective Date. Id. at 18.

d. Diaper Rash Skin Programs

[9] The "Effective Date" is "the date on which all appellate rights with respect to the Final Approval Order and Judgment have expired or have been exhausted in such a manner as to affirm the Final Approval Order and Judgment, and when no further appeals are possible, including review by the United States Supreme Court." Settlement Agreement, pp. 5-6.

The injunction requires P&G to produce pediatric resident training programs at leading children's health centers in the area of skin health, e.g., programs for medical schools and educational material in the amount of $150,000/year for two (2) years. Settlement Agreement, pp. 19-20. P&G must fund and develop the programs as soon as practicable and within a reasonable time after the Effective Date. RE #73 Final Approval Order and Final Judgment ("Final Approval Order"), pp. 5-6. The programs are required to give pediatric residents (the first line in rash cases) additional training and information about skin health and the treatment of diaper rash. Settlement Agreement at 20. The injunction further requires P&G, as soon as practicable and within a reasonable time after the Effective Date, to develop a program with the American Academy of Pediatrics in the area of skin health in the amount of $50,000/year for two (2) years. Id.[10]

3. Limited Release and Waiver of Class Action Procedural Device in Future Actions

In exchange for the above benefits, the Settlement Class Members would provide P&G with a limited release of equitable Claims. Settlement

[10] If any funds remain after developing either program, then P&G must use the remaining funds to develop the other remaining program, as well as another similar program. Settlement Agreement, p. 20. The Final Approval Order requires that any remaining funds "shall be used to fund the other remaining program, as well as another similar program." Final Approval Order, p. 6. Contrary to Greenberg's suggestion, the clause is not a "nullity" because of "incorrect referents." Objector-Appellant Brief, p. 10.

Agreement, pp. 22-23.[11] Settlement Class Members (other than Named Plaintiffs) expressly preserve the right to bring individual lawsuits for personal injury or actual damages. Id. at 22. Settlement Class Members also agree to be "permanently barred and enjoined from seeking to use the class action procedural device in any future lawsuit against Released Parties, where the lawsuit asserts Claims that were or could have been brought in State or Federal Court in this Action prior to the entry of this Final Approval Order and Judgment and are not otherwise released and discharged by the Settlement Agreement." Id. at 25.

II. THE DISTRICT COURT GRANTED FINAL APPROVAL OF THE PROPOSED SETTLEMENT

On September 28, 2011, the District Court granted final approval of the Settlement. Final Approval Order, pp. 6-7. The District Court found the prerequisites identified in Fed. R. Civ. P. 23(a) and (b)(2) were satisfied in that (a) the members of the Settlement Class were so numerous that joinder of all such members was impracticable; (b) there were questions of law and fact common to the Settlement Class; (c) claims of Plaintiffs were typical of claims of the Settlement Class; (d) Plaintiffs and Lead Class Counsel fairly and adequately

[11] "Claims" is defined to "mean all claims, demands, actions, suits, causes of action, allegations of wrongdoing and liabilities asserted by Plaintiffs, individually and as Class Representatives, in th[e] Action." Settlement Agreement, p. 5.

protected and represented the interests of the class; and (e) the action provided for injunctive relief. Id.

The District Court found the Settlement was fair, adequate and reasonable because (a) there was no evidence of fraud or collusion underlying the Settlement, which was reached after good faith, arms'-length negotiations; (b) Plaintiffs' likelihood of success on the merits balanced against the amount and form of relief offered in the Settlement weighed in favor of the Settlement; (c) the complexity, expense and likely duration of the ligation favored the Settlement; (d) the state of the proceedings and the amount of discovery weighed in favor of the Settlement; (e) the judgment of experienced trial counsel weighed in favor of Settlement; (f) the nature of the negotiations favored the Settlement; (g) the number and nature of the objections raised by class members weighed in favor of the Settlement; and (h) the public interest weighed in favor of the Settlement. Id. at 7-8.

The District Court awarded Class Counsel $2.73 million for attorneys' fees, costs and expenses. RE #74, Order Granting Plaintiffs' Motion for Attorney Fees, Reimbursement of Expenses and Representative Plaintiff Award Payments, p. 1. Since the maximum amount of attorneys' fees were negotiated during mediation, P&G agreed not to oppose or object to Class Counsel's application for

attorneys' fees, costs and expenses in an amount up to $2.73 million, in the aggregate. Settlement Agreement, § VII. The Court further awarded Representative Plaintiff Awards ("RPA") in the amount of $1,000 per affected child. Final Approval Order at 10. The RPA compensates Plaintiffs solely for their time and effort associated with their participation in this Action, and not for reimbursement or compensation for any damages, injury, reimbursement for medical bills or any such other payment or relief sought in the Action. Settlement Agreement at 21. Plaintiffs' and P&G's negotiation of the RPA did not occur until after the substantive terms of the Settlement, including the Injunctive Relief, had been negotiated and agreed upon during the mediation. Id.

SUMMARY OF THE ARGUMENT

After vigorous litigation by the Parties, the District Court properly approved and certified the settlement of this difficult class action. Hard-fought litigation and good-faith negotiations mediated by a respected former judge resulted in a Settlement with significant benefits for the Settlement Class. In exchange, Settlement Class Members agree to a limited release of equitable Claims and all Class Members (other than Named Plaintiffs) preserve their right to bring individual lawsuits for personal injury and actual damages. Settlement Class Members also agree not to use the class action procedural device for a second time.

After fully considering the difficulties associated with this litigation, including the likelihood of ultimate success on the merits and the risks, expense and delay of further litigation, the District Court certified the Settlement Class under Fed. R. Civ. 23(b)(2) and found that the Settlement was fair, adequate and reasonable. These rulings were well within the Court's proper exercise of its discretion.

Objector-Appellant Greenberg, a professional objector, misconstrues and minimizes the substantial benefits offered by the Settlement. Greenberg's displeasure with Fed. R. Civ. P. 23 and class action practice do not change the fundamental fact that the Settlement in this case provides real and substantial relief to Settlement Class Members and is fair, adequate and reasonable.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT ERROR IN APPROVING THE SETTLEMENT

Greenberg challenges the certification of the Settlement Class, the fairness of the settlement and the award of attorneys' fees. Other than the issue of adequate notice,[12] all of these decisions by the District Court are subject to a very limited review for clear abuse of discretion. Gooch v. Life Investors Ins. Co. of Am., Nos. 10-5003/5723, 2012 U.S. App. LEXIS 2643, at *24 (6th Cir. Feb. 10, 2012) ("The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion."); Poplar Creek Dev. Co. v. Chesapeake Appalachia, LLC, 636 F.3d 235, 244-245 (6th Cir. 2011) ("The acceptance of a settlement in a class action suit is discretionary with the [district] court and will be overturned only by a showing of abuse of discretion.") (quoting Laskey v. UAW, 638 F.2d 954, 957 (6th Cir. 1981)); Moulton v. U.S. Steel Corp., 581 F.3d 344, 350 (6th Cir. 2009 ("The district court did not abuse its discretion in approving this release."); Weitz & Luxenberg, P.C. v. Sulzer Orthopedics, Inc. 398 F.3d 778, 780 (6th Cir. 2005) ("We review a district court's award or denial of attorney fees for

[12] Fidel v. Farley, 534 F.3d 508, 513 (6th Cir. 2008) ("[W]hether a particular class action notice program satisfies the requirements of Fed. R. Civ. P. 23 and the Due Process Clause is a legal determination we review de novo.").

an abuse of discretion."); Clark Equip. Co. v. Int'l Union, Allied Indus. Workers, 803 F.2d 878, 880 (6th Cir. 1986) (citing Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981)).[13]

The law favors the settlement of class action lawsuits. UAW v. GMC, 497 F.3d 615, 632 (6th Cir. 2007) (noting "the federal policy favoring settlement of class actions"). There are significant benefits to the settlement of class actions, especially complex ones, as substantial resources can be conserved by avoiding the time, cost and rigors of prolonged litigation. Robinson v. Shelby Cnty. Bd. of Educ., 566 F.3d 642, 649 (6th Cir. 2009). "[I]n assessing whether the settlement is fair, equitable, and reasonable, the district court must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigated case." Id. (internal quotation omitted). "[B]ecause settlement of a class action, like

[13] Greenberg cites Kalamazoo River Study Group v. Rockwell Int'l Corp., 355 F.3d 574, 583 (6th Cir. 2004), for the proposition that this Court should review the certification of a Rule 23(b)(2) class under the de novo standard. Kalamazoo involved the District Court's interpretation of Rule 60(b). Id. Here, where Greenberg is contesting the Court's application rather than interpretation of Rule 23, the District Court's decision to certify a settlement class under Rule 23(b)(2) should be reviewed under the abuse of discretion standard. Gooch, 2012 U.S. App. LEXIS 2643, at *24 ("The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion."); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 643 (6th Cir. 2006) ("The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation.") (citing Stout v. J.D. Byrider, 228 F.3d 709, 716 (6th Cir. 2000)).

settlement of any litigation, is basically a bargained for exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public." Id. "Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Id. (Citation omitted.)

The District Court did not abuse its discretion in certifying the Settlement Class or finding that the Settlement is fair, reasonable and adequate. The Court committed no error in approving the notice plan agreed to by the parties. The Court's Final Approval Order should be affirmed in its entirety.

II. THE DISTRICT COURT PROPERLY CERTIFIED A SETTLEMENT CLASS UNDER RULE 23(b)(2)

Certification under Rule 23(b)(2) is appropriate when an action provides for declaratory or injunctive relief. Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006). As this Court has previously held, "[d]isputes over whether [an] action is primarily for injunctive . . . relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed." Olden v. Lafarge Corp., 383 F.3d 495, 510-11 (6th Cir. 2004) (quoting 7A Charles Alan

Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, 2d § 1775), cert. denied, 545 U.S. 1152, 125 S. Ct. 2990 (2005). See also Alaniz v. Saginaw Cnty., No. 05-10323, 2009 U.S. Dist. LEXIS 43340, at *8-9 (E.D. Mich. May 21, 2009) (certifying a Rule 23(b)(2) settlement class and preliminarily approving settlement).

A settlement class must satisfy two conditions under Rule 23(b)(2), in addition to the Rule 23(a) prerequisites. First, "the party opposing the class has acted or refused to act on grounds that apply generally to the class," and second, "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This Settlement satisfies both requirements, and certification of the Settlement Class under Rule 23(b)(2) was entirely appropriate.[14]

A. The Settlement Provides for Injunctive Relief Only and the Issue of Whether Monetary Relief Can Ever Be Included in a Rule 23(b)(2) Class is Not Presented Here

Seeking to create new law, Greenberg argues that this Court should hold that monetary claims can never be included in a Rule 23(b)(2) class settlement, even where the monetary claims are incidental to the injunctive or declaratory relief offered in the settlement. Objector-Appellant Brief, pp. 17-19.

[14] The remainder of this section corresponds to Objector-Appellant Greenberg's Argument section on a point-by-point basis, as it pertains to P&G.

In his attempts to change class action practice, Greenberg misinterprets the benefits of this Settlement.

As part of the Settlement, P&G agreed to an injunction requiring it to: (1) reinstate and extend its money-back guarantee program for unsatisfied consumers (including Settlement Class Members who purchased the product during the class period); (2) change the Dry Max Pampers product label to provide guidance to consumers; (3) disseminate important health information on the Pampers website that is directed to the issues addressed in this litigation; and (4) develop and fund preventative programs in the area of babies' skin health. Greenberg ignores an important point; this Settlement focuses on injunctive relief and provides for no class-wide damages or other monetary relief.

Since all Settlement Class Members (except the Named Plaintiffs) preserve any claims for personal injury or actual damages, this case is well-suited for class certification under Rule 23(b)(2). See Austin v. Wilkinson, 83 Fed. Appx. 24, 25 (6th Cir. 2003) ("[Appellant's] main complaint seems to be a desire to pursue compensatory damages; he is of course not barred from seeking damages by the preclusive effect of the class action, which bars only future injunctive relief."); Joel A. v. Giuliani, 218 F.3d 132 (2d Cir. 2000) (affirming the District Court's approval of a Rule 23(b)(2) class action settlement, reasoning that the

injunctive relief was adequate and the release preserved the right of individual plaintiffs to sue for damages or equitable relief); Smith v. Ohio Dep't of Rehab. & Corr., No. 2:08-cv-15, 2010 U.S. Dist. LEXIS 81842, at *7, 10 (S.D. Ohio Aug. 12, 2010) (certifying a settlement class under Rule 23(b)(2), noting that "if any [class member] has a documented, medically-substantiated asbestos-related condition, he is free to file a separate cause of action . . . [and] the pending litigation will not affect his rights in that regard" and holding that objecting class member "always had the right and ability to bring a separate cause of action to pursue compensatory damages for physical injury."); Fresco v. Auto. Directions, Inc., No. 03-CIV-61063, 2009 U.S. Dist. LEXIS 125233, at *13 and n.4 (S.D. Fla. Jan. 16, 2009) (certifying a Rule 23(b)(2) settlement and noting that "the parties' settlement preserves any individual claims that class plaintiffs may have for actual damages, claims which might otherwise have precluded certification under Rule 23(b)(3).").

Greenberg argues that a Rule 23(b)(2) class can never be certified when the matter "contain[s] any claim, even a non-predominant one, for monetary relief." Objector-Appellant Brief, p. 17 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974 (1985)). Greenberg relies on the recent Supreme Court decision in Wal-Mart Corp. v. Dukes, __ U.S. __, 131 S. Ct. 2541 (2011) for the proposition that monetary claims can never be included in relief

provided for in a Rule 23(b)(2) class. Objector-Appellant Brief, p. 18. Greenberg also cites to Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S. Ct. 1359 (1994) and Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999) as support for his argument that Rule 23(b)(2) certification of the Settlement Class is inappropriate. Greenberg overstates the law and mischaracterizes the Settlement.

This Settlement does not provide for any monetary relief for the Settlement Class, but rather injunctive relief. While the Settlement requires the Class to release certain future causes of action (like restitution and rescission),[15] claims for personal injury or actual damages are carved out of the release. Settlement Class Members may recover monetary damages in future individual lawsuits. None of the cases cited by Greenberg involved a settlement that provided for injunctive relief only, while preserving claims for personal injury or actual damages. And none of these cases stand for the proposition he advocates; namely, that very limited causes of action that might provide for monetary relief can never be released in a Rule 23(b)(2) settlement. Because the Settlement provides exclusively for injunctive relief rather than monetary relief, this Settlement was properly certified under Rule 23(b)(2).

[15] But see Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210-14, 122 S. Ct. 708, 712-15 (2002) (holding that only narrow categories of restitution are equitable in nature).

B. The Plain Language of Rule 23(b)(2) and Relevant Caselaw Support Certification

The Federal Rules of Civil Procedure are given "their plain meaning," and a Court's "inquiry is complete" if "the text of the Rule [is] clear and unambiguous." Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540-41, 111 S. Ct. 922, 927-28 (1991) (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 1989 120, 123, 110 S. Ct. 456, 458 (1989). Rule 23(b)(2) asks whether defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The phrase "so that" indicates that injunctive relief is "appropriate" within the meaning of Rule 23(b)(2) when the case centers on "a pattern or practice that is generally applicable to the class as a whole[.]" Gooch v. Life Investors Ins. Co. of Am., Nos. 10-5003/5723, 2012 U.S. App. LEXIS 2643, at *58 (6th Cir. Feb. 10, 2012) (quoting Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998)).

The Settlement Class comprises essentially all consumers who bought or acquired Pampers diapers containing Dry Max Technology through the date of the final approval hearing. Settlement Agreement, p. 11. P&G's conduct toward all of these Settlement Class Members was "uniform" in that it supplied all those persons with diapers containing Dry Max Technology. Gooch, 2012 U.S. App.

LEXIS 2643, at *58-59. Whether the children of all Settlement Class Members suffered diaper rashes -- the injury that Plaintiffs allege, and P&G denies -- is irrelevant. Id. (noting that 23(b)(2) certification is appropriate even where not all of the class members have suffered the same injury, as long as the defendant's conduct was generally applicable to the class). Injunctive relief is the foundation for the Settlement. The plain language of Rule 23(b)(2) supports certification of the Settlement Class.

C. The Injunctive Relief Offered in the Settlement Shows that a Settlement Class May be Certified under Rule 23(b)(2)

Greenberg argues that this Court should ignore the relief offered by the Settlement and determine instead that monetary claims predominate from the perspectives of the Consolidated Complaint, class definition and release. This argument ignores the reality of the Settlement. The Parties sought to certify a class for settlement purposes only; thus, this Court should examine the relief provided by the Settlement to determine whether certification under Rule 23(b)(2) is appropriate. Any examination of the Settlement shows that the District Court exercised appropriate discretion in certifying this Settlement Class under Rule 23(b)(2).

1. The Complaint is Not Relevant to the Certification of the Rule 23(b)(2) Settlement Class

Greenberg asserts that "[j]udicial assessment of the complaint and causes of action is customary procedure in courts of this Circuit and across the nation." Objector-Appellant Brief, p. 21.[16] However, since the Parties are seeking to certify a settlement class (and not a litigation class), an examination of the relief requested as part of the Settlement is the relevant inquiry.

Greenberg admits that most of the cases he cites are inapposite because plaintiffs sought certification of a litigation class, not a settlement class. Daffin v. Ford Motor Co., No. C-1-00-458, 2004 U.S. Dist. LEXIS 18977, at *2-3 (S.D. Ohio July 15, 2004) (deciding plaintiff's motion to certify a litigation class), aff'd, 458 F.3d 549 (6th Cir. 2006); Christ v. Beneficial Corp., 547 F.3d 1292,

[16] Greenberg argues that the Parties "acknowledged that looking to the complaint can be of value when deciding whether injunctive or monetary claims predominate" and judicial estoppel should prevent the Parties from arguing that the Complaint should not be reviewed for purposes of determining whether Rule 23(b)(2) certification was appropriate. Objector-Appellant Brief, p. 21. While the Parties referred the Court to requests for injunctive relief in the Prayer for Relief, the Parties did not argue that the District Court should look only to the Consolidated Complaint (and not the relief offered in the Settlement) when making the Rule 23(b)(2) certification decision. RE #54 Joint Motion for Certification of Settlement Class, Preliminary Approval of Settlement, Approval of Notice Plan and Notice Administrator and Appointment of Lead Counsel ("Preliminary Approval Motion"), p. 16. Both the Preliminary Approval Motion and Final Approval Motion discussed in detail the injunctive relief offered in the Settlement and explained that personal injury or actual damages claims were carved out of the Settlement. Preliminary Approval Motion, pp. 4-8 and RE #68, Joint Motion of Plaintiffs and Defendants for Final Approval of Settlement ("Final Approval Motion"), pp. 15-16.

1299 (11th Cir. 2008) (reversing the certification of a litigation class because the Truth in Lending Act did not provide for injunctive or declaratory relief); Monreal v. Potter, 367 F.3d 1224, 1236 (10th Cir. 2004) (affirming denial of certification of a litigation class); Richards v. Delta Air Lines, Inc., 453 F.3d 525, 530 (D.C. Cir. 2006) (affirming denial of certification of a litigation class). Where the certification of a litigation class is being sought, an examination of the complaint is relevant because it determines the relief that the litigation class is seeking.[17] Here, however, the focus properly should be on the relief obtained as part of the Settlement rather than that which is sought in the Consolidated Complaint to determine whether certification is appropriate.

For his argument that a complaint dictates whether Rule 23(b)(2) certification is proper, Greenberg relies heavily on the Ninth Circuit's recent decision in In Re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 945 n.8 (9th Cir. 2011) and the Fifth Circuit's decision in Crawford v. Equifax Payment Servs., 201 F.3d 877, 882 (7th Cir. 2000). Neither case supports reversal of the District Court's certification of a Rule 23(b)(2) Settlement Class in this case. While the footnote in Bluetooth Headset says the Ninth Circuit looked at the complaint, it

[17] Even if an examination of the Consolidated Complaint was relevant, it, too, seeks injunctive relief. In the Prayer for Relief, Plaintiffs ask the District Court to order P&G to take affirmative actions. Consol. Compl., pp. 205-06, Prayers B and C. These Prayers for Relief can be satisfied only by an injunction.

was not for the purpose of determining whether certification was appropriate. Rather, the Ninth Circuit considered the complaint to determine the value of the injunctive relief for purposes of the fee award. Id. Bluetooth Headset involved a general release of all claims (unlike the limited release in this settlement) and certification under Rule 23(b)(3). Crawford is distinguishable because it involved the settlement of claims brought under the Fair Debt Collection Practices Act, 15 U.S.C.S. §§ 1692e and 1692g, which provides only for monetary relief. Crawford, 201 F.3d at 882; Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982). Here, by contrast, injunctive relief is available under Plaintiffs' causes of action, and such relief is what this Settlement provided.

Greenberg also argues that one must examine the Consolidated Complaint to prevent Settlement Class Members with "authentic monetary claims" from being forced into a Rule 23(b)(2) class. Objector-Appellant Brief, p. 22. Even if this concern is relevant to certification, it does not weigh against certification in this case. Certification of the Settlement Class will not affect class members' individual monetary claims, which are expressly preserved.

Moreover, Greenberg cites this Court's decision in Reeb v. Ohio Dep't of Rehab. & Corr. as support for the "customary" practice of reviewing the complaint. Objector-Appellant Brief, p. 21. Yet, Greenberg ignores this Court's

holding that, on remand, Plaintiffs in Reeb could make a choice about whether to seek certification of a class under Rule 23(b)(3) (and seek monetary damages that predominate over injunctive relief), or whether to proceed under Rule (23)(2) (and seek declaratory or injunctive relief). "Plaintiffs now have the choice of proceeding under Rule 23(b)(3) in an action for money damages or in an action under Rule 23(b)(2) for declaratory or injunctive relief alone or in conjunction with compensatory and punitive damages that inure to the group benefit." 435 F.3d at 651.

Given the realities of this litigation and what could reasonably be achieved by negotiations, Plaintiffs chose to pursue injunctive relief, rather than continuing to pursue certification of a litigation class under Rule 23(b)(3).[18] Such a choice is especially appropriate in this case. See e.g., Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 472 (7th Cir. 2004) (vacating District Court's order denying class certification, remaining matter "with instructions to certify a class under Rule 23(b)(2) for equitable matters and to reconsider the extent to which damages matters also could benefit from class treatment"); Pella Corp. v.

[18] The practical effect of Greenberg's argument would merely be to require Plaintiffs to amend their complaint prior to entering into (or seeking approval of) the Settlement. Requiring Plaintiffs to amend their 207-page Consolidated Complaint, for the sole purpose of seeking to certify a Rule 23(b)(2) class, would be a waste of time and resources, especially in the settlement context.

Saltzman, 606 F.3d 391, 395 (7th Cir. 2010) (affirming decision to certify a Rule 23(b)(2) class for purposes of equitable relief where damages claim was alleged to go forward individually), cert. denied, 131 S. Ct. 998 (2011).

2. The Substantive Claims Released in the Settlement Are Not Relevant to Certification of a Rule 23(b)(2) Class

The Settlement releases equitable claims only, and preserves individual claims for personal injury and actual damages. Greenberg nevertheless asserts that, from the perspective of the release, monetary damages claims continue to predominate. Objector-Appellant Brief, pp. 27-29. However, as explained in more depth below, Greenberg misrepresents the release. Moreover, even if Greenberg's interpretation of the release was plausible, Greenberg never explains why examining a release is relevant to certification under Rule 23(b)(2). The release is not relevant to the requirements under Rule 23(b)(2).

Nothing in the caselaw suggests that a release provision is relevant to certification under Rule 23(b)(2). Greenberg cites two cases, and neither supports that proposition. The first, USW v. Cooper Tire & Rubber Co., held that certification was improper not because a release was relevant to certification under Rule 23(b)(2), but rather because plaintiff (a union) could not, as a matter of substantive labor law, release the claims of retirees. 474 F.3d 271, 282-83 (6th Cir. 2007). The decision was about labor law, compare Cleveland Elec. Illuminating

Co. v. Utility Workers Union of Am., 440 F.3d 809, 817-18 (6th Cir. 2006) (a union must obtain its retirees' consent before acting on their behalf); not about class certification. Greenberg's second case, Clarke v. Advanced Private Networks, Inc., 173 F.R.D. 521, 522 (D. Nev. 1997), stands for the unremarkable point that releases are relevant to the approval of a settlement as fair, adequate, and reasonable.[19]

Greenberg argues that the release of equitable Claims in the Settlement precludes certification under Rule 23(b)(2) because it discharges "individual[] monetary relief in the form of restitution . . . or rescission." Objector-Appellant Brief, p. 28.[20] The release was carefully negotiated and is appropriately

[19] Nor does Clarke provide any support for the proposition that "[m]andatory settlements that purport to release claims for monetary relief should be held unfair as a matter of law." Objector-Appellant Brief, p. 27. Unlike here -- where individual claims for personal injury or actual damages are preserved -- the parties in Clarke agreed to release "all claims." 173 F.R.D. at 522. Clarke does not support the position that this Settlement Class is inappropriate for certification under Rule 23(b)(2).

[20] Similarly, Greenberg claims that the Wal-Mart decision prohibits the certification of a Rule 23(b)(2) class in this case because the "analysis is not between 'equitable' claims and 'legal' remedies." Objector-Appellant Brief, p. 28. Contrary to Objector-Appellant's position, Wal-Mart should not be read so broadly to prevent the certification of a Rule 23(b)(2) settlement in this case, where the Settlement provides for injunctive relief only. Wal-Mart prohibits the certification of a Rule 23(b)(2) litigation class where back-pay claims are resolved as part of the litigation. Wal-Mart, 131 S. Ct. at 2560. This Settlement preserves claims for personal injury and actual damages, while providing for injunctive relief. The

(footnote cont'd…)

tailored to this case. Even if the limited release discharges claims for restitution and rescission, Greenberg gives no reason why a legal claim that is preserved as part of the Settlement would not provide the same relief. Just as restitution or rescission would allow purchasers to receive their purchase price, Restatement (Second) of Contracts § 371(b) (1981); Randall v. Loftsgaarden, 478 U.S. 647, 656-57, 106 S. Ct. 3143, 3149-50 (1986), so too would compensatory contract damages. Restatement (Second) of Contracts § 349 (1981) (injured party has right to damages that include expenditures made in performance of the contract).

In other words, a release of restitution or rescission claims does not actually release any monetary damages. Even if Greenberg is right that a release of monetary damages is unacceptable under Rule 23(b)(2), this Settlement preserves claims that could provide for the same monetary relief.[21] While Greenberg says he is concerned that certain releases of monetary claims in Rule 23(b)(2) settlements may be unfair, Objector-Appellant Brief p. 27, he should not be allowed to

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(…cont'd)
certification of a Settlement Class in this case is proper under Rule 23(b)(2), and complements the recent Wal-Mart decision.

[21] Greenberg broadly reads the release as implying that claims other than equitable Claims are released because of the "interpretative canon of expresio unius est exclusio alterius." The release cannot be read so broadly. The "Scope of Release" states that Settlement Class Members are releasing "all equitable Claims" and while some causes of action that may provide for monetary recovery are released (like rescission and restitution), the release is expressly limited to "equitable Claims."

shoehorn an argument against the approval of such settlements into an argument against their certification.[22]

3. Certification of a Rule 23(b)(2) Class Remains Appropriate from the Perspective of the Class Definition

Greenberg contends that certification of the Settlement Class under Rule 23(b)(2) is inappropriate because the Settlement provides prospective injunctive relief "tailored to benefit future purchasers." Objector-Appellant Brief, p. 24. To make this argument, Greenberg misconstrues (or unfairly minimizes) the benefits of the Settlement.

While Greenberg attempts to characterize the Settlement as providing benefits only to future purchasers, he is mistaken. The injunctive relief requires P&G to reinstate and extend its money-back guarantee program for all qualifying Settlement Class Members who purchased the product during the class period. Settlement Agreement, at ¶ V.B.4.[23]

Greenberg cites several cases to make this point, but each is distinguishable. Objector-Appellant Brief, p. 24. Settlement Class Members need

[22] There was nothing unfair, inadequate, or unreasonable about the release in the Settlement so as to prevent approval. See supra pp. 42-44.

[23] P&G had terminated its money-back guarantee on new Dry Max Pampers. It agreed to reinstate it only after negotiations with Plaintiffs resulted in including this requirement in the injunctive relief ordered in this Settlement.

not have an ongoing relationship with P&G to take advantage of the money-back guarantee. By contrast, in several of the cases cited by Greenberg, the injunctive relief would have benefited only those who had an ongoing relationship with defendants. Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 486 (S.D. Ohio 2001), aff'd, 370 F.3d 565 (6th Cir. 2004) (rejecting the certification of a litigation class because injunctive relief would benefit only current employees and not former employees); Brown v. Kelly, 609 F.3d 467, 482 (2d Cir. 2010) (injunctive relief would not be appropriate with respect to the statewide class as a whole); McManus v. Fleetwood Enters., Inc., 320 F.3d 547, 554 (5th Cir. 2003) (rejecting certification of a Rule 23(b)(2) litigation class where the injunctive relief would not benefit those without an ongoing relationship with defendant); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978 (5th Cir. 2000) (rejecting certification of a litigation class under Rule 23(b)(2) where all the harm was in the past and relief was aimed at the future); and Mogel v. UNUM Life Ins. Co. of Am, 646 F. Supp. 2d 177, 184 (D. Mass. 2009) (rejecting certification of a litigation class where class members would not benefit from the prospective injunctive relief that was sought in the litigation). Brown v. Kelly, 609 F.3d at 482, is also inapposite. There, unlike here, the court rejected certification of a state-wide Rule 23(b)(2) litigation class because defendants (New York City officials) had not acted on grounds applicable to the whole class. Id. at 482.

Unlike each of the cases above, which related to the certification of a litigation class, the Settlement at issue here provides benefits to each Settlement Class Member. While Greenberg guesses that Settlement Class Members may not take advantage of the reinstated money-back program, his speculation cannot undermine the significance of the benefit. The fact remains; the Settlement does not require Settlement Class Members to have an "on-going relationship" with P&G. The significant benefits provided to all Settlement Class Members is a significant factor establishing the appropriateness of this Settlement Class for certification under Rule 23(b)(2).[24]

4. Certification Here Did Not Depend on Class Counsel's "Subjective Preference"

Greenberg dismisses the Parties' decision to classify these claims as Rule 23(b)(2) claims as simply "not relevant" for purposes of determining whether to certify a Settlement Class. Objector-Appellant Brief, pp. 29-30. The Parties did not seek certification of the Settlement Class under Rule 23(b)(2) based upon their own "subjective preference."[25] Rather, the Parties understood the strengths and

[24] Greenberg's suggestion that Rule 23(b)(2) should apply only to discrimination cases, or cases involving constitutional rights, is without compelling support in the law. See Gooch, 2012 U.S. App. LEXIS 2643.

[25] While Plaintiffs did not expressly cite Rule 23(b)(2) in the Consolidated Complaint, Plaintiffs sought injunctive relief. Consol. Compl., pp. 205-06 (seeking an order to "ensure that the Dry Max Pampers lack the capacity to cause

(footnote cont'd…)

weaknesses of this case based on the litigation and negotiated a Settlement that provides for solely injunctive relief and preserves the right of Settlement Class Members to bring individual claims for personal injury and actual damages.

D. The Limited Release of Future Class Action Filings Does Not Preclude Rule 23(b)(2) Certification

Citing no relevant precedent, Greenberg argues that certification under Rule 23(b)(2) is inappropriate because the Settlement prohibits Settlement Class Members from initiating a second class action based on the same transaction and events that are involved in this case. Objector-Appellant Brief, pp. 31-35. To the contrary, this action remains appropriate for certification.

On this point, Greenberg mis-states what the Settlement actually does. Objector-Appellant Brief, p. 32. The class-action provision is limited to "Claims,"

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severe [diaper] rashes . . . [and] submit product testing results on a regular basis to ensure that their products lack the capacity to cause severe rashes. . . . "). When a complaint seeks injunctive relief, this Court can certify a settlement class under Rule 23(b)(2). Smith, 2010 U.S. Dist. LEXIS 81842, at *2 (certifying a Rule 23(b)(2) settlement class where plaintiff's complaint sought certification under Rule 23(b)(1), (b)(2) and (b)(3)); In re Diet Drugs Prod. Liab. Litig., No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *130 (E.D. Pa. Aug. 28, 2000) (finding that the cohesion necessary for settlement of a Rule 23(b)(2) class is present, in part, because in the settlement context, individual issues related to personal injury litigation are irrelevant); Yong Soon Oh v. AT&T Corp, 225 F.R.D. 142, 146-48 (D.N.J. 2004) (certifying a Rule 23(b)(2) settlement class where plaintiffs alleged breach of contract, common law fraud, negligent misrepresentation and violation of the New Jersey Consumer Fraud Act and sought damages in the complaint).

which are limited to "this Action" -- i.e., claims based on the alleged defects in Dry Max Pampers. Settlement Agreement, p. 5 and § VIII. Greenberg seems to think that because this portion of the release covers any claim that "could have been brought" in this Action, it applies to any claim that could have accrued before final judgment. Greenberg is incorrect. Since res judicata would bar the Named Plaintiffs from initiating a new action based on any claim that could have accrued before final judgment, the class action release provision applies only to absent Class members. As a result, the relevant rule is not Federal Rule of Civil Procedure 18(a), which deals with the joinder of claims, but Rule 20(a), which deals with the joinder of absent parties.

An absent party can be joined in an action only if their right to relief arises "out of the same transaction, occurrence, or series of transactions or occurrences" and raises a "question of law or fact common to all plaintiffs." Fed. R. Civ. P. 20(a)(1)(A) and (B). The class action release applies only to claims that meet those requirements. Contrary to Greenberg's assertions, the class action release provision applies only to claims that share a factual predicate with the

Named Plaintiffs' claims. This narrowly-tailored release provision[26] applies only to claims that allege defects in Dry Max Pampers.

The class action release provision is an essential element of the negotiated Settlement, and it is offset by the preservation of individual claims for personal injuries or actual damages. The Settlement affords broad (and fair) injunctive relief, while preserving the right of Settlement Class Members to bring future individual lawsuits for personal injury or actual damages. Settlement Agreement at § VII. The Settlement Agreement does not, however, allow a Settlement Class Member to file a second class action. Id.

Considering the Settlement as a whole, the class action provision is necessary to effectuate the Settlement; otherwise, P&G would receive no valuable consideration for the Settlement. A settlement embodies a compromise among the litigants resulting in the bargained-for terms of the Settlement. Moulton v. U.S.

[26] Greenberg also suggests the class action release provision somehow could be considered a "prior restraint" on speech. Objector-Appellant Brief, p. 32. The class action release provision prohibits Settlement Class Members from "seeking to use the class action procedural device in any future lawsuit against Released Parties, where the lawsuit asserts Claims." Settlement Agreement, § VIII.C. While the class action provision does prevent Settlement Class Members from "seeking" to use the "class action procedural device" (whether as a named plaintiff or as a class member), the class action waiver is not a prior restraint on the Settlement Class Members' freedom of speech. The prohibition on the second use of the class action device is tied to the defined term "Claims," which is appropriately tied to the claims made in this Action.

Steel Corp., 581 F.3d 344, 350-51 (6th Cir. 2009) ("The settlement process depends on compromise, and the objectors cannot expect [the defendant] to give up $4.45 million dollars, based on conduct since 2003, while leaving class members free to turn around and sue the next day for the same conduct."). The class action provision is a bargained-for concession, in return for the beneficial provisions conferred on the Settlement Class. Importantly, the Settlement preserves the rights of Settlement Class Members to pursue subsequent individual litigation for personal injuries and actual damages.[27]

Greenberg does not cite a single case in which a court has refused to certify a Rule 23(b)(2) settlement because of a class action release provision. Rather, release provisions such as the one in this Settlement have been approved in other settlements. E.g., In re Nationwide Fin. Servs. Litig., No. 2:08-CV-00249, 2009 U.S. Dist. LEXIS 126962, at *47 (S.D. Ohio Aug. 18, 2009); Fresco v. Auto. Directions, 2009 U.S. Dist. LEXIS 125233, at *12-13, *21-34.[28]

[27] The class action provision, as part of the overall Settlement, also serves the goal of judicial efficiency and economy, which would be undermined if, in settling one class, the Settlement Agreement permitted subsequent cascading, duplicative class actions based on the same claims and theories.

[28] To the extent Greenberg relies on Crawford v. Equifax Payment Servs., 201 F.3d 877 (7th Cir. 2000) to argue that certification is improper, his reliance is misplaced. Unlike Crawford, where the settlement class members received no

(footnote cont'd…)

There is a good reason that no court has refused certification due to a settlement's limits on the class action procedure; limiting such future class actions bars no substantive "right." Cf. Objector-Appellant Brief, p. 31.[29] There is no substantive "right" to proceed as a class action. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 1171 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claim"); Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004) (no substantive right to pursue a class action), cert. denied, 543 U.S. 874, 125 S. Ct. 97 (2004); Johnson v. W. Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000) ("the 'right' to proceed to a class action, insofar as the TILA is concerned, is a procedural one"), cert. denied, 531 U.S. 1145, 121 S. Ct. 1081 (2001).

(…cont'd)
benefit from the settlement, this Settlement provides real and substantial relief to Settlement Class Members in exchange for a limited release.

[29] Greenberg attempts to equate the Settlement to a "contract of adhesion." Objector-Appellant Brief, pp. 32-33 (citing AT&T Mobility LLC v. Concepcion, __ U.S. __, 131 S. Ct. 1740 (2011) and Carnival Cruise Lines v. Shute, 499 U.S. 585, 111 S. Ct. 1522 (1991)). Greenberg ignores that this class action settlement is far different than the contracts in AT&T Mobility and Carnival Cruise Lines (where the Supreme Court found the class action waiver and forum selection clause valid). Here, the Settlement was subject to review and approval by a District Court as fair, reasonable and adequate -- hardly a "contract of adhesion."

III. THE SETTLEMENT'S LIMITED RELEASE COMPLIES WITH DUE PROCESS

The Settlement discharges only equitable claims and preserves all legal claims. Despite this reality, Greenberg argues that the District Court erred in certifying the class because under the Due Process Clause, "a 23(b)(2) class cannot discharge monetary claims." Objector-Appellant Brief, p. 17. There are several problems with this argument.

First, Greenberg ignores that the Settlement does not, in fact, discharge any monetary claims. As previously shown, the Settlement preserves all claims for personal injury or actual damages to which Settlement Class Members may be entitled. See supra pp. 32-33. Greenberg's due-process argument, therefore, does not apply to the facts of this case, and the Court need not decide it.

Second, even assuming arguendo that the Settlement discharged monetary claims, there is no precedent for Greenberg's argument about due process. In the face of due process challenges, the First, Second, and Third Circuits have all upheld releases that discharged monetary claims in non-opt-out class actions. Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1555, 1560 & n.8 (3d Cir. 1994); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 31, 33-34 (1st Cir. 1991); TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 458-61 (2d Cir. 1982).

Third, nothing in any Supreme Court decision compels this Court to disagree with the First, Second, and Third Circuits and create a Circuit split. As Greenberg admits, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3, 105 S. Ct. 2965, 2974 (1985) reserved the question he wants this Court to answer. Appellant Brief, p. 17. Contrary to Greenberg's claims, Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S. Ct. 1359 (1994), involved a class action that released predominant, rather than incidental, claims for monetary damages. Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994). Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2558-59 (2011), did question whether binding class members to a class action that included any "individualized claim for money" might violate due process. It did not, however, address anything like this case, where the Settlement (even if it limits claims for rescission or restitution) permits future claims for monetary relief for actual damages and personal injuries.[30]

[30] Greenberg relies on Ortiz v. Fibreboard Corp., 527 U.S. 815, 845-46, 119 S. Ct. 2295, 2314 (1999), which stated that "certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members." The Seventh Amendment applies only to legal claims, Tull v. United States, 481 U.S. 412, 417, 107 S. Ct. 1831 (1987), and thus the Settlement's preservation of all monetary claims removes any Seventh Amendment concerns. More fundamentally, Ortiz based its decision on the Federal Rules, not the Constitution. See Ortiz, 527 U.S. at 861 ("The nub of

(footnote cont'd…)

Fourth, nothing in this Court's precedent suggests that the release violates due process. Greenberg cites to this Court's decisions in Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002) and In re Telectronics Pacing Sys. Inc., 221 F.3d 870, 881 (6th Cir. 2000), but neither case supports his argument. In Coleman, this Court held that compensatory damages under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., were not recoverable in a Rule 23(b)(2) settlement. 296 F.3d at 447. In Telectronics Pacing Sys., this Court held that notice and the opportunity to opt out must be provided in limited fund Rule 23(b)(1) settlements. 221 F.3d at 881. Neither case held that claims for rescission or restitution can never be released in a Rule 23(b)(2) settlement, when such a release does not affect the monetary damages available to the Class.

IV. THE CLASS DEFINITION IS APPROPRIATE AND CONSISTENT WITH THE LAW IN THIS CIRCUIT

The class definition provided in this Settlement is consistent with class definitions certified appropriately in other cases. "While class definitions are obviously individualized to the given case, important elements of defining a class include: (1) specifying a particular group at a particular time and location who were harmed in a particular way; and (2) defining the class such that a court can

(…cont'd)
our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it . . . .").

ascertain its membership in some objective manner." Laichev v. JBM, Inc., 269 F.R.D. 633, 639 (S.D. Ohio 2008) (citing McGee v. E. Ohio Gas Co., 200 F.R.D. 382, 387 (S.D. Ohio 2001) (certifying a class "through final judgment"). The Settlement Class here meets those requirements. The defined Settlement Class identifies a particular group ("all persons . . . who purchased or acquired (including by gift) Pampers brand diapers containing 'Dry Max Technology'"), at a particular time ("from August 2008 through Final Judgment") and location ("in the United States and its possessions and territories").

Greenberg asserts that "late-purchasing" Settlement Class Members (those purchasing the product between August 29, 2011 and September 28, 2011) received inadequate notice and never had the opportunity to object to the Settlement. There is no violation of Rule 23(e)(5), on which Greenberg relies, just because Settlement Class Members may enter a class after the objection deadline. If Greenberg's position were correct, many Rule 23(b)(2) classes, which include persons who can enter the class in the future, could never be certified. See, e.g., D.S. ex rel. S.S. v. N.Y. City Dep't of Educ., 255 F.R.D. 59, 68 (E.D.N.Y. 2008) (certifying a class of high school students under Rule 23(b)(2) and approving a settlement even though the definition reached students who would only join the school in future years); Wallace v. Chi. Housing Auth., 224 F.R.D. 420, 431 (N.D. Ill. 2004) (certifying a class that included persons who would move out of public

housing in the future). Greenberg's position, if accepted, would be an unprecedented change in class-action law. Greenberg points to nothing indicating that Rule 23(e)(5) was intended to effect such a change.

The cases cited by Greenberg are distinguishable or inapposite. Objector-Appellant Brief, p. 35. Many of the cases involve the certification of litigation classes under Rule 23(b)(3) where, unlike here, the heightened notice standard of Rule 23(c)(2)(B) ("best notice that is practicable under the circumstances") and the opt-out right apply.[31] Other cases are distinguishable because they involved class definitions of a litigation class where the parties

[31] In re Wal-Mart Stores, Inc., No. 06-02069, 2008 U.S. Dist. LEXIS 109446, at *15-16 (N.D. Cal. May 2, 2008) (defining Rule 23(b)(3) litigation class that did not include "'future' class members"); Trollinger v. Tyson Foods, Inc., 4:02-CV-23, 2007 U.S. Dist. LEXIS 88866, at *8-11 (E.D. Tenn. Dec. 3, 2007) (defining Rule 23(b)(3) litigation class, ending as of the date of the certification order because of opt-out right); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050, 07-4012, 2009 U.S. Dist. LEXIS 62817, at *3-5 (N.D. Cal. July 2, 2009) (defining Rule 23(b)(3) litigation class where plaintiff failed to provide end date); Wike v. Vertrue, Inc., No. 3:06-00204, 2010 U.S. Dist. LEXIS 96700, at *11-12 (M.D. Tenn. Sept. 15, 2010) (defining Rule 23(b)(3) litigation class where "parties could readily determine a more appropriate end date to the class definition"); Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 85 n.2 (S.D.N.Y. 2001) (defining Rule 23(b)(3) litigation class).

identified no end date.[32] Still others actually support the class definition presented here.[33]

To the extent there are any "late-purchasing class members," those Settlement Class Members had notice of the Settlement prior to the purchase and had the option of not purchasing the product.[34] Rather than objecting to the Settlement, those "late purchasing class members" could have decided not to purchase to product. Further, if Settlement Class Members purchased and were dissatisfied with the product, then they can avail themselves of the money-back guarantee. The District Court defined an appropriate Settlement Class.

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[32] Alaniz v. Saginaw Cnty., No. 05-10323, 2009 U.S. Dist. LEXIS 43340, at *5 (E.D. Mich. May 21, 2009) (plaintiff provided open-ended class definition); Mueller v. CBS, Inc., 200 F.R.D. 227, 235-36 (W.D. Pa. 2001) (rejecting definition of a litigation class where plaintiffs failed to provide end date).

[33] In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 602-03 (3d Cir. 2009) (stating that nothing "should be read to preclude an open-ended class period, as long as the period results from a proper application of law"); Saur v. Snappy Apple Farms, Inc., 203 F.R.D. 281, 286 (W.D. Mich. 2001) (defining Rule 23(b)(3) litigation class, stating that "federal courts have allowed class definitions which include 'future' class members under Rule 23(b)(2)").

[34] Fidel v. Farley, 534 F.3d 508, 513-14 (6th Cir. 2008) ("To comport with the requirements of due process, notice must be 'reasonably calculated to reach interested parties.' Due process does not, however, require actual notice to each party intended to be bound by the adjudication of a representative action.").

V. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Settlement provides Settlement Class Members with a good resolution, especially considering the risks of going forward with litigation. Considering the settlement factors,[35] the District Court did not abuse its discretion in approving the Settlement as fair, reasonable and adequate.

A. The Likelihood of Ultimate Success on the Merits Balanced Against the Amount and Form of Relief Offered Supports Approval

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." In re Gen. Tire & Rubber Co. Sec. Litig., 726 F.2d 1075, 1086 (6th Cir. 1984). Here, the prospect of any recovery, had the Parties proceeded further to litigate the matter, was "not overwhelming." RE #76, September 28, 2011 Fairness Hearing Transcript, pp. 32-33 ("The plaintiffs' likelihood of success on a certified class action trial was not overwhelming."). Significant questions exist as to whether Plaintiffs would have survived the pending Motions or could have prevailed on the merits.

After investigating the same claims made by Plaintiffs,[36] two independent regulatory bodies -- the CPSC and Health Canada -- could not identify

[35] UAW v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007).

[36] E.g., Consol. Compl., ¶¶ 10-49.

any specific cause linking Pampers with Dry Max to diaper rash. RE #40-1, No Specific Cause Found Yet Linking Dry Max to Diaper Rash, (available at http://cpsc.gov/cpscpub/prerel/prhtml10/10331.html (last visited Aug. 30, 2011); RE #40-2, Health Canada, US Consumer Product Safety Commission Find No Link Between Pampers Dry Max Diapers and Severe Diaper Rash (available at http://www.hc-sc.gc.ca/ahc-asc/media/ftr-ati/_2010/2010_149-eng.php) (last visited Aug. 30, 2011). P&G's Motions raised substantial support for the early dismissal of Plaintiffs' class action and claims. RE #39, Motion of Defendants The Procter & Gamble Company, Procter & Gamble Paper Products Company and Procter & Gamble Distributing LLC to Strike Plaintiffs' Class Allegations; RE #40, Motion of Defendant The Procter & Gamble Company, Procter & Gamble Paper Products Company and Procter & Gamble Distributing LLC to Dismiss the Consolidated Class Action Complaint. Even if Plaintiffs' claims survived dismissal, there was a risk as to whether Plaintiffs would ultimately prevail on the merits. Settlement Class Members avoid this risk.

The Settlement challenged by this Objector-Appellant provides certain and current relief, as opposed to uncertain litigation. Settlement Class Members can seek reimbursement under the reinstated and year-long money-back guarantee program. P&G agreed to provide specific information on its website about skin irritation alleged to be associated with Dry Max Pampers and about

when a doctor should be consulted. P&G will develop programs in the area of skin health. Nothing in the Settlement prevents any Settlement Class Member (other than the Named Plaintiffs) from bringing individual claims for personal injury and actual damages. When balanced against the possibility that Settlement Class Members might have received nothing by going forward, the District Court did not abuse its discretion by finding that this factor weighs heavily in favor of approving the Settlement.

B. The Risks, Expense and Delay of Further Litigation All Support Approval of the Settlement

The difficulty Plaintiffs would encounter in proving the claims, the substantial litigation expenses faced by the Parties and a possible delay in any recovery, all justify this Court's approval of the Settlement. The number of parties and the complexity of the issues would have made litigation enormously expensive and time-consuming. This litigation involves 59 Named Plaintiffs, 45 claims and the laws of all 50 States. Consol. Compl., ¶¶ 10-52, 151 and 165-720. More than 145 fact witnesses from nearly every state were identified along with experts in pediatric medicine, statistics, toxicology, manufacturing, product design, and consumer behavior and damages. RE #27, Rule 26(f) Report of the Parties.

Absent a settlement, Plaintiffs would have been required to respond to both pending Motions. The discovery would have been time-consuming,

expensive, and likely disputed. Approximately 300 depositions would have been taken, and extensive document production -- nearly all of it electronic -- would have been required. Presuming they survived the Motions, Plaintiffs would have been required to file and win motions seeking to certify a litigation class. If the Action proceeded beyond class certification, in addition to extensive fact discovery, expert discovery would involve experts' reports, rebuttal reports and the depositions of at least 14 experts. Summary judgment motions and trial preparation would have been a massive endeavor and required additional time and resources. Counsel on both sides would have had to expend many hours preparing for direct and cross-examination, identifying and preparing the exhibits intended for use at trial, and filing and responding to pre-trial motion practice, including Daubert challenges and motions in limine. The trial itself would have taken weeks, if not longer.

These efforts and costs are avoided as a result of the Settlement. In complex class action litigation, these expenses will burden any recovery obtained for the Settlement Class, even if Plaintiffs were successful. Moreover, even a victory at trial might be lost through post-trial motions or likely appeals. All of this work would have resulted in the expenditure of potentially years of effort, at great additional expense. The Settlement secures a substantial benefit in a highly-complex, contested action, undiminished by further expenses and without delay,

costs, and uncertainty of protracted litigation. The District Court did not abuse its discretion by finding that this factor also weighs heavily in favor of approval.

C. The Stage of Proceedings and Amount of Discovery Support Approval of the Settlement

The Settlement occurred after Plaintiffs had the opportunity to assess the facts supporting their claims, the legal and factual defenses raised by P&G, and the risks of continued litigation. Plaintiffs engaged in a significant investigation prior to filing the original complaint and the Consolidated Complaint. Plaintiffs conducted substantial factual research concerning Dry Max Pampers, including investigating the facts of the case by conferring with experts and reviewing documents produced by P&G. The Parties also participated in "informal core discovery," as ordered by the Court. P&G provided Plaintiffs with information about the Dry Max Pampers diapers, information including: (1) all Dry Max patents; (2) the names of Dry Max ingredients and/or components part suppliers, with corresponding name of item supplied; (3) the names and locations of Dry Max manufacturers; (4) a list of all Dry Max ingredients, including quantities, concentrations and grades of raw materials (both chemical and physical); and (5) information about the Dry Max assembly process.

Although the Parties negotiated the Settlement at a relatively early stage, they had adequate opportunity to identify the strengths and weaknesses of

their cases. This factor weighed in favor of approving the Settlement. Both sides were fully apprised of the legal and factual issues presented, as well as the strengths and weaknesses of their cases, and both sides made a well-informed decision to enter into the Settlement. RE #76, September 28, 2011 Fairness Hearing, p. 33 ("The stage of the proceedings was such that certain informal core discovery was undertaken with the Court's assistance. The parties and their counsel have done extraordinarily thorough investigation and analysis. And the stage of proceedings is perfectly appropriate to support the settlement."). The District Court did not abuse its discretion by finding that this factor favored approval.

D. The Judgment and Experience of Counsel Who Have Competently Evaluated the Strengths and Weaknesses of the Case Support Approval of the Settlement

As the District Court found, both Lead Class Counsel's and P&G's Counsel are experienced in the field of complex class actions. RE #76, September 28, 2011 Fairness Hearing Transcript, p. 33. Both Counsel represented that the Settlement was proper based upon their experience, knowledge of the strengths and weaknesses of the case, analysis of the discovery taken in the case, the risks associated with this type of litigation, the likely recovery at trial and on appeal, and

other factors considered in evaluating the Settlement.[37] The Settlement has been negotiated vigorously and at arm's-length and, at all times, Plaintiffs acted independently and their interests coincide with the interests of the Settlement Class. Plaintiffs and P&G entered into the Settlement, with the assistance, advice and judgment of an experienced mediator. The District Court did not abuse its discretion by finding that this factor favored approval.

E. The Negotiations Support Approval of the Settlement

Intensive, arm's-length negotiations were facilitated by the Honorable Layn Phillips, former Judge for the United States District Court for the Western District of Oklahoma and one of the leading mediators in the country. Phillips Decl., ¶¶ 2, 3. Prior to the first scheduled mediation session, Plaintiffs and P&G submitted confidential mediation statements supporting their respective positions. Id. ¶ 4. Judge Phillips presided over all day, in-person mediation sessions between the Parties on February 7 and 8, 2011, at his offices in Southern California. Since a settlement was not reached after two full days of intense negotiations, Judge

[37] It is well-settled that, in approving a class action settlement, the courts should "defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983); accord: Kogan v. AIMCO Fox Chase, L.P., 193 F.R.D. 496, 501 (E.D. Mich. 2000) (citing Bronson v. Bd. of Educ., 604 F. Supp. 68, 73 (S.D. Ohio 1984)).

Phillips continued to communicate with Plaintiffs and P&G regarding their respective settlement positions. Id. ¶ 6.

After multiple telephone mediation sessions, Plaintiffs and P&G eventually reached a Settlement, which was ultimately documented (after further negotiation) in the Settlement Agreement. Judge Phillips confirms that the mediation sessions were vigorous on both sides and that the Settlement was the result of arm's-length negotiations. Id. ¶ 10. Judge Phillips also states that, based on his extensive discussions with Plaintiffs and P&G and information made available to him during the mediation process, the Settlement was negotiated in good faith and the Settlement is fair and reasonable. Id. ¶ 11. The District Court did not abuse its discretion by finding this factor also weighs heavily in favor of approval of the Settlement.

F. That Only Three Settlement Class Members Have Objected Shows Strong Support for Settlement Approval

In considering a class action settlement, the District Court reviewed the reaction of the absent class members[38] and did not abuse its discretion by finding that this factor weighs heavily in favor of approval. Not only have all 59 Named Plaintiffs approved the Settlement, but the lack of significant objections was powerful evidence of the fairness of the Settlement. While the Settlement

[38] Olden v. Gardner, 294 Fed. Appx. 210, 217 (6th Cir. 2008).

Class is undeniably large -- it likely numbers in the hundreds of thousands -- only three Settlement Class Members objected to the Settlement, two of whom have a history of objecting to class action settlements. The Settlement Class reaction indicates support for the Settlement, and the District Court did not abuse its discretion by finding that this factor also weighs heavily in favor of approval.

G. The Settlement Is Consistent With the Public Interest

There is a strong public interest in encouraging settlement of complex litigation and class-action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources. As this Court has stated:

> "Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute."

Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976), cert. denied, 429 U.S. 862, 97 S. Ct. 165 (1976). The public has a significant interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve. The Settlement ends potentially long and protracted litigation and frees the District Court's valuable resources. The District Court did

not abuse its discretion by finding that this factor also weighs heavily in favor of approval.

VI. THE DISTRICT COURT CORRECTLY FOUND THAT THE NOTICE PROVIDED IN THIS CASE SATISFIED THE REQUIREMENT OF PROVIDING "NOTICE IN A REASONABLE MANNER"

The District Court approved a Notice Plan reasonably calculated to reach Settlement Class Members. RE #55, June 7, 2012 Order Preliminarily Approving Class Action Settlement ("Preliminary Approval Order") at 4. Plaintiffs published a Summary Notice on various websites and P&G provided a hyperlink to the Summary Notice on Pampers' website and provided the Summary Notice on Pampers' Facebook webpage. Id. Plaintiffs and P&G established and maintained a Class Settlement Website, with information about the Settlement. Id. The Class Settlement Website posted a copy of the Settlement Agreement, any preliminary approval order issued by the Court, a long-form notice, and other relevant information. Id. The Long-Form Notice and Short-Form Notice are attached as Exhibits A and B, respectively, to the Settlement Agreement.

The notice provided in this extraordinarily well-publicized Rule 23(b)(2) Settlement was more than sufficient. As anticipated, traditional media wrote articles based upon the press release (after the release was picked up by wire

services like the Associated Press), spreading information about the Settlement.[39] Notice was available on the Pampers website, as well as the Facebook website for Pampers. Given the social media associated with this case (as conceded by Greenberg), the combination of social and traditional media yielded extensive coverage of the Settlement.

As Greenberg admits, the Court need only "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). While Rule 23(e)(1) requires some form of notice of any class settlement, Rule 23(e)(1) does not require the same level of detail as the notice associated with Rule 23(c)(2) (required in Rule 23(b)(3) class actions). Int'l Union v. Gen. Motors Corp., 497 F.3d 615, 630 (6th Cir. 2007) (stating that Rule 23(b)(2) does not require notice before certifying a mandatory class and Rule 23(e) does not require "a notice to lay out every reason a class member might object to the settlement") (citing Fed. R. Civ. P. 23(e)(1) ("requiring the court only to 'direct notice in a reasonable manner'").

[39] Information provided to the District Court showed that between June 10 and 20, 2011, many articles about the Settlement were published by the Associated Press and Reuters news agencies. Final Approval Motion, Ex. 3. The Associated Press, which services 1,700 newspapers and 5,000 television outlets in the United States, was one of the first networks to publish the story about the Settlement. Id. By June 10, 2010, a Google search revealed over 90 stories, and by September 14, 2011, there were more than 21,000 search results revealed from a Google search of the terms "dry max" and "settlement." Id.

A settlement notice need only apprise the Settlement Class Members of the terms of the Settlement "so that class members may come to their own conclusion about whether the settlement serves their interests." Id.; accord DeHoyos v. Allstate Corp., 240 F.R.D. 269, 298 (W.D. Tex. 2007) (holding that "[a] class settlement notice need only properly identify the plaintiff class and generally describe the terms of the settlement so as to alert members 'with adverse viewpoints to investigate and to come forward and be heard.'") (citation omitted); Dillard v. City of Foley, 926 F. Supp. 1053 (M.D. Ala. 1995) (holding that notice that advised class members of the terms of the proposed consent decree, the existence of the opportunity to object and the time and place of the fairness hearing was sufficient).

Greenberg complains the notice in this case failed to identify the intended recipients of the cy pres award. Objector-Appellant Brief, pp 51-52. There is no cy pres award in this Settlement. The Settlement does not result in "unclaimed funds," nor is it one where charitable donations are made because distribution to the class would be cost-prohibitive.[40] Rather, the Settlement

[40] Greenberg's cited caselaw demonstrates the inapplicability of cy pres in this settlement. For example, the Ninth Circuit stated in Nachshin v. AOL, LLC, that "a court may employ the cy pres doctrine to 'put the unclaimed fund to its next best compensation use.'" 663 F.3d 1034, 1038 (9th Cir. 2011) (citations omitted). Here, there is no unclaimed fund, and there is no distribution to the Settlement

(footnote cont'd…)

provides for injunctive relief that requires P&G to reinstate and extend its money-back guarantee program, change its diaper packaging, and produce and fund programs in the area of skin heath. Settlement Agreement, pp. 19-20.

Administrative details, like the exact locations of the skin health programs, are not material terms of the Settlement. It is the purpose of the injunctive relief -- the development of programs in the area of skin health -- that is the material part of the Settlement. That information has been disclosed to the Settlement Class Members. There was sufficient notice of the relief offered as part of the Settlement.

Greenberg further claims the notice is deficient because it does not provide the sum total that will be sought in Representative Plaintiff Awards. Objector-Appellant Brief, pp. 52-53. Greenberg fails to mention that even though there are 59 total Named Plaintiffs, the total amount for all of the awards was only $51,000; less than $1000 per Named Plaintiff. RE #86-2, Joint Declaration of Lynn Lincoln Sarko and Gretchen Freeman Cappio, ¶ 3. Many of the Plaintiffs are both parents of an "affected child," and thus they are entitled to only one payment

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(…cont'd)
Class. Likewise, this is not a settlement where the "cost-prohibitive distribution to the plaintiff class" would warrant a "series of charitable donations" that would constitute cy pres distributions. Id. at 1037. Since this Settlement is for injunctive relief only under Fed. R. Civ. P. 23(b)(2), it does not include any distribution to the Settlement Class.

(and not multiple payments). E.g., Consolidated Complaint, ¶ 16 (Ryan and Stacie Berman), ¶ 23 (Robert and Angelina Davenport), ¶ 25 (Jessica and Brandon Ehrhart), ¶ 30 (Morgan Maue and Robin York), ¶ 46 (John and Karina Walker), ¶ 47 (Emily and Ryan Weaver), and ¶ 48 (Brigette and Joseph Wolfe). The sum total of the amount is not material to the Settlement and need not have been included in the notice.[41]

CONCLUSION

For the foregoing reasons, P&G respectfully requests that this Court affirm the decision of the District Court.

[41] Greenberg cites to Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000), cert. denied, 532 U.S. 1038 (2001) for the proposition that the failure to disclose an incentive award makes the notice deficient. The case provides no support. Contrary to Greenberg's position, the court did not find that notice was deficient based upon the alleged failure to disclose the total amount of the incentive award. Rather, the court rejected the $30,000 incentive payment. Id. Greenberg has not and cannot cite legal authority for the proposition that the sum total of the representative payment award needs to be in the class notice for it to be approved pursuant to Fed. R. Civ. P. 23(e).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), Defendants-Appellees P&G certify the foregoing Brief is in 14-point proportional type and consists of 13,798 words, and therefore complies with the typeface requirement in Fed. R. App. P. 32(a)(5) and the word limitation in Fed. R. App. P. 32(a)(7)(B). P&G further certify that the foregoing Brief was prepared using Microsoft® Office Word 2007, and that counsel is relying on the word count of this word processing program.

s/ D. Jeffrey Ireland
D. Jeffrey Ireland

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

s/ D. Jeffrey Ireland
D. Jeffrey Ireland

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