No. 14-13882

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Christopher Batman, *et. al.*,

Appellants,

v.

The Gillette Co., *et. al.*,

Appellees.

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

BRIEF OF APPELLEES JOSHUA D. POERTNER AND THE SETTLEMENT CLASS

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Certificate of Interested Persons

Pursuant to 11TH CIR. R. 26.1-1, Joshua D. Poertner and the Settlement Class ("Appellees" or "the Settlement Class") hereby notify the Court that they believe that the Certificates of Interested Parties heretofore submitted to this Court by the other appellants and appellees, including the Certificate of Interested Persons in Appellants' Brief, filed on December 3, 2014, reference a complete list of all persons and entities known to have an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11TH CIR. R. 28-1(c) and 34-3, Appellees respectfully suggest that this appeal can be resolved without oral argument. Under binding Eleventh Circuit precedent concerning court approval of class-action settlements, the District Court was well within its discretion to approve this Settlement. *See, e.g., Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980).

In fact, Objectors fail to cite a single case from this Circuit requiring reversal of the District Court's order. That is because each of the dispositive legal issues that govern this case has been authoritatively determined by this Circuit. Additionally, the facts and legal arguments have been thoroughly explored in the briefs and record. Therefore, Appellees believe oral argument is unnecessary.

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Statement of the Issues

1. Did the District Court act within its discretion in approving a class-action settlement where (a) Class Members had the right to complete relief and also received a substantial equitable benefit in Defendants' agreement to stop selling Ultra batteries; (b) there was no evidence of fraud or collusion; and (c) the court carefully weighed the six-factor test in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) and found that the Settlement was fair, adequate, and reasonable?

2. Did the District Court act within its discretion in approving Class Counsel's fee and expense request, which represented approximately 10% of a constructive common fund, not including the substantial equitable benefits, and was supported by Class Counsel's lodestar and a risk multiplier of 1.56 in a complex, contingent-fee class action?

Statement of the Case

A. The Duracell Ultra Batteries Settlement

This Settlement resolves two similar, independent class actions against Defendants Procter & Gamble ("P&G") and The Gillette Company ("Gillette") (together, "Defendants"). Plaintiffs in each case claimed that Defendants misleadingly advertised their Duracell Ultra Power and Ultra Advanced batteries (the "Ultras") as longer lasting than their lower-priced CopperTop batteries. Plaintiffs asserted that damages could be estimated by subtracting the average price paid for Duracell CopperTop batteries from the average price paid for the Ultras during the Class Period. Doc. 113-1, pp. 2-3.

Under the Settlement, Defendants agreed to compensate each of the 7.26 million Class Members who submitted valid claims by paying them their total estimated damages without requiring any proof of purchase. Doc. 113-1, pp. 25-26. Additionally, Defendants ceased producing and marketing the Ultras and agreed to never again sell these batteries by claiming that the Ultras are Duracell's "Longest Lasting" or "Last Up to 30% Longer." Doc. 113-1, p. 25. Defendants further agreed to donate $6.0 million worth of Duracell products to charitable organizations that use substantial numbers of batteries, such as Toys for Tots and the American Red Cross. Doc. 113-1, pp. 26-27. Finally, Defendants agreed to pay Class Counsel's fees

and expenses of up to $5.68 million, a $1500 representative plaintiff payment, and all notice and administration costs. Doc. 113-1, pp. 27-29.

Following preliminary approval, Class Notice was published in leading consumer magazines, three major newspapers, and numerous websites. Doc. 151-1, pp. 2-4. Notice was also disseminated to the U.S. and state attorneys general, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"). It is likely that the Notice reached more than 70.4% of the Class. *Id.* The Claims Administrator received 55,346 claims. Doc. 156, pp. 2-3.

No attorneys general objected to the Settlement or Class Counsel's fee and expense request. Only seven of the 7.26 million Class Members submitted objections, and only twelve requested exclusion. Doc. 168, pp. 4-5.

B. The District Court Grants Final Approval

On August 21, 2014, following a fairness hearing, the District Court granted final approval to the Settlement and Class Counsel's fee and expense request. Doc. 168, p. 3. The court applied this Circuit's applicable legal standards in determining whether to approve a class-action settlement—whether "the settlement is fair, adequate, reasonable, and not the product of collusion between the parties"—and applied the six-factor test under *Bennett*, 737 F.2d at 986. Doc. 168, p. 3.

The District Court found that the settlement was achieved "after arm's

length negotiations between Class Counsel and attorneys for the Defendants during formal mediation overseen by a well-qualified mediator appointed by [the court]." Doc. 168, p. 8. Plaintiff was also "sufficiently informed to negotiate, execute, and recommend approval of this settlement." *Id.*

The court observed that the small number of objections and exclusions represented "a minuscule percentage of the estimated 7.26 million member Class." *Id.* at pp. 4-5. The court carefully considered and rejected each objection, finding that "there [was] no practical alternative by which to deliver greater value to Class Members." *Id.* at pp. 5, 7. With regard to Objectors' argument that direct instead of publication notice should have been provided, the court found that "Gillette does not sell at retail, so it has no records from which to identify actual purchasers of Ultra batteries. And attempting to gain this information from retailers would be difficult, expensive, and essentially fruitless." *Id.* at p. 6.

The court also considered the $6.0 million in-kind charitable contribution in evaluating the overall value of the settlement, as well as that "Class Counsel's efforts have played a large part in ending the Defendants' practice of selling the Ultra batteries, which is a direct benefit to the class members." *Id.* The court concluded that Defendants' decision to cease Ultra battery sales was "motivated by this lawsuit" and "formalized through the Settlement Agreement."

Finally, the District Court granted Class Counsel's $5.68 million fee and expense request, recognizing that "[t]his sum was arrived at independently of the class settlement, and was the result of extensive arms-length negotiations." *Id.* at p. 8, 11. It also found that "[i]n addition to the claimant's fund established for the benefit of the class, the class also received a substantial equitable benefit by reason of Gillette's agreement to stop selling Ultra batteries." *Id.* at p. 9.

"With respect to the economics of prosecuting the case, Class counsel expended more than 6000 billable hours to these cases, worth approximately $3.5 million at their normal hourly rates, plus costs advanced in the sum of $270,000. Using a lodestar analysis, the requested fee represents a risk multiplier of 1.56, which is well within the range of reasonableness for a contingent fee complex class action case. Thus, whether viewed as a percentage of a common fun [*sic*] or by lodestar analysis, the fee requested here is reasonable." *Id.*

C. Standard of Review

This Court reviews a district-court decision approving a class-action settlement for abuse of discretion. *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012). "Determining the fairness of [a] settlement is left to the sound discretion of the trial court and [this Circuit] will not overturn [a] court's

decision absent a clear showing of abuse of that discretion." *Bennett*, 737 F.2d at 986; *see also In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982).

"A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in [reaching its decision], or makes findings of fact that are clearly erroneous." *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011) (citation omitted). Under the clearly erroneous standard, this Court looks to whether the District Court's findings were "plausible in light of the record viewed in its entirety." *Fireman's Fund Ins. Cos. v. M/V Vignes*, 794 F.2d 1552, 1555 (11th Cir. 1986). If the district court's account of the facts was plausible, this Court "may not reverse even if [it] would have weighed the evidence differently and arrived at a contrary conclusion." *Id.*; *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)) ("[Under] the clearly erroneous standard … appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.").

Finally, this Court reviews a district court's award of attorneys' fees and expenses for abuse of discretion. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011). "The district court has great latitude in formulating attorney's fees awards subject only to the necessity of explaining its reasoning so that we can undertake our review." *Id.*

Summary of the Argument

This Settlement is an outstanding result. It compensates Class Members—Duracell Ultra purchasers who were allegedly misled about how long their batteries would last—with cash payments equal to their total estimated damages, provides an in-kind contribution to charitable groups, and ensures that the alleged wrongful conduct will never occur again.

Most importantly, the direct cash payments provide $3.00 per pack to Class Members, up to a total of $6.00, with no documentation and an easy, online claims process. Doc. 154, p. 4-7. By contrast, Class Members incurred average damages of $2.89, and they, on average, purchased 1.4 packs during the Class Period. *Id.* Had this case proceeded to class certification and trial, Class Members could have lost or received substantially less. Doc. 168, p. 7. Given the risks, the result is excellent.

Objectors attempt to swim upstream. Faced with overwhelming evidence that the Settlement was an outstanding deal for the Class, they do not challenge its amount. Brief of Appellants at 12. And faced with the lack of any evidence of collusion among the parties, they concede that point as well. Doc. 181, pp. 22-23. Instead, Objectors seek to infer collusion through the use of a claims process rather than direct payments. Because that claims process yielded a low rate, they contend

that the amount awarded in attorneys' fees is disproportionately high compared to the money paid directly to the Class. This argument is specious.

Not only is there nothing wrong with a claims process, but the District Court found it was the only feasible method of distributing funds to Class Members. Doc. 168, p. 6; *see Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429 (11th Cir. 2012). In fact, settlements routinely employ claims procedures when, as here, the parties lack individual Class Members' contact information. Doc. 168, p. 6; *see* Newberg on Class Actions § 12:18 (5th ed.). Nor was there any evidence that it could reasonably be obtained from merchants. Doc. 181, p. 36. The claims process in this case was simple and straightforward, allowing Class Members to fill out a short online form without any documentation. The parties certainly did not conspire to make the process difficult or burdensome, and Objectors do not allege otherwise.

For all their purported concern about the Class, Objectors' real beef is with the award of attorneys' fees. Objectors ask this Circuit to impose a new rule that would require any class-action fee award to be tied to the actual amount of paid claims, entirely disregarding (or sharply discounting) any equitable relief or in-kind contributions. Not only would Objectors' rule require this Court to overrule its own binding precedent, it would also conflict with the approach of the majority of other

circuits. *Waters*, 190 F.3d at 1297; *accord Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-37 (2nd Cir. 2007); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997).

Such a rule would turn class-action jurisprudence on its head. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal citation omitted). But by limiting attorneys' fees to only a percentage of actual claims, Objectors' rule would make it extraordinarily difficult to prosecute cases with small individual—but large aggregate—harm.

The District Court's lodestar analysis crystallizes this point. Class Counsel engaged in hard-fought litigation, conducted substantial discovery, engaged experts, fully briefed and argued dispositive motions, and negotiated in good faith. They faced deep-pocketed Defendants, represented by highly respected law firms. Class Counsel spent thousands of hours, incurring lodestar of over $3.5 million—all without any guarantee of recovery.

But if Objectors' radical new rule were adopted, limiting fees to actual claims and ignoring all other benefits, it is doubtful *any* competent attorney would have brought this case, much less prosecuted it successfully. Perhaps that is their goal.

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

I. The District Court Did Not Abuse Its Discretion by Approving a Settlement That Provided Complete Relief to Class Members.

In this Circuit, "[t]he district court reviews a class action settlement for fairness, reasonableness, and adequacy. [This Circuit has] instructed the district court to consider the following factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Faught*, 668 F.3d at 1240 (internal citations omitted).

"In addition, our judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986. Finally, "[i]n considering the settlement, the district court may rely upon the judgment of experienced counsel for the parties." *Nelson*, 484 F. App'x at 434. This is precisely the inquiry the District Court engaged in. Doc. 168, p. 3.

Objectors all but ignore the *Bennett* factors. At one point, they even claim that a district court's reliance on this Circuit's binding precedent in *Bennett*

requires reversal.[1] This is simply wrong. Instead, the gravamen of Objectors' argument—that the allocation of the settlement is skewed—concerns whether the settlement is fair and reasonable, the heart of the *Bennett* test. Based on an extensive record, the District Court carefully considered and rejected Objectors' arguments. *Id.* at pp. 5-8. This was not legal error.

A. The District Court Properly Considered the Value of the Monetary Benefits Provided to Class Members, Which Closely Approximates the Total Damages Obtainable at Trial.

During both the preliminary and final approval stages, the District Court considered substantial evidence regarding the monetary benefits the Settlement creates for the Class in light of the significant risks Plaintiffs faced. Doc. 168, pp. 7-8; Doc. 118. The record showed that Class Members' damages could be calculated by subtracting the retail price of Duracell's regular CopperTop batteries from the retail price charged for the Ultras. That difference was approximately $0.39 per AA and $0.41 per AAA battery. Doc. 154, p. 7. The average number of cells per pack was 7.4 for AAs and 7.1 for AAAs. *Id.* at 4-5. Therefore, the average

[1] The only Eleventh Circuit case Objectors cite for this proposition, *Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530-31 (11th Cir. 1994), does not support their argument. *Leverso* concerned whether a class settlement that included a distribution plan that provided benefits to bondholders violated the underlying bond indenture. Since the district court never considered the underlying indenture, this Circuit reversed. Unlike *Leverso*, Objectors here do not contend there was any underlying contract that the Settlement would violate. To the extent that *Leverso* creates a seventh factor to add to *Bennett*'s six-factor test, it does not apply here.

overcharge per pack was estimated at $2.89 for AAs and $2.91 for AAAs.[2] On average, Class Members purchased 1.4 packs of AAs or 1.3 packs of AAAs during the Class Period, yielding average estimated total damages of $4.04 for purchasers of AAs and $3.78 for purchasers of AAAs. *Id.* at 6-7.

Under the Settlement, each of the 7.26 million Class Members who submitted a valid claim receive a payment of $3.00 per pack of Ultra batteries, up to a total of $6.00, without providing any documentation.[3] Claims could be submitted online in just a few minutes' time. The process only requires the claimants to enter their contact information and answer a few simple questions, such as how many battery packs they purchased and what kind. Doc. 113-2.

This is an outstanding result. Each of the 7.26 million Class Members are entitled to receive payment amounting to a reasonable approximation of their estimated damages, immediately and without providing documentation.[4] By

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[2] This does not include batteries purchased at Costco. There, consumers paid a price premium of $0.13 over CopperTop for AA and $0.06 over CopperTop for AAA, and the average per pack price differential ranged from $2.08 to $3.90 for AA and was $0.96 per pack for AAA. Doc. 154, p. 8.

[3] Claimants who submit receipts qualify for up to $12.00 in compensation.

[4] Objectors' arguments that limiting the number of claims per household or that the total amount per claim somehow makes the settlement *per se* unreasonable also fail. Class Members could claim, on average, more packs than they purchased, and could receive, on average, cash payments equal to their total damages.

contrast, in the cases Objectors' rely on, class members would have received dramatically less. *See In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) (providing coupon for a free box of disposable diapers, only claimable with original receipt and UPC code); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3rd Cir. 2013) (providing $5, without receipts, compared to total potential damages of $150); *Pearson v. NBTY, Inc.*, 2014 WL 6466128 (7th Cir. Nov. 19, 2014) (providing $3 per bottle of glucosamine supplements although product retailed for up to seven times that amount); *In re Bluetooth Headset Prods. Litig.*, 654 F.3d 935 (9th Cir. 2011) (providing no direct compensation to class).

The District Court concluded that this Settlement was "the best practical means of providing relief to the Class." Doc. 168, p. 6. It is even more impressive when compared against the considerable risks Class Counsel faced. *Id.* at p. 7. The District Court found:

> The Settlement eliminates a substantial risk that the Class would end-up empty-handed. … Further, Defendants have defended this action vigorously and if this case were to proceed without settlement, the resulting trial and the almost inevitable appeal would be complex, lengthy, and expensive. Accordingly, it would be years before Class Members receive any benefit, and the ultimate net recovery could well be less than received under this Settlement.

Id. Plaintiffs faced the risks that their motions for class certification would be denied, that Defendants would prevail on liability, and that, even if successful, less

than the total damages sought would be awarded. *See* Docs. 73, 77, and 78; Doc. 114-1, pp. 4-5. Defendants planned to argue, *inter alia*, that their packaging was actually true and that the Ultras included additional features that distinguished them from CopperTops, thereby reducing potential damages. See Docs. 77 & 78. Class Counsel believed that their own scientific analyses of the batteries, as well as evidence of what reasonable consumers would expect from the packaging claims, would ultimately prevail, but Plaintiffs also acknowledged that a win was far from guaranteed. Doc. 114-1, pp. 4-5.

In light of these risks, the District Court's decision that the monetary benefits provided to Class Members were fair, adequate, reasonable, and not the product of collusion between the parties was not an abuse of discretion.

B. The District Court Properly Rejected Objectors' Arguments That the Settlement Was Unfair or Unreasonable Because Class Members Were Required to Submit Claims.

Objectors complain that requiring Class Members to submit claims somehow tarnishes the value of the Settlement or indicates it was the product of collusion. Brief of Appellants at 20. This argument is absurd.

The District Court properly found that when, as here, Defendants do not possess contact information for individual Class Members, a claims process is

necessary.[5] Doc. 168, p. 6. In fact, it was the *only* feasible method of distributing benefits to Class Members. *See* Newberg on Class Actions § 12:18 ("There are certain settlements in which a claiming process is inevitable. This is true, for example, for defective consumer products sold over the counter. … There would be no way of distributing a settlement fund to the class members without a process by which the class members identified themselves, their mailing addresses, etc.").

Objectors take an uncompromising position against all claims-made settlements, and they, to use an idiom, throw out the baby with the bath water. Faced with the reality that claims-made settlements are not inherently suspect and that this claims process was simple and straightforward, Objectors instead invent an entire straw man settlement to argue against. Brief of Appellants at 21. Under Objectors' straw man, dubbed "*Acme* Settlement Two":

> One million class members have the right to fill out a twelve-page claim form requesting detailed proof of purchase, with a notarized signature attesting to its accuracy under penalty of perjury. The claim form must be hand-delivered in person between the hours of 8:30 a.m. and 9:30 a.m., on December 24, 2014, at Acme's offices in Walla Walla, Washington or Keokuk, Iowa. Class members with valid claim forms receive $200.

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[5] *See* Doc. 181, p. 36 ("The Court: How else would you settle a case like this? Because there are no records. You don't have retail sale records You don't know whether one person bought two cells or two people bought forty-two cells. … You've got to come up with some sort of reasonable compromise.").

Id. This is farcical. Given the straw man settlement's onerous claims process, no court would ever bless the deal as fair, adequate, and reasonable. The requirements are arbitrary and its terms a bureaucratic morass. No wonder Objectors invented it to argue against.

This Settlement bears no relation to Objectors' straw man. Unlike *Acme* Two, the Settlement claim form was a single page with just a few simple questions. Doc. 113-2. It required no documentation and did not need to be notarized. *Id.* And not only could Class Members mail it anytime over a four-month period, they could complete it online. Doc. 152, p. 2.

Pure common funds are not inherently superior to claims-made settlements. *See Hall v. Bank of Am., N.A.*, 2014 WL 7184039, at *7 (S.D. Fla. Dec. 17, 2014) ("[R]equiring class members to file claim forms … maximizes the relief available to class members who opt to submit a claim. A settlement's fairness is judged by the opportunity created for the class members, not by how many submit claims."); *Hamilton v. SunTrust Mortg. Inc.*, 2014 WL 5419507, at *6-7 (S.D. Fla. Oct. 24, 2014). The real question is whether the Settlement, regardless of the method used, provides significant benefits to Class Members and whether the process to obtain those benefits is simple and straightforward. There was no evidence suggesting that

it was difficult or onerous for Class Members to file claims, a finding Objectors do not dispute. Nor do they contest the total amount of compensation.

That the actual claims represent a fraction of the available fund does not diminish the Settlement's value. The claims rate only reflects that the damages incurred are small, and direct-mail notice was not feasible because Class Members' identities were unknown. Doc. 156, pp. 2-3. Indeed, the District Court determined that "there [was] no practical alternative by which to deliver greater value to Class Members." Doc. 168, pp. 5, 7. That factual finding should not be disturbed.

C. The District Court Properly Applied the Total Benefits Rule in Assessing the Overall Value of the Settlement.

Objectors argue, citing authority from outside this Circuit, that the Settlement's value should not be assessed by the relief made available to the Class but rather by the claims that were actually made. In this Circuit, however, the value of a settlement fund is determined by the total amount made available to the class, not by the amount actually claimed. *Waters*, 190 F.3d at 1297 (applying the percentage of the common-fund method to a total available common fund, even though the amount paid out in claims was substantially less).

This total-benefits rule applies regardless of whether the settlement fund is capped, such as in *Nelson*, 484 Fed. App'x 429, or uncapped, as in *Dikeman v.*

Progressive Exp. Ins. Co., 312 Fed. App'x 168, 171-72 (11th Cir. 2008).[6] This rule serves an important purpose: it allows attorneys to effectively litigate class actions involving large overall harm but relatively small individual damages. As one commentator explained:

> In cases where each individual class member has suffered only a small degree of harm, it is possible, if not likely, that few class members will step forward to claim their portion of the total reversionary fund. Limiting class counsel to a fee based on a percentage of what class members actually claim will, in many instances, result in a fee that is so small as to prevent class action attorneys from pursuing such cases, which serve primarily a regulatory and deterrent function ….

Hailyn Chen, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 UCLA L. REV. 879, 892 (2003). Irrespective of whether an individual class member submits a claim, every class member has an interest in ensuring that the defendant's fraudulent conduct is deterred, and valuing the settlement based on the total funds made available furthers that purpose.

Objectors argue that "[p]ublic policy demands that settlement allocation should be attuned to the result actually achieved for the class." Brief of Appellants at 20. But this argument entirely ignores both the compensatory benefit to a Class

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[6] *See also Hall*, 2014 WL 7184039; *Hamilton*, 2014 WL 5419507; *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 694-695 (S.D. Fla. 2014); *David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362, *8 n. 14 (S.D. Fla. Apr. 15, 2010).

Member who submits a claim and the important deterrent function that class actions play in enforcing consumer-protection laws.

As the Supreme Court explained, "the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617; *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) (small-stakes class actions would not be possible without the "fee-spreading incentive" and contingent fees that are "central" to Rule 23). The total-benefits rule thus effectuates the purpose of class actions.

D. The District Court Properly Exercised Its Sound Discretion in Not Requiring the Parties to Subpoena Third-Party Retailers.

Objectors contend that whenever a class-action settlement employs a claims process, a district court must require the parties subpoena third-party retailers to obtain direct contact information for individual consumers and provide them with actual notice. This is not the law. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1320-21 (11th Cir. 2012) (only requiring "best practicable" notice, not actual notice).

Objectors also mischaracterize the facts. They claim that they provided "unrefuted record evidence" that consumer contact information from retailers was available. But Objectors' "unrefuted record evidence" only consists of Mr. Frank's

beliefs that "several vendors" have "loyalty cards or other customer records" and a 2012 newspaper article "documenting [the] degree" to which retailers collect and use consumer information. Doc. 126-1, p. 2; Brief of Appellants at 27. None of this "evidence" addressed the specific circumstances here, nor did Objectors provide any information about what incremental benefit the Class might receive from the proposed subpoenas.

In reality, there is no evidence that this information is actually available, that retailers would or could provide it, or that it would be practical to subpoena thousands of merchants. *See* Brief of Defendants at 34–40 (explaining flaws in Objectors' proposal and distinguishing cases). Based on the record before it, the District Court properly concluded that attempting to acquire this information from merchants would be "difficult, expensive, and essentially fruitless." Doc. 168, p. 6. This conclusion was well within its discretion.

II. The District Court Correctly Concluded That the Settlement Was Not the Product of Fraud or Collusion.

The District Court found no indication that the Settlement was the product of fraud or collusion. Doc. 168, p. 8. On the contrary, the litigation was hard fought, and the parties entered mediation only after the court ordered they do so. Doc. 157, p. 2; Doc. 114, pp. 2-7. They worked with a highly respected mediator, who testified

that the mediation was conducted at arms-length, and the case did not settle until the parties had both briefed and argued the class-certification motion. Doc. 114-3.

Objectors now urge this Court to disregard the District Court's factual findings and instead find that this Settlement was the product of collusion, even though they themselves admitted below there was no "explicit collusion." To square these positions, they argue that various "indicia" suggest that the Settlement *might be* collusive, citing Defendants' agreement not to oppose Class Counsel's fees and the absence of a provision automatically converting those fees to additional Class benefits, should a court reduce them. They even suggest that separate negotiation of Class benefits and fees infers collusion.

Objectors' problem is that for all their theoretical bluster, the extensive District Court record shows there was no collusion.

A. This Circuit Does Not Disfavor Negotiated Fee Awards or Subject Them to Any Form of Special Scrutiny.

Objectors contend the District Court abused its discretion because it did not subject Defendants' agreement to pay fees in addition to the amounts paid directly to the Class to heightened scrutiny. This assertion is wrong on two fronts. First, this Circuit does not require any such inquiry. And second, even in a hypothetical circuit that did, the District Court carefully analyzed the structure of the negotiated attorneys' fee award—contrary to Objectors' claims.

Objectors attack two specific Settlement features: (a) the provision that Defendants not oppose Class Counsel's request for fees and expenses up to a set amount and (b) the lack of a provision that would automatically convert any reduction in fees to an additional Class benefit. Using terms like "clear sailing" and "kicker," Objectors insinuate that these features are inherently suspicious. But they are simply components of a negotiated fee award, where after all the substantive provisions of a class-action settlement have been agreed to, the parties separately negotiate attorneys' fees—here, under the supervision of a neutral mediator as an additional check against collusion.

Incredibly, Objectors even suggest that the separate negotiation of class relief and attorneys' fees ("segregation," as they term it) somehow corrupts the process. But their suggestion would flip this Circuit's well-settled law on its head. *See Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 133741, at *34 (M.D. Fla. Jan. 27, 1998) (finding separate settlement and fee negotiations promote strenuous bargaining and are not collusive); *see also Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001); *Fresco v. Auto Data Direct, Inc.*, 2007 WL 2330895, *3 (S.D. Fla. May 14, 2007); *Strube v. American Equity Inv. Life Ins. Co.*, 2006 WL 1232816, at *2 (M.D. Fla. May 5, 2006). Instead, this Circuit's courts have consistently held that sequencing settlement negotiations reduces the potential for any conflict of interest

and supports approval of both settlements and fee awards. *See Knight v. Alabama*, 469 F. Supp. 2d 1016, 1036 (N.D. Ala. 2006); *Strube*, 2006 WL 1232816, at *2.

Defendants' agreement to not oppose Class Counsel's fee award is both commonplace and proper. These provisions are "appropriate when, as here, [they do] not impact the substantive benefits offered to the class." *Eisen v. Porsche Cars N. Am., Inc.*, 2014 WL 439006, at *10 (C.D. Cal. Jan. 30, 2014); *see also Shames v. Hertz Corp.*, 2012 WL 5392159, at *13 (S.D. Cal. Nov. 5, 2012) ("clear-sailing" provision was not collusive because attorneys' fees were separately negotiated); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 n.6 (S.D. Cal. 2011) (federal courts routinely accept "clear-sailing agreements"); Newberg on Class Actions § 15:34.

Objectors' argument regarding the so-called "kicker" likewise fails. Contrary to their assertions, the payment of attorneys' fees out of a segregated fund is a valuable settlement feature, ensuring that the class is fully compensated without regard for class counsel's attorneys' fees. *See Hall*, 2014 WL 7184039, at *9 ("The fees will not be taken from the amount made available to the Class and these indicia of fairness extinguish any suggestion of collusion."). Objectors complain that had the District Court awarded less than the full amount in fees requested by Class Counsel, any surplus should have been automatically reallocated to Class Members. In this Circuit, however, no such requirement exists. *See generally Camden I Condo.*

Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); *Waters*, 190 F.3d at 1295-96; *Nelson*, 484 F. App'x 429, 432, 435.

Yet Objectors persist. Seeking to manufacture legal error, Objectors again heavily lean on two cases from other jurisdictions—*Bluetooth* and *Pearson*—to raise "red flags" about the Settlement's theoretical collusiveness. But both cases only stand for the unremarkable proposition that the presence of so-called "clear sailing" and "kicker" provisions merely signal a potential inference of possible collusion—an inference which the District Court flatly determined nonexistent based upon unchallenged and well-supported factual findings.[7] Doc. 168, p. 8. Another case Objectors cite, *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 520 (1st Cir. 1991), merely holds that even when class counsel's fees will not affect the class's recovery, the district court should examine the request to determine whether it is fair and reasonable, rather than simply rubber-stamping it. That is precisely what the District Court did here.

By now, Objectors' willful ignorance of this Circuit's precedents should not be surprising. Objectors habitually trumpet *Pearson* and *Bluetooth*—but do not cite

[7] Additionally, in *Bluetooth*, comparing the proposed settlement with the fee request suggested that collusion might have actually occurred. Class members received zero monetary compensation, even though damages were initially sought, and the attorneys' fee was $800,000. 654 F.3d. at 938-39. Here, by contrast, Objectors have not claimed that a better result could have been achieved for the Class at trial—nor could they reasonably make such a claim.

any Eleventh Circuit cases adopting or echoing their reasoning or analysis.[8] Besides, even if they were the law, *Bluetooth* and *Pearson* in no way require rejection of this Settlement. *Bluetooth* simply instructs that if there are signs of self-dealing, approval must be "supported by a clear explanation of why the disproportionate fee is justified and does not betray the class's interests." 654 F.3d at 947, 949. As explained *infra*, the District Court's approval of the Settlement was accompanied by such a "clear explanation," backed by ample evidence. *See* Doc. 168, pp. 5, 9.

B. The Factual Record Demonstrates That There Was No Collusion Among the Parties.

Despite Objectors' unsupported allegations that Class Counsel placed their own self-interests above the interests of the Class, the District Court found that there was "no suggestion of fraud or collusion between the parties and no evidence of want of skill or lack of zeal on the part of Class Counsel." Doc. 168, p. 8. That factual finding is supported by substantial evidence and is entitled to deference.

Most importantly, the parties actively litigated their claims and reached the Settlement only after months of negotiations under the direct supervision of a

[8] To the contrary, other Circuits, after *Bluetooth,* have upheld settlements that included so-calling "clear sailing" and "kicker"clauses. *See, e.g., Blessing v. Sirius XM*, 507 Fed. App'x 1, 4 (2nd Cir. 2012) (overruling Mr. Frank's objection and explaining that "[t]o the extent objectors argue that the clear-sailing and reversionary provisions suggest improper collusion between class counsel and [defendant], we note that such provisions, without more, do not provide grounds for vacating the fee.").

court-appointed, nationally recognized mediator, Rodney A. Max. *See generally* Doc. 114-3; Doc. 114-1; Doc. 114-2. U.S. District Courts in Florida regard Mr. Max as "eminently qualified." *See, e.g., Fresco*, 2007 WL 2330895, at *5; *see generally Nelson*, 484 Fed. App'x at 435 (when parties utilize a highly regarded mediator to assist negotiations, an inference of collusion is unwarranted).

In a sworn declaration, Mr. Max described the "lengthy negotiations" as "exhausting," adding that he "never witnessed or sensed any collusiveness between the parties." Doc. 114-3, pp. 4-5. Rather, in the mediator's opinion, "at each point during these negotiations, the settlement process occurred at arm's length and, while professionally conducted, was quite adversarial." *Id.* The record demonstrates that the Settlement was only reached after several spirited, adversarial mediations—first over the settlement benefits and later, separate negotiations over attorneys' fees. Doc. 114-1, pp. 7-8; Doc. 114-2, pp. 7-8; Doc. 114-3, p. 5. In fact, all of the substantive terms of the settlement were agreed to before the negotiations regarding attorneys' fees even began. Doc. 114-3, pp. 4-5; Doc. 157-1, pp. 4-5 & 8. After the class relief was agreed to, Defendants had every incentive to vigorously bargain for modest attorneys' fees, and Class Counsel ultimately agreed on an amount that was substantially less than what Mr. Max proposed. Doc. 114-1, pp. 7-8; Doc. 114-2, pp. 7-8.

The record further shows that the Court received a minuscule number of objections, suggesting that the Settlement was not the product of collusion. Only seven of 7.26 million class members objected to the Settlement, and only twelve opted out. Doc. 168, pp. 4-5. Of special significance, no U.S. or state attorney general objected. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 820 (9th Cir. 2012); *Hall*, 2014 WL 7184039, at *5. Moreover, all three Objectors who have joined in this appeal are serial objectors whose motives may be suspect.[9] Doc. 158, pp. 21-25.

Class Counsel did not simply rely on "bald assertions" of a lack of collusion. *Cf. In re Bluetooth*, 654 F.3d at 948. Instead, the record includes numerous corroborating declarations from both counsel and the mediator. Docs. 114-1, 114-2, & 113-3; Docs. 157-1, 157-2, 157-3, & 157-4. In sum, the District Court record demonstrates that counsel conducted the entire settlement process at arm's-length,

[9] Objectors also make an unfounded claim that the District Court erred by weighing the small number of objections and exclusions in favor of approval. To the contrary, the class's reaction to a proposed settlement is one of the relevant factors bearing on its fairness and reasonableness. *Bennett*, 737 F.2d at 986, 988 n. 10 (proper to consider both the number and substance of objections in approving settlement). Courts in this Circuit have consistently found that a minuscule objection rate weighs strongly in favor of approval. *Sacciocco*, 2014 WL 808653, at *8 (objections and exclusions of 0.018% favor approval); *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) ("extraordinarily" low rate of 0.0004% objections favor approval); *Assn. for Disabled Americans. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002) ("small number of objectors from … class of many thousands is strong evidence of … fairness and reasonableness"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1336 (S.D. Fla. 2011) (extraordinarily low rate of objections by class members is "entitled to nearly dispositive weight").

by well-represented parties, under the supervision of a respected, court-appointed mediator, and with the class benefits decided before any discussion of fees occurred. Doc. 114-3, pp. 4-5; Doc. 157-1, pp. 4-5 & 8. This was no "red-carpet treatment," as Objectors disingenuously suggest. *See Weinberger*, 925 F.2d at 524; *accord In re Bluetooth*, 654 F.3d at 948.

Objectors urge this Court to disregard the District Court's factual findings and instead find that the Settlement was the product of collusion, despite the lack of any supporting evidence. In fact, Objectors' own attorney, Adam E. Schulman, admitted as much during the District Court's fairness hearing. Doc. 181, pp. 22-23 ("The second argument Mr. Frank is not making is that there has been any explicit collusion between the settling parties to sellout absent class members.").

Instead, Objectors' now hang their hats on "red flags" that might manifest some theoretical inference of collusion. This ploy should be rejected. Given the extensive factual record demonstrating that the Settlement was free from fraud and collusion, the District Court acted well within its discretion.

III. The District Court Properly Considered the Settlement's Equitable Benefits in Assessing Its Overall Value.

One of the principle objectives of this litigation was to obtain an injunction, preventing Defendants from advertising Ultra batteries as lasting longer than the

CopperTops. Doc. 117, p. 3. Defendants agreed through this Settlement to cease and never again resume the allegedly misleading advertising. Doc. 113-1, p. 25.

Objectors claim that Duracell's decision to stop selling the Ultras shortly before the Settlement was reached somehow nullifies this equitable relief, and therefore, the District Court erred by considering its value. This claim is baseless and ignores the context in which the Settlement was reached.

A. The Settlement Provided a Substantial Equitable Benefit to the Class.

These cases were filed in early 2012, but Defendants did not cease packaging, marketing, selling, and distributing its Ultra batteries until July 2013. Doc. 153, pp. 1-2. Defendants admitted that this litigation was a material factor influencing their decision to stop marketing and selling the Ultras containing the allegedly misleading advertising. *Id.* The Settlement Agreement ensures that Defendants will never again resume the alleged wrongful conduct. Doc. 113-1, p. 25.

The District Court properly found that "this litigation, and Class Counsel's efforts have played a large part in ending the Defendants' practice of selling the Ultra batteries, which is a direct benefit to the class members. While the cessation of Ultra battery sales predates the Settlement Agreement, that business decision was motivated by this lawsuit and was formalized through the Settlement Agreement." Doc. 168, pp. 3, 5-6. This substantial equitable benefit influenced the

District Court's determination that the Settlement was "fair, adequate, reasonable, and not the product of collusion between the parties." *Id.* at p. 3, 5-9; *see also* Doc. 181, p. 14 ("I do weigh pretty heavily the injunctive aspect of this based on this representation that it was this lawsuit that caused [Defendants] to take this advertising or this product off the market. Clearly there's a benefit there.").

The District Court's factual finding that the Settlement provides the Class with a substantial equitable benefit was supported by extensive evidence and is entitled to deference.

B. The District Court Properly Overruled Objections to the Value of the Equitable Relief.

Objectors contend that the court abused its discretion in considering the value of the equitable benefits in weighing the Settlement's fairness. Objectors are wrong. To the contrary, it is entirely proper—and in fact, required—for district courts to consider the value of both monetary and nonmonetary relief when assessing a proposed class-action settlement. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Camden I*, 946 F.2d at 775.

Objectors cite no Eleventh Circuit law to support their argument that the District Court abused its discretion by crediting the injunctive relief as a benefit to the Class. On the contrary, where, as here, Defendants' decision to stop the alleged wrongful conduct is enforced through a judicially approved Settlement, it is entirely

proper to do so.[10] *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001).

The cases Objectors cite from outside of this Circuit, *Pearson* and *In re Dry Max Pampers*, do not support their contention either.[11] Instead, *Pearson* and *Dry Max Pampers* stand for the unremarkable proposition that temporary and merely cosmetic labeling changes provide limited or no value to consumers. *Pearson*, 772 F. 3d at 785; *In re Dry Max Pampers*, 724 F.3d at 719.

In *Pearson*, the plaintiffs claimed that the defendants had violated state consumer-protection laws by falsely touting glucosamine pills' health benefits. 772 F.3d at 785. The *Pearson* settlement included changes to the glucosamine pills' labels for a period of thirty months.[12] *Id.* The Seventh Circuit questioned the value of imposing such a temporary change, observing that the "cutoff means that after 30 months Rexall can restore the product claims that form the foundation of this suit." *Pearson*, 772 F.3d at 785. Even more damning, the proposed labeling changes

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[10] *See also Saccoccio*, 297 F.R.D. at 698 (overruling objection that injunctive relief lacked value when settlement to discontinue practice ensured continued cessation); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *13 (N.D. Cal. Mar. 18, 2013).

[11] *Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1090-91 (C.D. Ill. 2012) also does not apply when, as here, Defendants' decision to stop their wrongful conduct in response to litigation is enforced through judicial ratification of the Settlement. *Buckhannon*, 532 U.S. at 604.

[12] The court found the injunction would, in practice, run just twenty-four months.

were "purely cosmetic in wording."[13] *Id.* at 785. As a result, the *Pearson* settlement did not benefit and instead arguably made things worse for the class, because it lent judicial protection to the alleged misleading advertising. *Pearson*, 772 F.3d at 785.

Similarly, in *In re Dry Max Pampers*, the Sixth Circuit found the defendant's agreement to make purely cosmetic changes to a product's packaging for a two-year period conferred little benefit on the class. 724 F.3d at 719. There, the plaintiffs claimed that the defendant failed to warn consumers that Pampers diapers with "Dry Max technology" could cause severe diaper rash. The proposed settlement only required defendants to add a sentence to the diaper-box labels suggesting that consumers "consult Pampers.com or call 1-800-Pampers" 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." *Id.* at 716. The Sixth Circuit reasoned that these proposed changes provided negligible value to the class, because they "amount[ed] to little more than an advertisement for Pampers." *Id. at 719.*

In contrast, this Settlement ensures that Defendants will never again use the alleged misleading advertising that precipitated this litigation. The Settlement not only prohibits Defendants from using the precise language used to market the

[13] The settlement only required defendants to change their label from "support renewal of cartilage" to "contains a key building block of cartilage." *Id.*

Ultras but also prohibits them from making any similar claims that would lead consumers to believe that the Ultras last longer than Duracell's lower-priced batteries. Unlike *Pearson* and *Pampers*, this is not a purely cosmetic change but represents important relief that was sought by plaintiffs. *See* Doc. 117, p. 3.

Objectors' also make the sweeping claim that "no changes to future advertising by [Defendants] will benefit those who already were misled." Brief of Appellants at 55 (quoting *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1077 (C.D. Cal. 2010)). This simply does not apply here. The *True* case itself acknowledges its limited application. *Id.* at 1077 (its finding that the injunctive relief would provide little value was "largely a byproduct of the nature of Plaintiffs' claims"). *True* concerned alleged false advertisements about the fuel efficiency of Honda Civic Hybrids. The settlement required Honda to change "actual mileage may vary" to "actual mileage will vary" for a period of twenty-four months—a limited time during which a Honda owner would be unlikely to purchase a new car. *Id.* at 1061. Moreover, regulatory changes had already required Honda to substantially lower its fuel economy estimates. *Id.* at 1077.

This Settlement Class, in contrast, consists of battery purchasers—ordinary consumers who are likely to purchase batteries in the future. This is very different from the big-ticket item involved in *True*. And unlike *True*, no regulatory change

occurred in the course of the litigation mandating the change. Instead, the Settlement itself ensures the permanent cessation of the alleged wrongful practice.

Finally, Objectors apply identical arguments to the District Court's award of attorneys' fees. This again ignores and mischaracterizes the law. When assessing a request for attorneys' fees, district courts not only may but *must* consider the value of both monetary and nonmonetary relief included in a settlement. *Camden I*, 946 F.2d at 775 (in awarding attorneys' fees, court should consider "any non-monetary benefits conferred upon the class by the settlement"); *see also Mills*, 396 U.S. at 392 (attorneys' fees may be awarded where common benefit has been created for the class, even when settlement does not include cash value).

Moreover, when considering the value of equitable relief, a district court need not calculate a specific monetary value. Instead, it may use its best judgment, considering the equitable benefit as a "relevant circumstance" in assessing the appropriate percentage of a common fund to be awarded as attorneys' fees. It may even award fees based solely on equitable relief. *Faught*, 668 F.3d at 1233-44 (holding that award of additional attorneys' fees based on the value of changes to a company's business practices is not an abuse of discretion, even when the Court

does not calculate the specific monetary value of those changes); *accord Ault*, 692 F. 3d at 1217-18; *see also Camden I*, 946 F.2d at 768.[14]

By properly considering Defendants' agreement to cease and never again engage in the alleged wrongful conduct, the District Court found that the Settlement conferred a substantial equitable benefit on the Class. Doc. 168, p. 9. The District Court's decision that this substantial benefit supported approval of both the Settlement and attorneys' fees was well within its sound discretion.

IV. The District Court Properly Considered the Settlement's Charitable Contribution.

While the primary features of the Settlement were paying Class Members a reasonable estimate of their full damages and ensuring Defendants cease and never again engage in the alleged misleading advertising, the District Court also considered the value of the charitable contribution that Defendants agreed to make under the Settlement.[15] It found that the charitable contribution will "have an

[14] Other circuits follow the same approach. *See Merola v. ARCO*, 515 F.2d 165, 172 (3rd Cir. 1975); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999).

[15] The District Court did not, however, include the in-kind contribution in its calculation of the $49.8 million Settlement value or in awarding attorneys' fees.

indirect benefit to the Class." Doc. 168, p. 5. This conclusion was entirely proper and supports affirmance on appeal.

As part of the Settlement, Defendants agreed to make an in-kind payment of $6.0 million (at retail value) to charitable organizations, including first-responder organizations, the Toys for Tots charity, and the American Red Cross. Doc. 113-1, pp. 26-27. These contributions are entirely separate from any products that Defendants have already donated or were committed to donate, and they will quality batteries and products guaranteed to be fresh. *Id.*; Doc. 153, pp. 3-4.

Objectors make two fallacious arguments against this donation. First, they challenge the inclusion of a charitable contribution at all, arguing that it is somehow improper for a defendant to give money to charity in addition to directly compensating the Class. Second, they contend that even it were acceptable to include charitable contributions in the Settlement, they are improper because the recipients are not adequately identified. Both arguments miss the mark.

A. The District Court Properly Concluded That the Charitable Contribution Benefited the Class.

Objectors' first argument—that the inclusion of charitable contributions in addition to direct payments to Class Members is always improper—is so outlandish that Objectors coin a fictitious term, "*ex ante cy pres*," to describe it. In support of this fictitious distinction between two types of *cy pres*, Objectors cite to a single law-

review article. Brief of Appellants at 44. But a law-review article is not law. Nor does it appear that any federal court has adopted that term.

Nomenclature aside, Objectors misunderstand the nature and context of the charitable contribution and then misapply the law. The District Court made neither of these errors. Unlike the *cy pres* in the settlements Objectors cite, the in-kind relief here provides a supplemental benefit *in addition to* the complete cash relief the Settlement provides to Class Members. *See supra* Sect. I.A. The charitable contributions will be made to organizations that either consume large numbers of batteries or which will distribute batteries to consumers nationwide.

In either case, the charitable contribution is not a method of "distributing settlement funds to non-class third parties," as Objectors claim. Rather, it is an effective method of distributing $6.0 million in real benefits to particularly high-volume Class Members. Doc. 153, pp. 2-3 (getting benefits "in the hands of individuals or families who likely otherwise purchase the batteries at retail with their own money"). The District Court therefore reasonably concluded that it will provide "an indirect benefit to the Class." Doc. 168, p. 5.

Nevertheless, Objectors rely on authority from outside this Circuit to support their contention that charitable contributions are somehow improper.[16] To the contrary, in this Circuit, the use of charitable contributions is a an accepted way of indirectly compensating settlement class members for whom direct compensation is infeasible, as well as to deter wrongdoing. *See, e.g., Nelson*, 484 F. App'x at 435 (upholding approval of *cy pres* distribution); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986); *see also In re Checking*, 830 F. Supp. 2d at 1355 (*cy pres* "serve[s] the goals of civil damages by ensuring [the defendant] fairly pays for the class's alleged losses").

Not only are *cy pres* awards proper, but under the circumstances here—where Class Members who file claims will be fully compensated and it would be infeasible to directly pay unknown recipients—they are actually *favored*. Doc. 154, p. 2. As *In*

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[16] The cases on which the objectors primarily rely—*Nachsim v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) and *Pearson*, 772 F.3d 778—are not the law of this Circuit, and in any event, are distinguishable. In *Nachsim*, the Ninth Circuit rejected a *cy pres* distribution because the geographic dispersion of the nationwide class was not fairly represented. 663 F.3d at 1040. In contrast here, the proposed charities are national organizations and are therefore well-aligned with the nationwide Class. In *Pearson*, the Seventh Circuit rejected a *cy pres* award to an orthopedic foundation in a case involving glucosamine supplements sold to consumers at retail. That award had two problems. First, the orthopedic foundation was neither a class member nor would be distributing any of the award, even indirectly, to the class. Second, the court found that class members had not received complete relief, making it improper to resort to a *cy pres* award when additional payments could make them whole. 772 F. 3d at 784. This settlement faces neither obstacle.

re Checking explains, earmarking excess awards for identified settlement class members may disadvantage unidentified settlement class members, whereas *cy pres* awards would indirectly benefit those who otherwise receive no benefit at all. 830 F. Supp. 2d at 1356 (explaining "why, faced with a set of reasonable but imperfect choices, the law allows the Court discretion" in approving *cy pres* awards); *see also Perkins v. Am. Nat. Ins. Co.*, 2012 WL 2839788, *4 (M.D. Ga. July 10, 2012).[17]

While the Settlement's charitable contribution was not its primary feature, it was an additional component that, together with the direct payments to Class Members and substantial equitable benefits, benefitted the Class. For that reason, it was entirely proper for the District Court to consider it when determining the fairness, adequacy, and reasonableness of the Settlement.

B. The Settlement Sufficiently Identified the Recipients of Charitable Contributions.

This Settlement sufficiently identified the types of organizations that will receive in-kind charitable contributions. These organizations include "first responder charitable organizations, the Toys for Tots charity, The American Red

[17] The Circuit's approach is not unique. *See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (*cy pres* distributions preferable to providing windfall recoveries); *Fears v. Wilhelmina Model Agency, Inc.*, 315 Fed. App'x 333, 335-36 (2nd Cir. 2009) (awarding residual funds to charities rather than plaintiffs was not abuse of discretion); *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 705 (8th Cir. 1997) (refusing to distribute remaining funds to class members because "neither party had a legal right").

Cross or 501(c)(3) organizations." Doc. 113-1, pp. 26-27. Neither Rule 23 nor due process requires greater specificity. *See Nelson*, 484 Fed. App'x at 429 (approving settlement that only identified *cy pres* recipients as "charities [to be] agreed upon by the parties"); *see also In re Baby Prods.*, 708 F.3d at 172. Objectors' claim that recipients of any charitable contribution must be specifically identified in the class notice ignores decades of precedent in this Circuit and others.[18] In fact, the parties often select c*y pres* recipients well after notice has been disseminated and all distributions to the class have occurred. For example, in *In re Infant Formula Multidistrict Litig.*, the court *sua sponte* designated a *cy pres* recipient approximately five years after the settlement was finalized and class members were paid. 2005 WL 2211312 (N.D. Fla. Sept. 8, 2005). Similarly, in *Perkins*, the court considered recommendations regarding the distribution of $3.6 million to *cy pres* recipients after all identifiable class members were paid. 2012 WL 2839788; *see also In re Lupron*, 677 F.3d at 31-33.

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[18] The cases on which Objectors rely—*In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2nd Cir. 1987) and *Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012)—are inapposite. *In re Agent Orange* does not address notice requirements at all; it only addresses whether a cash *cy pres* distribution can be made without providing that charity with any direction on using the funds. 818 F.2d at 185-86. And *Dennis* only found that an award to "charities that feed the indigent" is both insufficiently descriptive and unlikely to go to any individuals who are class members. 697 F.3d at 866-67. Here, however, the charities are identified by name, and the record shows that the distribution plan provides *an additional benefit* to the Class.

As explained *supra*, not only are the charities adequately identified, but they provide an additional benefit to Class Members. And the Class, through adequate notice, had ample opportunity to review and object to the recipients. Despite their protestations, Objectors simply cannot reasonably assert any error of law.

V. The District Court Did Not Abuse Its Discretion by Approving Class Counsel's Fee and Expense Request Based on the Substantial Monetary and Equitable Benefits They Achieved for the Class.

The District Court did precisely what district courts are supposed to do. It applied this Circuit's law, considered the Settlement's monetary and nonmonetary benefits, weighed those benefits against the risks of proceeding to trial, and appropriately determined Class Counsel's award. Doc. 168, p. 9. The court then checked that award against the attorneys' lodestar and found that it fell "within the range of reasonableness for a contingent fee complex class action case." *Id.*

Despite Objectors' reliance on law from other circuits, dissenting opinions, and policy papers about what *should be* but is *not* the law of this Circuit, they all but ignore binding Eleventh Circuit precedent that the District Court was duty-bound to follow. Absent an error of law—which objectors cannot show—the District Court's factual findings as to the reasonableness of Class Counsel's fee and expense award are entitled to deference.

A. The District Court Correctly Applied Eleventh Circuit Law on Attorneys' Fees in Class-Action Settlements.

The District Court considered both the "fund established for the benefit of the class" and the "substantial equitable benefit by reason of Gillette's agreement to stop selling Ultra batteries" and granted Class Counsel's $5.68 million fee and expense request.[19] Doc. 168, p. 9. In doing so, it correctly found that it was "not limited by the actual amount of claims to be paid." *Id.* Instead, by properly evaluating both the monetary and nonmonetary relief, the District Court concluded that the requested fee was reasonable.

Objectors contend that it is reversible error to award Class Counsel anything other than a percentage of the actual claims by Class Members. This contention ignores this Circuit's binding precedent. In this Circuit, as well as in the majority of circuits that have considered the issue, an attorneys' fee award should be based on a percentage of the total common fund made available to a class, rather than a percentage of the amounts actually claimed. Furthermore, Objectors' specious claim that the total-benefits rule has been displaced by the 2003 amendments to Rule 23 or by the enactment of CAFA lacks any support.

[19] This award consisted of $5.4 million in attorneys' fees and $272,000 in expenses.

1. Under this Circuit's Binding Precedent, the Settlement's Value Must Be Calculated on the Total Benefit Made Available to the Class.

This Circuit has consistently valued claims-based class-action settlements as common funds against which Class Counsel's fees should be weighed. It does not matter whether the amount available to be claimed by the Class is reversionary or non-reversionary or whether the fund is limited or unlimited in size. As this Circuit explained in *Waters*, the size of the fund must be calculated by determining the maximum total benefits available to the class. 190 F.3d at 1297 (applying the percentage of the fund method to the total amount, even though the actual paid claims were substantially less).

In reversionary settlements like *Waters*, if the amount of the common fund is expressly stated, it functions as a maximum value, limiting class members to this amount. In fact, sometimes a settlement agreement will expressly describe a fund as the "maximum settlement amount," even though the claims paid may be substantially less. When the claims process is capped, calculating the size of the fund is simple; the value of the fund is the maximum settlement amount. *Nelson*, 484 Fed. App'x at 429 (treating a claims-made settlement with both maximum and minimum payouts as a constructive common fund and valuing the fund based on

the maximum settlement amount); *Atkinson v. Wal-Mart Stores, Inc.*, 2011 WL 6846747 (M.D. Fla. Dec. 29, 2011).

But common-fund settlements need not specify a maximum value, artificially limiting the class recovery. Common funds also may be unlimited. In such cases, a defendant simply agrees to pay all valid claims with no cap on the potential recovery. In uncapped common-fund cases, this Circuit instructs that courts should calculate the total amount that may be claimed by the class and treat that sum as a constructive common fund. *Dikeman* at 171-72 (finding that a claims-made class-action settlement may be treated as a constructive common fund, even though the settlement did not expressly create a fund); *Hall*, 2014 WL 7184039, at *8-9; *Saccoccio*, 2014 WL 808653, at *9; *David*, 2010 WL 1628362, at *8.

This rule is not altered by a settlement that provides for payment of attorneys' fees separate from payments to the class; the maximum amount payable is still treated as a constructive common fund against which the proposed fee payment is measured. *Saccoccio*, 2014 WL 808653, at *9 ("The 'common fund' analysis is appropriate even where the fee award will be paid separately by Defendants."); *Hall*, 2014 WL 7184039, at *8-9 (finding constructive common fund where defendant paid attorneys' fees separately); *David*, 2010 WL 1628362, at *8 n.14; Manual for Complex Litig. § 21.75 (4th ed. 2008) ("If an agreement is

reached on the amount of a settlement fund and a separate amount for attorney fees … the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class."). In analyzing claims-made settlements, courts simply add the total amount that could be claimed by the class, the agreed-upon attorneys' fees and expenses, and the costs of notice and administration to calculate the total size of the fund. *Id.*

Thus, applying this Circuit's common-fund doctrine, the District Court correctly calculated the total benefits made available to Class Members. Doc. 168, p. 9. Duracell has estimated the total number of Class Members at 7.26 million, and each is entitled to $6.00 (without proof of purchase). Multiplying the total number of Class Members by the available benefit per Class Member results in available benefits of $43.6 million. When this figure is added to the $5.68 million in attorneys' fees and expenses and the notice and administration costs of $632,095, the Settlement creates a constructive common fund of $49,872,095. While this constructive common fund is enormous, it is actually a conservative estimate, as it does not attribute any monetary value to the substantial equitable benefits or the $6.0 million in-kind contribution.

Objectors' attacks on Class Counsel's fee request are based on a flawed understanding of the applicable law concerning class-action settlements. In *Boeing v. Van Gemert*, the U.S. Supreme Court explained:

> **[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.** … The common-fund doctrine reflects the traditional practice in courts of equity, … and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. … The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. … Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

444 U.S. at 478 (1980) (internal citations omitted).

Relying on *Boeing*, this Circuit considered whether attorneys' fees should be awarded based on a percentage of the fund or on lodestar. *Camden I*, 946 F.2d at 768. In *Camden I*, the class-action settlement created a $3 million fund to pay claims and attorneys' fees; any unclaimed funds would revert to defendants. Class counsel requested a fee of 31% of the common fund, but the district court instead awarded fees based on lodestar. *Id.* at 770. This Circuit vacated and remanded the decision, holding, "Henceforth in this circuit, attorneys' fees awarded from a common fund

shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Id.* at 774.

Following *Camden I*, this Circuit further clarified that class counsel are entitled to a reasonable fee based upon a percentage of the total fund available to the class, not the lesser amount actually claimed. *Waters*, 190 F.3d at 1297. The *Waters* settlement created a $40 million common fund to pay claims and class counsel's fees and expenses; like *Camden I*, any unclaimed amounts would revert to the defendant. *Id.* at 1292. The district court awarded fees of $13.3 million (33 1/3% of the total $40 million fund), even though the estimated payout to class members was approximately $6.5 million. *Id.* at 1295 n.6.

This Circuit affirmed, observing that "[t]he fact that there were a reduced number of claimants had no effect at all on the amount each class member received. That amount, rather, was determined by the total fund accrued. Negotiating a $40 million gross settlement fund, therefore, created a benefit on behalf of the entire class." *Id.* at 1297. In reaching its decision, this Circuit relied heavily on *Boeing*, noting that the *Boeing* court had "rejected petitioner's argument that the attorneys' fee award could be based only on the portion of the common fund actually claimed by class members and not from the unclaimed portion of the fund." *Id.* at 1294.

This Circuit's recent decision in *Nelson* demonstrates the continued vitality of this principle. 484 Fed. App'x 429. In *Nelson*, the parties agreed to pay class members no more than $12 million, $4 million of which would revert to the defendant if the claims totaled less than $8 million. *Id.* at 432. In assessing whether the requested $3.68 million fee award was appropriate, this Circuit reasoned that the request amounted to approximately 25% of the value of the total settlement, i.e., of the $12 million fund plus the $3.64 million requested fee; that actual claims were lower was irrelevant. *Id.* at 435.

Despite Objectors' mischaracterization of the law, most other circuits apply the total-benefits rule. Indeed, this Circuit's approach is now settled law. 4 Newberg on Class Actions § 11:29 ("When the size of the settlement offer remains contingent on the value of the claims filed, it is now settled that the court looks to the total potential benefit to the class, regardless of the number of claims filed, in determining a reasonable fee.").

For example, in *Masters*, the Second Circuit held that it was error for a district court to calculate the percentage award to class counsel based on the claims made against a common fund, rather than on the entire fund. 473 F.3d at 436-37. The district court had awarded fees as a percentage of the actual claims made. The Second Circuit reversed, holding, "The entire Fund, and not some portion thereof,

is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not." *Id.* at 436-37.

In *Williams*, the Ninth Circuit reached the same conclusion. 129 F.3d 1026. There, the district court awarded fees as a percentage of the actual claims made. *Id.* at 1027. The Ninth Circuit reversed, holding that the district court "abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar." *Id.* Even though actual claims totaled only $10,000, the Ninth Circuit concluded that class counsel was entitled to one-third of the total fund of $4.5 million. *Id.*

This total-benefits rule serves an important purpose: the deterrence of defendants' wrongdoing in small-stakes class actions. By keying attorneys' fees to the total fund available, the total-benefits rule allows attorneys to effectively litigate class actions involving relatively low-cost consumer products such as the Ultras, in which the alleged aggregate harm is huge, but individual damages are small. While class actions involving larger stakes for each class member may both insure plaintiffs against harm and deter defendants from causing it, small-stakes class actions primarily serve a deterrence function. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046-47 (2010) ("small-stakes

class actions serve an especially important deterrence role because if small-stakes claims are not brought to court through the class action device, they will not be brought at all, and defendants will not will not internalize the costs of causing small harms"); *see also* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998) ("[t]he purpose of [these actions] is solely to deter the kind of wrong that causes a small injury to a large number"). By basing fee awards on the total amount made available, the total-benefits rule enables class counsel to bring and prosecute these cases, functioning as a critical deterrent to defendants' wrongdoing.

2. Neither the 2003 Amendments to Rule 23 nor CAFA Superseded the Total Benefits Rule.

Despite Objectors' conclusory statements to the contrary, nothing in the 2003 amendments to Rule 23 or CAFA disturbed the settled rule that fees in common-fund settlements must be awarded as a percentage of the total benefits made available to the class.

Objectors place much weight on Rule 23(h), which was added to Rule 23 with the 2003 amendments. But the plain text of this rule in no way supports their argument. Rule 23(h) simply states, "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). Rule 23(h) does not overrule—or even

suggest overruling—the Supreme Court's decision in *Boeing* or this Circuit's decisions in *Camden I* and *Waters*. Each of these decisions was premised on the foundational principle that attorneys' fees awards must be reasonable. *Camden I*, 946 F.2d at 774 ("attorneys' fees awarded from a common fund shall be based upon a *reasonable* percentage of the fund established for the benefit of the class.") (emphasis added). In fact, this Circuit has made clear that while fee awards in common-fund cases must be keyed to the total benefits available to the class, these awards may be adjusted upward or downward according to a series of eight factors to account for reasonableness. *See Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Rule 23(h) simply codified this rule.

Moreover, the Advisory Committee Notes to Rule 23(h) make clear that it was not intended to supersede existing law on calculating fee awards, explaining:

> This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. **The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.**

Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (emphasis added). This Circuit has decided the question: in common fund cases, courts must use the common-fund method, and that common fund is calculated based on the total benefit made available, subject only to *Johnson* factor adjustments for reasonableness. *Camden I*, 946 F.2d at 774. This Circuit's decisions are therefore entirely consistent with Rule 23(h).

Likewise, nothing in CAFA supersedes this Circuit's total-benefits rule. Objectors do not cite a single case supporting their argument that CAFA somehow displaced *Boeing*, *Camden I*, and *Waters*. This is for a good reason: none exists. CAFA only addresses attorneys' fees in "coupon settlements," where class members are required to spend money to receive the benefit. *See Masters*, 473 F.3d at 438 (rejecting the argument that CAFA requires that attorneys' fees be awarded based on claims actually made and noting that CAFA's "only mention of fees to be allowed to class counsel deals with the award of fees in coupon settlement cases."). CAFA has no bearing on attorneys' fees in non-coupon settlements.

3. Objectors' Argument Relies Entirely on Law from Other Circuits That Is Distinguishable and/or Distorted.

Despite citations to authority from other jurisdictions, Objectors do not point to a single district-court or appellate decision from this Circuit that awarded attorneys' fees as a percentage of the value of actual submitted claims in a common-

fund settlement post-*Waters*. The reason is simple: any such decision would contravene binding precedent. And to the extent Objectors cite cases for that proposition from outside this jurisdiction, they fail to place those cases in the proper context or use selective quotes to fit their argument.

For example, Objectors cite *Strong v. Bellsouth Telecoms. Inc.* for the proposition that *Waters* does not apply to constructive common-fund settlements. Brief of Appellants at 19-20 (citing 137 F.3d 844, 852 (5th Cir. 1998)). But this is simply wrong. First, *Strong* is a Fifth Circuit decision and cannot overrule an Eleventh Circuit case. Second, *Strong* was decided prior to *Waters*, and the Eleventh Circuit expressly declined to follow *Strong* when it ruled in *Waters*. *Waters*, 190 F.3d. at 1296 (*Strong* "does not mandate that a district court must consider only the actual award made to the class"). Third, *Strong* is easily distinguishable on its facts. Unlike the present case or *Waters*, *Strong* was a coupon settlement. *Strong* held that the purported fund did not actually exist, because class members were required to purchase products from defendants to receive credits, not cash payments. *Strong*, 190 F.3d at 852-853.

Likewise, Objectors' extensive reliance on the Ninth Circuit's decision in *Bluetooth* for the proposition that fees cannot be disproportionate to the actual value of submitted claims is misplaced. As previously explained, unlike the present

Settlement, *Bluetooth* provided no monetary relief to the class. 654 F.3d at 938 (providing class with $100,000 in *cy pres* and "zero dollars for economic injury"). Lacking a common fund of any kind, *Bluetooth* could not possibly stand for Objectors' contention that settlements must be valued based on submitted claims; there were none. Instead, class counsel sought fees based on lodestar alone. *Id.*

Finally, the Seventh Circuit's decision in *Pearson*, on which Objectors heavily rely, did not create the categorical rule they claim. *Pearson*, 772 F.3d at 782-83. In *Pearson*, the court found that the parties appeared to have "structure[d] the claims process with an eye toward discouraging the filing of claims." *Id.* As that court explained, *Pearson* included a confusing settlement website, burdensome claim forms, and almost meaningless injunctive relief. *Id.* The Seventh Circuit concluded that Class Counsel and Defendants colluded to minimize the number of claims. *Id.* at 783 ("It's hard to resist the inference that Rexall was trying to minimize the number of claims that class members would file, in order to minimize the cost of the settlement to it. Class counsel also benefited from minimization of the claims, because the fewer the claims, the more money Rexall would be willing to give class counsel to induce settlement.").

This Settlement, in contrast, includes none of these features. While Class Members must submit claims (a necessity since Defendants do not have their

contact information), Objectors have failed to make any showing that that process was burdensome or difficult—or that the parties colluded to minimize claims. On the contrary, the claims process was simple: Class Members could complete a claim form online in minutes and without documentation. That a small number of Class Members submitted claims should not prevent the District Court from weighing the benefits that were made available to the Class and awarding a reasonable fee.

And regardless of Objectors' mischaracterizations of *Strong*, *Bluetooth*, and *Pearson*, the District Court could not have abused its discretion by failing to follow the law of another circuit when the law in this Circuit is crystal clear.

B. The District Court's Factual Findings on the Reasonableness of the Fee and Expense Award Are Entitled to Deference.

After carefully analyzing the extensive factual record, including the substantial monetary and nonmonetary benefits of the Settlement, the risks the Class faced in winning its case, and the significant amount of time and expenses incurred by Class Counsel, the District Court concluded that the $5.68 million fee request was reasonable. Doc. 168, p. 8-9. In reaching this conclusion, the District Court found that it was "not limited by the actual amount of claims to be paid." *Id.*

Given that Objectors cannot point to any errors of law, the only question that remains is whether the District Court abused its discretion by making factual findings that were clearly erroneous. *See Faught*, 668 F.3d at 1242 (acknowledging

district courts have "great latitude" in deciding attorneys' fees); *Fireman's Fund*, 794 F.2d at 1555-56. As explained *infra*, that simply did not occur here.

1. The District Court Acted Within Its Sound Discretion When It Concluded that Class Counsel's Fee of 10.85% of a Common Fund Was Reasonable.

In this Circuit, fee awards in the range of 20-30% of the total benefits made available through a common fund are presumptively reasonable. The benchmark award is 25% of the common fund, but courts are free to adjust this award upward or downward based on the *Camden I* factors. 946 F.2d at 775. In practice, fee awards in this Circuit typically constitute about one third of the total fund, which is consistent with other jurisdictions. *Wolff v. Cash 4 Titles*, 2012 WL 5290155, at *5 (S.D. Fla. Sept. 26, 2012) ("the average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third").[20]

The District Court here awarded Class Counsel less than 11% of the total common fund, not including the "substantial equitable benefit" that the court also weighed in favor of Class Counsel's request.[21] Doc. 168, p. 9. This award is not only consistent with fee awards in comparable cases nationwide, within the Eleventh

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[20] The Middle and Southern Districts of Florida follow Eleventh Circuit practice. *Id.*, at *6 (survey of courts in M.D. Fla. and S.D. Fla. found at least twenty cases where class-action fee awards met or exceeded 30% of the fund).

[21] *See also supra* Section III (discussing value of equitable benefit).

Circuit, and within the Middle and Southern Districts of Florida, but it is also substantially lower than typical fee awards. Finally, the District Court found that the *Camden I* factors fully supported this award. *Id.* at 8-9.

Class Counsel presented extensive materials to support their fee and expense request, including detailed declarations about the strengths and risks of the cases, lodestar and expense summaries, and declarations from a neutral mediator supporting the award. Docs. 114-1, 114-2, & 114–3; Docs. 157-1, 157-3, & 157–4. This record supported the District Court's ultimate decision that Class Counsel's fee award was fair, reasonable, and proportionate to the substantial benefits achieved for the Class.

Objectors contest Class Counsel's fee award on the basis that only a small number of Class Members submitted claims. But that fact does not magically transform an otherwise fair and reasonable settlement into an unfair and unreasonable one. And in this Circuit, it also cannot transform a reasonable fee award into an unreasonable one.

2. The District Court Acted Within Its Sound Discretion When It Alternatively Concluded that Class Counsel's Fee Was Reasonable Under a Lodestar Analysis.

As an alternative basis, the District Court concluded that Class Counsel's fee was reasonable under a lodestar analysis. Doc. 168, p. 9. The court found that Class

Counsel "expended more than 6000 billable hours to these cases, worth approximately $3.5 million at their normal hourly rates, plus costs advanced in the sum of $270,000."[22] *Id.* This represented a risk multiplier of 1.56, which the court determined was "well within the range of reasonableness for a contingent fee complex class action case." *Id.*

In this Circuit, the average risk multiplier is approximately three times lodestar. *See Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (explaining that the Eleventh Circuit "performed both methods of analysis and gathered cases on the range of fee awards under either method and noted that lodestar multiples in large and complicated class actions' range from 2.26 to 4.5, while three appears to be the average.") (internal quotations omitted). Here, Class Counsel's risk multiplier of 1.56 is substantially less than that range.

The District Court record also included extensive evidence and argument supporting each of the factors that influence whether a risk multiplier is reasonable, including the benefits made available to the class, the quality of counsel's work, the complexity of the issues, and the contingency of payment. *See Holman v. Student Loan Xpress, Inc.*, 778 F. Supp. 2d 1306, 1314 (M.D. Fla. 2011).

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[22] This lodestar reflects that two sets of firms independently prosecuted two separate cases in California and Florida. *See* Docs. 157-1, 157-2, 157-3, & 157-4.

Notably, the record showed that Class Counsel invested extensive time and effort litigating two cases in two separate courts; briefing two separate class certification motions (and arguing the motion in Florida); conducting extensive discovery, including review of over 250,000 documents and numerous depositions on both sides; and negotiating a hard-fought final agreement after two mediations over five months. Doc. 114, pp. 2-7; *see also* Docs. 114-1, 114-2, & 114–3; 157-1, 157-2, 157-3, & 157–4. Class Counsel's prosecution of the case came against substantial opposition from two well-regarded defense firms, Jones Day and Carlton Fields, which vigorously defended their clients. Doc. 114-1, pp. 4-5. The cases also involved complex scientific and technical issues, requiring Class Counsel to devote significant time to understanding the technical issues governing battery performance and chemistry, testing methodologies and procedures, and statistical modeling. Doc. 157-2, pp. 3-4; Doc. 157-1, p. 11.

Finally, both the Florida and California actions were prosecuted on a purely contingent basis. Class Counsel have not been paid for over two and a half years and assumed all risk of nonpayment. Doc. 157-2, pp. 4-5; Doc. 157-1, p. 11. Class Counsel also advanced out-of-pockets expenses totaling $272,275, including the retention of expert technical and economic consultants. Doc. 157-2, p. 5; Doc.

157-1, pp 10-11; Doc. 157-3, p. 4. The fully contingent nature of Class Counsel's work weighed in favor of a reasonable risk multiplier.

The undisputed facts demonstrated that Class Counsel prosecuted two separate actions on behalf of state-only classes in each jurisdiction. The result: a Settlement that provided, on average, complete relief to all Class Members nationwide and guaranteed that Defendants will cease and never again resume the alleged misleading marketing at issue. Given that record, the District Court correctly recognized that this was an excellent result. Its finding that Class Counsel's fee request was reasonable, based either as a percentage of the fund or on lodestar, is well within its sound discretion and should not be disturbed.

Conclusion

For the foregoing reasons, the District Court did not abuse its discretion by approving the class-action Settlement and award of attorneys' fees.

The decision of the District Court should be affirmed.

DATED: February 4, 2015

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 11TH CIR. R. 28-1(m), because this brief contains 13,998 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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DATED: February 4, 2015

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Certificate of Service

I hereby certify that on February 4, 2015, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will provide notification of this filing to all registered ECF filers.

Additionally, I also caused to be sent via USPS first-class mail a copy of the foregoing to the following *pro se* appellant:

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