No. 15-765

IN THE

Supreme Court of the United States

THEODORE H. FRANK,

Petitioner,

v.

JOSHUA D. POERTNER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THE GILLETTE COMPANY AND THE PROCTER & GAMBLE COMPANY

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RESTATEMENT OF QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's approval of a class action settlement that offered each class member all of the relief that the average class member could have recovered had the class prevailed in full at trial—*i.e.*, a cash payment that exceeded the full amount of the average class member's claimed damages and an injunction that prohibited any continuation of the challenged advertising?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents make the following disclosures:

Respondent The Procter & Gamble Company ("P&G") has no parent company and no publicly held company owns 10% or more of P&G's outstanding common stock. Respondent The Gillette Company ("Gillette") is a wholly-owned subsidiary of P&G.

P&G has announced its plan to divest the Duracell business to Berkshire Hathaway, Inc. This transaction is expected to close during the first quarter of calendar year 2016.

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BRIEF IN OPPOSITION

Petitioner asserts that a circuit split exists over how to evaluate class action settlements that do not "maximize recovery" for the class members. Pet. 5. No such split exists. In each of the cases on which petitioner relies as having invalidated a class settlement, the settlement offered to class members only a fraction of their alleged damages. In some cases, the settlement additionally imposed a burdensome claims process to discourage class members from making claims or it failed to effectively enjoin the defendant from continuing the challenged practice.

The settlement here exhibits none of those characteristics. It offered a cash payment to each class member that exceeded the full damages the class member could have recovered with a complete victory at trial. It imposed no burdensome claims process—only a simple claim form that could be submitted on-line, without proof of purchase. And it enjoins defendants from continuing the challenged advertising. In short, the settlement offered the class members everything they could have obtained if they had prevailed in full on every aspect of their claim. Petitioner cites no case that has struck down a settlement like this. The decision below thus does not reflect that the Eleventh Circuit follows any different rule from other courts. It reflects only that the district court below, whose decision the Eleventh Circuit found was not an abuse of discretion, had before it a settlement far different from the settlements in the cases on which petitioner relies.

Petitioner argues that the district court should have required the parties to find a way to allocate

even more of the settlement funds to class members. Pet. 14. But petitioner cites no case that has imposed any such requirement when the amount offered already exceeds the recoverable damages. To the contrary, the courts have repeatedly ruled that class members who have already been fully compensated are not entitled to the windfall of even further distributions. *See infra*, pp. 15-16. The relatively small number of claims in this case reflects only that each class member's recoverable damages were small because plaintiff sued over an inexpensive consumer product, with alleged damages of as little as $1 or $2 per class member. It does not mean the compensation the settlement offered was inadequate. In fact, it was fully compensatory.

Petitioner asserts that the parties should have been ordered to individually notify class members and make payments directly to those who did not make a claim under the settlement. Pet. 8. Again, however, he cites no case that has imposed any such requirement in a case like this, in which a mass-produced consumer product sold at thousands of retail outlets is at issue and the parties lack any records that would identify the millions of end-user consumers who purchased the product. On this issue as well, therefore, there is no split in the courts below.

In sum, the Eleventh Circuit's narrowly written, unpublished decision did no more than find that the district court's approval was not abuse of discretion on the particular facts of this case, based on the same general legal standards that other circuits apply. Certiorari should be denied.

RESTATEMENT OF THE CASE

A. Plaintiff's Claim.

Plaintiff claims that Duracell falsely advertised that its Ultra AA and AAA batteries last longer than CopperTop batteries. Dkt. 117.[1] He alleged that Duracell advertised that Ultra Advanced batteries last "Up to 30% Longer in Toys* *vs Ultra Digital" (Ultra Digital was the Ultra battery that preceded Ultra Advanced). *Id.*, ¶ 14. And he alleged that the later Ultra Power battery packages carried the claim "Our Longest Lasting." *Id.* ¶¶ 19-21.

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

Duracell denied that its advertising was false or that any consumer had been overcharged. Had the case not settled, Duracell intended to prove that the challenged statements were supported by extensive testing that showed the Ultra Advanced batteries did in fact last up to 30% longer in toys than the Ultra Digital batteries (Dkt. 78, ¶ 12) and that the Ultra

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[1] References in this brief to "Dkt." are to the docket entries in the district court below. *Poertner v. The Gillete Co., et. al.*, No. 12-cv-00803-GAP (M.D. Fla.).

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

batteries were indeed Duracell's longest lasting alkaline batteries. *Id.* ¶¶ 15, 16.

Duracell would also have shown that as many as half of Ultra purchasers could not possibly have been misled because the challenged statements did not appear on the battery packages they purchased. (Duracell did not advertise Ultra batteries in print or on television.) Dkt. 82, Ex. B, pp. 35:16-36:3, 150:19-23.[2] The claim that Ultra Advanced batteries lasted longer than Ultra Digital batteries appeared on only 30% of the AA Ultra packages and 7% of the AAA Ultra packages shipped during the class period. *Id.* The claim that the Ultra batteries were Duracell's "longest lasting" or "most powerful" appeared on only 51% of the AA packages and 44% of the AAA packages. *Id.*

Duracell also denied that plaintiff and the class suffered any recoverable damages. Beginning in October 2009 (shortly after the class period began), Ultra batteries came with PowerCheck, a feature on

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

each battery that displays the battery's remaining power. This feature was not offered on CopperTop batteries. Dkt. 77 ¶¶ 7, 9. Thus, the additional value of the PowerCheck feature would have to be accounted for in determining what portion of the price differential, if any, was attributable to the "longest lasting" claim. The jury would have been entitled to find that PowerCheck by itself was sufficient to justify the price differential, resulting in the class recovering zero damages.

B. Settlement.

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

Contemporaneous with their class certification briefing, the parties engaged in four months of extensive settlement discussions overseen by Rodney A. Max, whom the district court had designated to mediate the case. Dkt. 114-1, ¶¶ 6-8.[3] With Mr. Max's assistance, the parties participated in two lengthy in-person mediation sessions, followed by extensive further negotiations by telephone and e-mail. *Id.* ¶¶ 7-8. When those negotiations initially failed to resolve the case, the parties proceeded with

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

the hearing on plaintiff's class certification motion. One week after the hearing, they finally agreed on the principal settlement terms and executed a memorandum of understanding. *Id.* ¶ 8.

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

The settlement's principal terms are:

- ***Cash compensation to the class:*** All class members who submitted a claim are entitled to $3 cash compensation per package of Ultra batteries purchased, up to 2 packages per household without proof of purchase and up to 4 packages with proof of purchase. Dkt. 113-1, ¶ 59. As discussed below (at 11-12), these amounts exceeded the full amount of the damages the average class member could have recovered if plaintiff had prevailed in full at trial. The settlement agreement did not cap the total cash payments. All valid claims are to be paid in full, subject only to the limit of two or four packages per household. Claims could be submitted on-line or by mail. *Id.* ¶ 39. The claim form was a simple, one-page form. Dkt. 122-1, Ex. B.

- ***Injunctive Relief:*** Defendants are permanently barred from stating on packaging or displays in the United States that Ultra batteries in their current chemical formulation last longer than CopperTop batteries. Dkt. 113-1, ¶ 58. The settle-

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

- ***In-Kind Payment:*** Duracell will donate $6 million of Duracell products (retail value) over a period of five years to charitable organizations, including first responder charitable organizations, the Toys for Tots charity, the American Red Cross, or other 501(c)(3) organizations that regularly use consumer batteries or related products. *Id.* ¶ 61. The payment is separate from, and does not include, any donation of products Duracell had already made or was committed to donate as of the date of the settlement agreement. *Id.*

- ***Attorneys' Fees:*** Plaintiff is entitled to an award of fees and expenses as approved by the court, up to a maximum of $5.68 million. Duracell agreed not to oppose an award up to that amount. *Id.* ¶ 63. The court's award of fees is to be separate from its determination whether to approve the settlement. *Id.* ¶ 65.

The settlement agreement called for an extensive notice plan, including widespread internet banner advertising, notices on Duracell's website and publication in leading national magazines and newspapers. Dkt. 151, ¶ 3-8; Dkt. 152, ¶ 6; Dkt. 153, ¶ 6.

C. District Court's Approval.

The district court preliminarily approved the settlement on November 5, 2013. Dkt. 118. Following class notice, seven class members filed objections, and 12 class members opted out. Dkt. 168, p. 4. To ensure that the parties and the class would have

sufficient time to address the number of claims filed before the court considered final approval, the district court deferred the hearing date on final approval and permitted the objectors an additional round of briefing. Dkt. 141. Claims for payment under the settlement were submitted by 55,346 class members. Dkt. 156, ¶ 6.

The district court issued its final approval order on August 21, 2014. Pet. App. 16a. Exercising its authority under Federal Rule of Civil Procedure 23, the court ruled that the settlement was fair, reasonable, and adequate. It found that the settlement "eliminates a substantial risk that the Class would end up empty-handed" and further that the settlement avoided the time, expense, and delay of a "complex, lengthy, and expensive" trial and likely appeal. *Id.* at 24a. The court found that the settlement was achieved through arm's length negotiations overseen by a well-qualified court-appointed mediator. Because the settlement was entered after 16 months of discovery and motion practice, the court ruled that "Plaintiff was sufficiently informed to negotiate, execute, and recommend approval of the Settlement." *Id.* at 25a. As the court found, "[t]here is no suggestion of fraud or collusion between the parties and no evidence of want of skill or lack of zeal on the part of Class Counsel." *Id.*

Reviewing the substance of the settlement, the court rejected the objectors' arguments that the settlement should have provided greater cash compensation to class members. The court concluded that, given that Duracell does not have records that identify individual purchasers, there was "no

practical alternative by which to deliver greater value to Class Members." *Id.* at 22a. The court rejected as "difficult, expensive, and essentially fruitless" petitioner's suggestion that the parties be required to try to track down purchasers by subpoenaing retailers around the country who sold Ultra batteries. *Id.* at 23a. The court also ruled that the in-kind donation of batteries was relevant to the value of settlement overall, because it provided an indirect benefit to the class. *Id.* at 22a. And the class obtained a direct benefit from the cessation of the challenged advertising, a result that "was motivated by this lawsuit and was formalized through the Settlement Agreement." *Id.*

Finally, the court granted class counsel's request for $5.68 million in fees and expenses, finding that it was reasonable either as a percentage of a common fund or under a lodestar approach. *Id.* at 26a-27a.

D. Court of Appeals' Decision.

The Eleventh Circuit affirmed, in an unpublished decision. Applying an abuse of discretion standard of review, the court concluded that the district court followed the proper procedures and properly found that the settlement was fair, reasonable, and adequate.

The court first concluded that the "monetary relief that the settlement offered the class was fair. Indeed, the $6 that could be claimed without proof of purchase exceeded the damages that an average class member would have received if the class had prevailed at trial." Pet. App. 9a. The court also found that it was permissible to use a claims process under the circumstances, and that the claims process

here was not "particularly burdensome or difficult." *Id.*

The court further concluded that the district court's finding that the class received "substantial benefit" from the settlement's nonmonetary relief was not clearly erroneous. *Id.* at 11a. The court ruled that the district court reasonably found that the class benefited from the injunctive relief, because the litigation that led to that relief was a material factor in Duracell's decision to discontinue the Ultra line of batteries. *Id.*

The court similarly ruled that the district court appropriately approved the settlement's provision for an in-kind donation of batteries. *Id.* at 12a. The court observed that the "battery donation is independent of the monetary relief available to the class," which meant "that nonclass-member charities have not been favored over class members." *Id.* With regard to petitioner's assertion that the parties should have issued subpoenas to third-party retailers to try to learn the identities of individual class members, the court ruled that the district court reasonably concluded that the parties were not required to undertake such a difficult and expensive effort as a condition of settling their dispute. *Id.* at 12a-13a. The court noted that it was uncontested that Duracell does not have records from which to identify individual consumer purchasers of its batteries, and that the objector's "evidence" showed at best that only some class member's identities might be discoverable. *Id.*

Finally, the court concluded that the district court's award of attorney's fees was not an abuse of discretion. *Id.* at 9a-10a, 14a.

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S SETTLEMENT VALUATION DOES NOT CONFLICT WITH OTHER CIRCUITS.

A. Petitioner's Cases Did Not Address Settlements That Offered Full Compensation and Fully Effective Injunctive Relief.

Petitioner's argument that a circuit conflict exists ignores the critical aspects of the settlement here that differentiate it from the settlements in all of the cases on which petitioner relies.

As the court of appeals recognized (and petitioner does not challenge), the settlement here offers each class member the full amount of damages the average class member could have recovered had plaintiff prevailed at trial. At stores other than Costco, the full amount of the alleged overcharge was on average $2.89 per AA package and $2.91 per AAA package—in both cases, *less* than the $3 per package offered by the settlement.[4] Further, the most

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[4] These figures are based on an average price differential at non-Costco stores of 39 cents per AA battery and 41 cents per AAA battery, with an average AA package containing 7.4 batteries and an average AAA package containing 7.1 batteries. Dkt. 154, ¶ 14. The average price differentials for batteries sold at Costco are even less—13 cents for AA batteries and 6 cents for AAA batteries. Dkt. 154, ¶ 15. These differentials result in an alleged overcharge of $2.08 for a package of 16 AA batteries and $3.90 for a 30-battery AA package. *Id.* For AAA batteries (which are sold at Costco only in 16-packs), the alleged overcharge is 96 cents. *Id.* Costco accounts for 11% of Ultra AA battery sales and 5% of Ultra AAA sales. *Id.*

popular size package of both AA and AAA batteries contained 4 batteries. Dkt. 154, ¶¶ 3-4. For purchasers of this package, the alleged overcharge was $1.56 per package for AA batteries and $1.64 for AAA batteries—again, well below the $3 per package offered by the settlement. And, because the settlement does not impose any overall limit on the number of packages for which this compensation will be paid, every class member who submitted a valid claim will receive payment in this amount.[5]

In addition to full monetary compensation, the settlement contains a complete prohibition on the challenged conduct. Petitioner quibbles over the "value" of this injunctive relief, arguing that Duracell had discontinued the Ultra battery line (and thus the challenged advertising) before the settlement was reached. Pet. 15. But petitioner does not challenge the adequacy of the injunctive relief to prevent recurrence of the challenged conduct. Petitioner thus does not—and cannot—argue that class counsel should have insisted on some better or different injunctive relief.

None of the cases on which petitioner relies involved a settlement of this kind—*i.e.*, one that offers full compensation and that contains fully effective injunctive relief. To the contrary, in each of the cases, class members were offered an amount far

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[5] The settlement limits payment to two packages without proof of purchase and four packages with proof. The average household, however, that purchased Ultra batteries purchased only slightly more than one package during the class period. Dkt. 154, ¶¶ 13C & 13D. Thus, even with the limits, the settlement offered on average more than full compensation.

below the claimed damages, or the injunctive relief was challenged as inadequate, or both. In petitioner's lead case, *Pearson v. NBTY, Inc.,* 772 F.3d 778 (7th Cir. 2014), the complaint alleged that the product was worthless but the settlement offered class members only $3 per bottle without proof of purchase, or $5 with proof—amounts that class counsel said were, respectively, 12% and 20% of the purchase price.[6] The court also found the injunctive relief inadequate because (1) it prohibited use of the challenged advertisements for only 24 months, rather than perpetually; and (2) it made "purely cosmetic changes" in the wording of the advertisements that "preserve[d] the substance" of the allegedly false statements. 772 F.3d at 784-86.

Petitioner's other cases likewise involved settlements that offered less than full compensation or less than fully effective injunctive relief. *See, e.g., Eubank v. Pella Corp.,* 753 F.3d 718, 723-24 (7th Cir. 2014) (up to half of class members were only given coupons; other class members could receive monetary payments, but such payments were capped and (if the claimant elected a higher cap) required that the claim be arbitrated with the defendant preserving the right to assert defenses; court also found that class counsel had a conflict of interest, because he was the son-in-law of the class representative and

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[6] *See Pearson v. NBTY, Inc.*, No. 11-cv-07972, ECF No. 73, p. 16 (N.D. Ill. May 7, 2013). These per bottle amounts were increased to as much as $6 and $15 if the number of claims did not exceed a specified threshold. *Id.* at 4. But even those increased amounts did not offer anything close to the full compensation the settlement offered in this case.

because he was embroiled in state bar disciplinary proceedings that gave him an incentive to settle quickly); *In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 176 (3d Cir. 2013) (likely damages per class member were $150 after trebling but settlement offered only $5 without proof of purchase); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-19 (6th Cir. 2013) (settlement offered a refund for only one box of disposable diapers; claimants were required to present an original receipt *and* the UPC code from a previous purchase; relief was similar to an earlier refund program that had been offered to the class separate and apart from the litigation).

Petitioner thus cites no case that has addressed the fairness of a settlement (including the allocation between class compensation and attorney's fees) that offers class members full compensation and fully effective injunctive relief. This distinction is critical because it goes to the core of petitioner's assertion that class action settlements must be scrutinized to ensure that class counsel "maximize recovery for the" class and do not "bargain away the interests of unnamed class members in order to maximize their own." Pet. 5, 6 (internal quotation marks omitted). Neither the Eleventh Circuit nor any other circuit of which we are aware disagrees that class action settlements must be scrutinized for these purposes, among others. But the relevant question is how that scrutiny should be accomplished in a case in which both the compensation offered to the class and the injunctive relief has already been maximized. Petitioner cites no case that conflicts with the Eleventh Circuit's decision to affirm the district court's resolution of that issue here.

Far from being in conflict, the cases uniformly recognize that further distributions to class members are inappropriate when class members have already been offered full compensation for their losses. In *In re Lupron Mktg. & Sales Practices Litig.,* 677 F.3d 21, 34–35 (1st Cir. 2012), for example, the First Circuit affirmed the denial of additional distributions to class members who had already been fully compensated by the settlement. The court held that distributing additional funds "to claimants who have already recovered their losses necessarily results in an undeserved windfall for those plaintiffs, who have already been compensated for the harm they have suffered." *Id.* at 35 (internal quotation marks omitted). Similarly, the Fifth Circuit held in *Klier v. Elf Atochem North Am., Inc.,* 658 F.3d 468, 475 (5th Cir. 2011), that additional distributions to class members should not be made where they "would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution."

Significantly, the Seventh Circuit has likewise rejected a fairness and "allocation" challenge to a settlement that offered full compensation to class members. In *In re Southwest Airlines Voucher Litig.,* 799 F.3d 701 (7th Cir. 2015), the settlement called for class members to be offered new drink coupons to replace coupons the defendant had refused to honor. The district court approved the settlement, without receiving evidence as to the number of coupons actually claimed and redeemed. And it approved a fee award of $1.64 million, even though Southwest had agreed not to oppose an award of up to $3 million. Mirroring the arguments petitioner makes

here, the objectors (represented by petitioner here, Theodore Frank) challenged the approval on the grounds that the settlement's fairness could not be assessed without knowing the amount actually paid out and that the defendant's purported willingness to pay as much as $3 million in fees meant that additional money should have been allocated to the class. The Seventh Circuit rejected these arguments on the ground that, by offering a full replacement coupon, the settlement gave class members "essentially everything they could have hoped for," and thus "the class was not short-changed for the benefit of class counsel." *Id.* at 704, 712. Distinguishing its prior decisions that overturned class action settlements as unfair (the same decisions on which petitioner relies here), the court ruled that "essentially complete relief for the class is the model of an adequate settlement." *Id.* at 711.

This decision refutes petitioner's assertion that the Seventh Circuit follows any categorical rule "that the attorney award must be a fraction of the amount *actually realized* by the class," Pet. 3 (emphasis in original), or that the Seventh Circuit (or any other circuit) "would plainly have rejected *this exact settlement*," Pet. 22 (emphasis in original). The question this case raises—the adequacy of a settlement that offers the class full compensation and fully effective injunctive relief—was simply not presented in the cases on which petitioner relies. And, in the case that most closely approximates this case, the Seventh Circuit affirmed the settlement and rejected petitioner's argument.

Petitioner suggests that additional amounts could have been paid to the class, without creating a

windfall, if the district court had forced the parties to individually notify class members and directly mail payments to them. Pet. 15. Petitioner does not claim, however, that Duracell has any records that disclose the names and addresses of the consumers who purchased its batteries. Instead, petitioner argues that the parties should have been required to "ascertain [class] membership using subpoenas or otherwise-available data from retail loyalty programs or other tracking methods, permitting individualized notice or even direct payments." Pet. 15.

Petitioner cites no decision, however, that has imposed such a requirement. Petitioner relies principally on *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 09-md-2023 (E.D.N.Y.). Pet. 34. But the court there did not rule that individual notice is required, let alone that class counsel must embark on a campaign of third-party subpoenas to try to identify class members as a condition of settlement approval. It merely approved an amended settlement under which direct payments would be made to consumers whose identity had already been determined through a handful of subpoenas plaintiffs had issued to retailers in the discovery phase of the case. *Id.,* Dkt. 218-1, p. 6.

Petitioner's other cases are similar. In *Pearson,* 772 F.3d at 784, the court observed that the defendant knew who 4.72 million of the purchasers were and payments could have been made directly to those purchasers. In *McDonough v. Toys "R" US, Inc.*, No. 06-cv-00242, Dkt. 895 (E.D. Pa. Jan 21, 2015), the defendant was itself the retailer, and its

own business records allowed it to identify purchasers. *Id.*, p. 6.

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

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

676 (quoting Fed. R. Civ. P. 23(c)(2)). The court concluded that, because the damages at stake were so small and the number of banks whose records would have to be subpoenaed so large, the members could not be individually "identified through *reasonable* effort, effort commensurate with the stakes." *Id.* (emphasis in original). Accordingly, notice by publication was sufficient.

That the Seventh Circuit was considering class notice under Rule 23(c)(2), rather than notice of a settlement under Rule 23(e), does not change this analysis. Rule 23(c)(2) imposes a higher standard than Rule 23(e), which means that notice that suffices under Rule 23(c)(2) necessarily also satisfies Rule 23(e). *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at *38 (N.D. Tex. Nov. 8, 2005) (Rule 23(e) "is considered less stringent than Rule 23(c)(2)"); *In re Oil Spill*, 910 F. Supp. 2d at 913 (same). No other result would make sense. If petitioner's argument were accepted, the class could have been *certified* in *Hughes* without individual notice, but it could not have been *settled* without such notice.

In sum, no circuit split exists on the question this case presents because no circuit court has struck down a settlement as inadequate that offers class members full compensation and provides fully effective injunctive relief. And no case has endorsed petitioner's argument that individual notice and payment is required when the parties do not know the identity of the class members, let alone when the payments to be made amount to only a few dollars per class member.

B. No Circuit Conflict Exists On How To Value *Cy Pres* Distributions.

Petitioner is also mistaken in asserting that the circuits are split on the value that should be ascribed to *cy pres* distributions. Petitioner asserts that the Seventh Circuit has adopted a categorical rule that *cy pres* awards never "benefit the class" and thus invariably must be excluded "entirely" from the settlement valuation. Pet. 20. But the Seventh Circuit has adopted no such rule. Petitioner relies again on *Pearson*, in which the plaintiff alleged that the defendant misrepresented the effectiveness of its glucosamine product in treating joint disorders. The settlement there called for a $1.1 million *cy pres* distribution to the Orthopedic Research and Education Foundation. The Seventh Circuit ruled that this award would benefit the class only if it "contribute[d] to the discovery of new treatments for joint problems," which the court deemed a "hopelessly speculative proposition." 772 F.3d at 784. The court further ruled that a *cy pres* distribution was inappropriate in any event because the parties possessed the mailing address of 4.72 million class members and could have made a supplemental distribution to them rather than resort to a *cy pres* award. *Id.* The court's ruling was thus specific to the facts of that case. The court did not hold that *cy pres* awards never benefit class members.

Likewise groundless is petitioner's assertion that the Third Circuit "more rigorously" scrutinizes the value of *cy pres* awards than does the Eleventh Circuit. Pet. 20. Disagreeing with the position petitioner advances here, the Third Circuit in *Baby Products*, rejected as "unwise" a rule that would

require that district courts discount settlements that include a *cy pres* component. 708 F.3d at 178. The court instead adopted "case by case" approach under which the district courts would have "discretion to determine whether" any discount was appropriate. *Id.* at 179. It said that the district court should first determine the amount of funds that would be actually distributed to class members. Then it should determine whether this amount reflects a failure of class counsel to adequately represent the class. *Id.* The court noted that that a "lodestar cross-check" may be useful in making this determination, which should ultimately be based on "the performance and skill of counsel, the nature and history of the litigation, and the merits of the lawsuits." *Id.* at 179-80.

The decisions below are entirely consistent with these decisions. Because the settlement agreement here offered full cash compensation to class members, the donation of batteries did not favor non-class charities over class members. Pet. App. 12a. And the Eleventh Circuit affirmed the district court's approval of the settlement (including its award of attorney's fees) based on an overall assessment of the settlement as a whole, without any suggestion that undue weight was given to the battery donation.

C. The Circuits Are Not In Conflict On Valuing Injunctive Relief.

Petitioner also argues that a circuit split exists over the value to be given to injunctive relief. Pet. 21-22. Petitioner is mistaken on this point as well. As noted, petitioner does not challenge the sufficiency of the injunction here to prevent recurrence of the challenged conduct. Rather, he

argues the injunctive relief afforded no value because Duracell had decided before entering the settlement to stop selling Ultra batteries. The Eleventh Circuit found the district court acted within its discretion in rejecting that argument on the ground that the decision to stop selling Ultra batteries was itself prompted by the lawsuit. Pet. App. 11a.

Petitioner cites no case that has reached a different result on this question. Instead, the decisions on which he relies addresses different challenges to the value of different injunctive relief provisions. As discussed above, the Seventh Circuit court in *Pearson* affirmed the trial court's decision to ascribe no value to the injunctive relief because the injunction was not perpetual and did not actually correct the alleged misrepresentation. 772 F.3d at 784-86. In other words, the court found the injunction to have no value because of reasons peculiar to that case, not because the Seventh Circuit has adopted any different standard from other circuits. Petitioner suggests that the Seventh Circuit ruled that injunctions against false advertising have no value because they benefit only future purchasers. Pet. 21. In fact, the court merely stated that purported value to future purchasers who were not members of the class (*i.e.*, who had not also purchased in the past) was not a benefit to the class. 772 F.3d at 786. It did not say that class members who intended to purchase in the future would not benefit.

The only other case petitioner cites on this point is *Pampers*. Again, however, the Sixth Circuit did not apply any rule there that conflicts with the rules in any other circuit. It merely held that the packag-

ing and website disclosures required by the settlement did not provide consumers with any information that they did not already know or could not readily discover. The plaintiff had alleged that the defendant's diapers caused diaper rash (an allegation the Consumer Product Safety Commission had investigated and found lacked any factual basis). The settlement agreement required that the defendant put a statement on the packaging directing consumers to the defendant's website for more information about "common diapering questions," including "diaper rash." 724 F.3d at 719-20. But it said nothing about any risk that the defendant's diapers themselves might cause diaper rash. Nor did the settlement require that any such disclosure be published on the defendant's website. Instead, the Sixth Circuit concluded that the website contained "only rudimentary information whose value to unnamed class members is negligible." *Id.* at 720.

In short, the cases petitioner cites simply ruled on the value of the specific injunctive relief provisions in those cases, without adopting any categorical rules, let alone any rules that conflict with the law in the Eleventh Circuit or elsewhere.

II. THE CIRCUITS ARE NOT IN CONFLICT ON WHEN *CY PRES* DISTRIBUTION IS PROPER.

Petitioner argues that a circuit conflict exists because the decisions below supposedly endorsed a *cy pres* distribution as a "first resort," while other circuits have ruled that *cy pres* awards should be made only when it is not feasible to distribute the funds to class members. Pet. 24-25.

Again, however, petitioner ignores that the settlement here separately offered to each class member full payment of their alleged damages. The parties thus did not "first resort" to the battery donation in lieu of offering full compensation to class members. The donation was instead a separate and independent component of the settlement, provided on top of the full payment offer.

None of petitioner's cases involved this circumstance. In *Klier,* the Fifth Circuit explicitly recognized that the class members who were proposed to receive a further distribution had not already been offered full compensation: "Claimants in Subclass A have already received some measure of compensation for their injuries, but it is far from full." 658 F.3d at 477-78. Embracing the standard adopted by section 3.07 of the American Law Institute's *Principles of the Law of Aggregate Litigation* (on which petitioner here relies), the court ruled that district courts are not required to make additional distributions to class members "where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." *Id.* at 475. That ruling is entirely consistent with the ruling in this case, where offering higher amounts would result in class members receiving more than they possibly could have recovered at trial.

As discussed above (at 13), the Seventh Circuit's *Pearson* decision is off point for the same reason. Further distributions there would not have created a windfall, because the class members had previously been offered only a fraction of the damages they

sought. And the parties knew the addresses of over 4.7 million class members, to whom they could have made direct payments. 772 F.3d at 784. None of that is true in this case.

In cases (like this one) in which the identity of class members is not known, and in which the recoverable damages per class member are "too small even to warrant the bother, slight as it may be, of submitting a proof of claim," the Seventh Circuit has expressly endorsed a *cy pres* distribution. *Hughes*, 731 F.3d at 675. In *Hughes*, the Seventh Circuit held that a *cy pres* award in such a circumstance can both serve a deterrent purpose and "amplify the effect of the modest damages in protecting consumers." *Id.* at 676; *see also In re Lupron,* 677 F.3d at 34-35 (affirming *cy pres* distribution where class members who made claims had already received full compensation); 4 Herbert B. Newberg et al., *Newberg on Class Actions* § 12:32 (5th ed. 2015) ("Courts in every circuit, and appellate courts in most, have approved the use *of cy pres* for unclaimed class action award.").

The Eighth Circuit in *In re BankAmerica Corp. Sec. Litig.,* 775 F.3d 1060 (8th Cir. 2015), similarly expressly concluded that a further distribution to class members (rather than a *cy pres* award) was proper because the initial payments comprised "only a percentage of the damages" the plaintiffs had sought. *Id.* at 1066. The court also ruled that it would be feasible to make a further distribution because "lists of NationsBank class members who received and cashed prior distribution checks exist and would form the basis of a further distribution to the classes." *Id.* at 1064. The court did not suggest

(as petitioner does here) that the parties would be required to undertake a subpoena campaign to identify unknown class members who did not make claims. To the contrary, the court approvingly noted that the district court had "ordered that no further search need be made for class members whose checks were returned undelivered." *Id.* at 1064-65.

Nor is there any conflict between the decisions below and the Third Circuit's *Baby Products* decision. As in the other cases, in overturning the district court's *cy pres* award and ordering the district court to consider further distributions to class members, the Third Circuit expressly relied on the fact that the $5 payment initially offered to class members without proof of purchase was not fully compensatory. 708 F.3d at 176 (noting that the overcharge per product was as much as $50, before trebling). And the court agreed with other circuits that a *cy pres* award (with no further distributions to class members) is appropriate "where all class members submitting claims have already been fully compensated for their damages by prior distributions." *Id.* That describes the situation in this case exactly.

In short, petitioner is incorrect in asserting that the parties here "revert[ed] immediately" to an in-kind payment in conflict with the decisions of various courts directing that *cy pres* be used only when further distributions are infeasible. Pet. 27. Petitioner cites no case holding improper an additional in-kind payment where the class has already been offered full compensation. Far from casting any doubt on the propriety of this settlement, the

donation of batteries it requires is further reason to endorse it.

For the same reason, petitioner is incorrect that this case presents any issue "flagged . . . for review" in *Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J., statement respecting the denial of certiorari). Because this case involves the peculiar circumstance of an in-kind donation accompanying a fully compensatory offer—an issue on which no circuit conflict exists—this case does not present the broader and more commonly recurring issues noted in the Chief Justices' separate statement regarding the use of *cy pres* distributions generally.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING CLASS SETTLEMENT STANDARDS.

Petitioner's argument that this case is a good vehicle for addressing the issues petitioner raises rests on the faulty premise that this case actually presents those issues—*i.e.*, that this case is like cases in which the parties have "structured" (Pet. 2) a settlement to shortchange the class members by offering them only a percentage of their alleged damages, by failing to include effective injunctive relief, or by adopting a claims process designed to discourage claims. As the discussion above demonstrates, none of those features exists in this case—and petitioner cites no decision that has struck down a settlement like this one. By itself, that is sufficient reason to deny certiorari.

Petitioner is also incorrect in suggesting that a case that actually presents the relevant issues is unlikely to come before the Court. If petitioner is

correct that the issues he raises are "recurring" and likely to rise "more and more," Pet. 28, there should be no shortage of appropriate cases in which this Court can address them. Indeed, the number and recency of the court of appeals' decisions on which petitioner relies belies any notion that any issue on which this Court's guidance is needed is likely to evade review—or that there is any shortage of objectors willing to challenge settlements.

Nor is there any merit to petitioner's suggestion that the Eleventh Circuit "has long been lax in this area" or that it has become a magnet for class action settlements. Pet. 30. Petitioner cites no authority supporting those assertions, and none exists. He refers to recent settlement approvals in the Eleventh Circuit, but offers no basis for thinking more cases are settled in the Eleventh Circuit than elsewhere. If anything, the number of cases he cites from other circuits (*e.g.*, the Third, Fifth, Seventh, Eighth, and Ninth) suggests that class action settlements are less frequent in the Eleventh Circuit than elsewhere.

Petitioner asserts that this case is unique because there is "record evidence" regarding the likelihood of claims being made. Pet. 31. Such information, however, has long been available.[7] And, in a case like this in which class members were offered full compensation, the likely (or actual) number of claims does not invalidate the settlement. Contrary to petitioner's assertion, the claims rate

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[7] See, e.g., *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (citing cases).

does not mean that class members have been shortchanged. It reflects only that each class member's recoverable damages were small because plaintiff sued over an inexpensive consumer product that class members only infrequently purchased, with alleged damages of as little as $1 or $2 per class member. Duracell was not obligated to agree to provide class members a windfall—in the form of payments that exceed any appropriate measure of potential recovery—simply to generate additional claims and a larger class payout. The issue here is not the amount offered in settlement, but the amount of the alleged damage.

Although petitioner frames his petition as challenging the settlement in this case, petitioner's arguments in reality go more fundamentally to the propriety of class treatment in the first place of cases in which the alleged damages per class member are too small to motivate class members to submit even a simple claim form and in which the class members' identities are unknown and cannot be identified through any reasonably practical means. But the vehicle for addressing such questions is a case in which the question of class certification is itself raised, not a case in which the parties have already proceeded to settlement, and certainly not a case in which that settlement offers full compensation and fully effective injunctive relief. Whatever reforms may be needed to curb abuses of the class action device, this is not the case for adopting those reforms.

IV. THE DECISION BELOW WAS CORRECT.

In addition to not implicating any circuit conflict and not presenting the issues petitioner seeks to raise, the decision below was correct.

1. The predicates to the district court's ruling, affirmed by the Eleventh Circuit, that the compensation offered to the class was fair, reasonable, and adequate are amply supported by the record and are essentially unchallenged in this Court:

a. Uncontradicted evidence established that, as the court of appeals ruled, "the $6 that could be claimed without proof of purchase exceeded the damages that an average class member would have received if the class had prevailed at trial." Pet. App. 9a. Increasing the amount offered to class members would thus have overcompensated class members and created an impermissible windfall. And that is particularly true when the considerable risk is considered that the class would not have prevailed at all had the case proceeded to trial or would have recovered only a fraction of the damages plaintiff alleged. *See supra*, pp. 3-5. As discussed above, the relevant authorities uniformly reject any notion that class members must be offered more in settlement than they could have obtained at trial. *Supra*, pp. 15-16.

b. The court of appeals' ruling that the claims form and the mechanisms for submitting a claim were not "particularly difficult or burdensome," Pet. App. 9a, was also unassailably correct and is essentially unchallenged in this Court. *Id.* There is thus no issue in this case of the parties "'formulating

claims-filing procedures that discourage filing and so reduce the benefit to the class.'" Pet. 19 (quoting *Pearson*, 772 F.3d at 781).

c. No claim is made that the settlement left the defendants free to continue to engage in the challenged conduct. The settlement's injunctive relief provisions unambiguously prohibit defendants from making any of the advertising claims plaintiff challenged as false.

d. The court of appeals properly found no abuse of discretion in the district court's ruling that the parties were not required as a condition of settling to issue subpoenas to third-party retailers to learn the identities of individual class members. As discussed above, no case has imposed such a requirement. *Supra*, pp. 17-18. If accepted, petitioner's argument would require a protracted, expensive, and uncertain effort that would make settlement in cases such as this infeasible. Duracell batteries are sold in an exceptionally broad array of retailers around the country—grocery stores, drug stores, home improvement stores, big-box retail stores, hardware stores, electronics stores, corner markets, office supply stores, toy stores, camera stores, gas station convenience stores, sporting goods stores, and so on. Petitioner's proposal would require issuing subpoenas to these hundreds or thousands of retailers, the vast majority of which are unlikely to have any records that could identify their customers or what they purchased. For any retailers who may have such information, legitimate customer data privacy concerns will likely cause the retailers to resist providing the information, resulting in a multitude of judicial proceedings around the country

to enforce subpoenas. And, to the extent that this process could identify any purchasers, there would be additional processing costs to cull their information from the data and prepare and send any individualized notice. Rule 23(e) requires only that a court "direct notice in a reasonable manner to all class members who would be bound" by the settlement. Fed. R. Civ. P., Rule 23(e). Requiring a third-party subpoena campaign as a pre-condition to settlement is not reasonable. And it is particularly unreasonable in this case, where the amount paid to any individual class member is only a few dollars, reflecting that any true damage incurred by class members is minimal and the compensatory function served by the payments is slight.

3. The court of appeals also correctly found no error in the district court's rejection of petitioner's argument that the settlement must be overturned because the settlement funds were misallocated between the class and plaintiff's counsel. Because the settlement offered class members full compensation and provided fully effective injunctive relief, and because individual notice and payment was not reasonable, no basis exists for asserting that the class compensation was inadequate or should have been increased. Any such increase would only have resulted in a windfall.

Petitioner argues that Duracell's agreement to not oppose a fee award of up to $5.68 million means that Duracell was agreeing that some or all of that amount could be paid to the class if the fee request was found excessive. Pet. 11. That is not true. Duracell's only agreement regarding cash compensation to the class was its agreement to pay the $3

offered per package. And its only agreement with respect to fees was to not oppose class counsel's fee request. It did not agree that fees in that amount were reasonable or should be awarded.

If the amount of fees class counsel requested was excessive, that means only the amount requested was excessive and that Duracell should not be obligated to pay such fees. It does not mean the class should be paid the amount excessively sought, particularly when the class was already offered full compensation. Nor does it mean that the class compensation component of this settlement should be overturned. *See* Dkt. 113-1, ¶ 65 (providing in settlement agreement that "Court's award of any fees, costs and expenses to Class Counsel shall be separate from its determination of whether to approve the Settlement and this Agreement."); *Dikeman v. Progressive Express, Inc.*, 312 Fed. Appx. 168, 171 (11th Cir. 2008) (finding that district court did not abuse its discretion in approving the settlement agreement, but remanding for further consideration of fee request); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967-68 (9th Cir. 2009) (same); *see also In re Prudential*, 148 F.3d at 346 ("For the foregoing reasons, we will affirm the certification of the proposed class and the approval of the settlement, and vacate and remand on the issue of attorneys' fees.").

In short, the settlement here was fair, reasonable, and adequate. Faced with a claim it vigorously disputed, but wishing to avoid the expense and risk of litigation, Duracell agreed to offer full compensation to every class member, to permanently discard the challenged advertising, and

additionally to donate batteries to organizations that regularly use batteries of the kind at issue and that would put those batteries in the hands of consumers. The Eleventh Circuit properly held that it was not an abuse of discretion for the district court to find that nothing more is or should be required to settle a class action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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